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Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	29/09/2025 4:04:30 PM AEST
Date Accepted for Filing:	29/09/2025 4:04:34 PM AEST
File Number:	NSD527/2024
File Title:	FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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Form 59
Rule 29.02(1)

Affidavit

No. 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

Affidavit of:	**Rebecca Mary Dunn**
Address:	Level 35, International Tower Two, 200 Barangaroo Avenue Barangaroo NSW 2000
Occupation:	Solicitor
Date:	9 September 2025

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Filed on behalf of (name & role of party) The First, Second and Fourth Respondents
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I **Rebecca Mary Dunn** of Level 35, International Tower Two, 200 Barangaroo Avenue Barangaroo NSW 2000, Solicitor, say on oath:

Introduction

1. I am a partner of Gilbert + Tobin Lawyers, and I have day-to-day carriage of this matter for the First, Second and Fourth Respondents (the **Element Zero Respondents**) with Michael Williams, the solicitor for the Element Zero Respondents.

2. I have sworn six previous affidavits in these proceedings.

3. I am a Partner in Gilbert + Tobin's Technology and Intellectual Property practice and I have over 19 years' experience conducting cases before the Federal Court of Australia, the Supreme Court of New South Wales, and the High Court of Australia including complex intellectual property litigation, cases involving claims of infringement of copyright, breach of confidence, breach of fiduciary duties, contraventions of the *Corporations Act 2001* (Cth) and breach of contract. I have been involved in numerous cases involving discovery over the last 20 years, including large-scale and complex commercial litigation like the "C-7" litigation conducted before Sackville J.

4. Where I refer to my experience in this affidavit, I intend to be relying on this experience.

5. I make this affidavit in relation to the Applicants' Interlocutory Application dated 17 June 2025 (the **Applicants' IA**). For the purposes of making this affidavit I have read the affidavit of Paul Alexander Dewar affirmed 19 August 2025 (the **Dewar Affidavit**). I have not responded to every statement appearing in the Dewar Affidavit and do not intend to be taken to agree with statements to which I have not responded below. As I make plain later in this affidavit, there are aspects of the Dewar Affidavit that are unclear to me and do not identify the conclusion he is seeking to draw from various recitations, complaints and assertions made by him.

6. I make this affidavit from my own knowledge unless indicated to the contrary. Where I rely on information provided to me from other sources, I have identified the relevant source and believe that information to be true and correct.

7. In making this affidavit, I do not waive or intend to waive – nor am I authorised to waive – privilege in any communication between Element Zero Respondents and their external legal representatives, including any privileged advice, work product or work undertaken by lawyers of Gilbert + Tobin in connection with these proceedings.

Exhibits

8. Exhibited to me at the time of swearing this affidavit are the following bundles of documents to which I refer in this affidavit:

   (a) a bundle of documents marked "**Exhibit RMD-5**"; and

   (b) a confidential bundle of documents marked "**Confidential Exhibit RMD-6**".

9. A reference to a page number of Exhibit RMD-5 or Confidential Exhibit RMD-6 is a reference to the document on the corresponding page of those exhibits.

10. Confidential Exhibit RMD-6 contains information that has been designated as confidential by one of the parties in the proceeding and documents produced by the Element Zero Respondents in discovery, those documents containing information which is commercially sensitive to Element Zero. I respectfully request that access to Confidential Exhibit RMD-6 be restricted to external legal representatives of the parties.

Summary

11. In summary, in response to the Applicants' IA and in particular the support for it as expressed in the Dewar Affidavit:

   (a) I consider that the Element Zero Respondents have undertaken their discovery in a proper and orthodox way. Searches were undertaken for documents within the categories in Schedule 1 of the orders made 26 February 2025 (the **Discovery Orders**). I have overseen the discovery process for the Element Zero Respondents, including the searches that have been undertaken of the Element Zero Respondents' records which include the Seized Material from the execution of the Search Orders made on 14 May 2024 (the **Search Orders**). Based on my knowledge of the search process, I consider that they were undertaken in good faith using reasonable and proportionate searches, carried out under my direction.

   (b) The documents obtained through searching were reviewed by myself and a team of lawyers of Gilbert + Tobin that work under my supervision. I was personally responsible for the final review of documents to be produced. Based on my experience, I consider that the Element Zero Respondents have given proper discovery.

(c) The Applicants have alleged there are a very large number of deficiencies with the Element Zero Respondents' discovery, however, as set out in this affidavit, the issues that have been identified by them do not, in my view, amount to any legitimate concern that the discovery has been inadequate. There are many instances where the complaints appear to me to be based on speculation about the existence of documents that do not exist or have not been located even after searches have been undertaken by the Element Zero Respondents. Where I have considered that there are further documents that could be produced, they have been produced.

12. Where the Applicants' complaints are based on different approaches to discovery taken by the Third Respondent and the Element Zero Respondents respectively, I remain of the view that the discovery decisions made by the Element Zero Respondents were correct, and that in many cases the documents produced by the Third Respondent were not relevant or were not in the possession of the Element Zero Respondents. However, given the insistence by the Applicants that certain documents already produced by the Third Respondent be produced by the Element Zero Respondents, where they too are in possession of the Element Zero Respondents, then without admission as to their responsiveness to the relevant categories, I have caused them to be produced.

13. When the timetable and hearing of the Applicants' IA was set down on 19 June 2025, her Honour Justice Markovic observed that the parties should work to narrow the issues in dispute (see T12.34). I am concerned that the Applicants have in fact done the reverse. Following the case management hearing on 19 June 2025 the Applicants continued to expand the scope of the dispute. The Dewar Affidavit is reflective of that approach – Mr Dewar continues to raise issues which have been addressed and resolved by the Element Zero Respondents in correspondence, thereby overstating the number of matters in contention which he prefers to describe as "deficiencies". As I have already observed, in many instances I am unable to even identify from the Dewar Affidavit the nature of the dispute or the resolution sought by the Applicants generally or in relation to the Applicants' IA – other than a general claim that the Applicants be entitled to unsupervised access to the seized materials, by virtue of having amassed a number of "deficiencies", in a "form and manner" which, contrary to prayer 1, has not been notified to the Element Zero Respondents.

Access to Seized Material sought by the Applicants

14. I do not consider that an order for access to the seized materials as sought in the Applicants' IA is appropriate for a number of reasons.

15. *First*, document production has taken place according to a discovery process and the Court's rules governing it, not by access to the Seized Materials as the Applicants first sought to do in this proceeding.

16. *Secondly*, it would involve the Applicants going behind the verified discovery given by the Element Zero Respondents in accordance paragraph 10.13 of the Central Practice Note, and the Court's rules governing any inadequacy in discovery.

17. *Thirdly*, it would enable the Applicants to rummage through the documents of the Element Zero Respondents unsupervised, thereby raising the concerns identified in the Affidavit of Michael John Williams sworn 25 June 2024 about access to the documents seized including the documents of competitors of the Applicants.

18. *Fourthly*, it would render the discovery process to date by the Element Zero Respondents otiose, with the Applicants traversing material already searched for by the Element Zero Respondents. This would result in the wastage of all the costs associated with that process.

History in relation to Seized Material

19. The Search Orders against the First, Second and Third Respondents were executed and documents and things seized, including from the First and Second Respondents (the **Seized Material**).

20. On 24 May 2024, prior to the first return date following the execution of the Search Orders, the Applicants proposed access to the Seized Material by way of an order that:

> *On or before [6 June 2024 / 1 week from return date], the Independent Computer Experts make and provide to each party's solicitors a copy of all things* [Listed Things] *referred to in paragraph 20(e)(iv) of the search order made on 14 May 2024.*

21. The Element Zero Respondents opposed that proposed order. A copy of the proposed orders and correspondence between the parties is reproduced at page 2 to 5 of **Exhibit RMD-5**.

22. At the first return date on 30 May 2024, before Logan J, the Applicants did not press the order seeking access to the Seized Material, in the face of the Element Zero Respondents' opposition to those orders.

23. On 14 August 2024, the Applicants provided draft discovery categories as Schedule 1 to their submissions on the Element Zero Respondents' interlocutory application to set aside the Search Orders. A copy of Schedule 1 is reproduced at page 6 to 11 of **Exhibit RMD-5**. Those discovery categories contained the following notation (emphasis added):

> *For the avoidance of doubt, a "reasonable search" for the purposes of r 20.14 of the Federal Court Rules 2011 (Cth) includes a search over the copies of materials seized or imaged pursuant to the Search Orders.*

24. On 20 August 2024, at the hearing of the set aside application, the following exchange took place between Justice Markovic and senior counsel for the Applicants (T144.22-35) (emphasis added):

> *MR COOKE:…In addition, your Honour, as we've explained in paragraphs 127 to 130 of our written submission, the respondents arguments as to the scope of the listed things also ignores the fact that it's only a subset of the seized material which will be caught by any discovery categories ordered by the court, and one can see that when one looks at our draft categories and looks through that. One can logically infer that that's only a subset of the seized things. We will never, ever see anything outside the discovery ordered by your Honour, whatever that's going to be. We're never going to see what's outside that.*
>
> *HER HONOUR: But you will see the whole universe of what was seized - - -*
>
> *MR COOKE: No.*
>
> *HER HONOUR: - - - is your point because it's a preservation order only.*
>
> *MR COOKE: Exactly. Exactly…*

25. On 4 October 2024, Justice Markovic handed down her reasons for judgment on the set aside application (*Fortescue Limited v Element Zero Pty Limited (No 2) [2024] FCA 1157*). The following paragraphs are extracted from that judgment (emphasis added):

> *[267] …Thus, the only material seized on execution of the search orders that will be available for inspection will be the subset that is caught by any categories of discovery ordered by the Court.*
>
> *[268] …Further, access to all of the material seized by Fortescue would only be granted in limited circumstances, for example if questions arise as to the adequacy of discovery: see Rauland Australia Pty Ltd v Johnson (No 2) [2019] FCA 1175 at [55]. While it is premature to consider whether such a step might be required, I note that if it was, it too would be subject to the Court's supervision.*

26. On 6 November 2024, the Applicants provided proposed discovery categories which included the same notation referred to in paragraph 23 above, being (emphasis added):

> *For the avoidance of doubt, a "reasonable search" for the purposes of r 20.14 of the Federal Court Rules 2011 (Cth) includes a search over the copies of materials seized or imaged pursuant to the Search Orders.*

27. A copy of the Applicants' proposed discovery categories are reproduced at page 12 to 19 of **Exhibit RMD-5**.

Applicants' Discovery Application

28. On 20 November 2024, the Applicants filed an interlocutory application seeking discovery from the Respondents (**Applicants' Discovery Application**). That application did not include the notation in relation to a "reasonable search" referred to at paragraphs 23 and 26 above. That application is reproduced at page 20 to 30 of **Exhibit RMD-5**.

29. The Applicants' Discovery Application was heard over two days (6 and 20 February 2025). On 6 February 2025, during the hearing, a new category (being 6A) was raised for the first time by senior counsel for the Applicants (see T48.39-44). The transcripts from those hearings are reproduced at page 31 to 191 of **Exhibit RMD-5**.

30. Subsequently, 12 discovery categories were ordered on 26 February 2025 (being category 1, 2A, 3, 5, 6, 6A, 7, 8, 11, 12, 13 and 14). A copy of those orders is reproduced at page 192 to 208 of **Exhibit RMD-5**. Categories 2, 4 and 9 as sought in the Applicants' Discovery Application were not granted.

31. The Applicants have persisted with attempts to obtain discovery of category 2 on several occasions by altering its form (which on each occasion the Court has rejected) and does so again now in prayer 3 of the Applicants' IA. Previously:

    (a) On 8 April 2025, DCC sent a letter to Gilbert + Tobin and MinterEllison proposing a further amended form of category 2 and proposed search terms. A copy of that correspondence is reproduced at page 209 to 216 **Exhibit RMD-5**.

    (b) On 17 April 2025, Gilbert + Tobin responded to that letter indicating that the Element Zero Respondents opposed the further amended form of category 2. A copy of that correspondence is reproduced at page 217 to 219 **Exhibit RMD-5**.

32. On 29 April 2025, the Element Zero Respondents filed and served their verified Lists of Documents and produced the non-confidential documents in those lists to the

Applicants, together with a confidentiality undertaking to be signed and returned by the legal representatives of the Applicants. Two days later, on 1 May 2025, after receipt of signed confidentiality undertakings, the Element Zero Respondents produced the confidential documents to the Applicants.

33. On 30 April 2025, one day after the Element Zero Respondents produced their non-confidential documents, the parties attended a case management hearing. As at the time of that case management hearing, I am aware that the non-confidential documents produced by the Element Zero Respondents had not been accessed by the Applicants' lawyers (via Mimecast, the large file sharing system used by Gilbert + Tobin). A copy of the transcript from that case management hearing is reproduced at page 220 to 241 of **Exhibit RMD-5**. At the case management hearing on 30 April 2025, senior counsel for the Applicants made the following comment (see T2.44 – 3.4) (emphasis added):

> *…Now, your Honour, of course, there may be other deficiencies in respect of the EZ respondents' discovery list, but we have not had time to consider our position in that regard because we were only provided with the discovery list last night. Now, unless the EZ respondents accept the deficiencies that we notify them in due course and remedy them, then we will have no choice but to file an interlocutory application in due course. But we're not at that stage yet because we haven't had time to review, and the issues in dispute have not crystallised in that regard.*

34. Based on the above, I have formed the view that even before a single document produced by the Element Zero Respondents was reviewed by the Applicants, the Applicants had already pre-determined that they would allege that there were deficiencies in the discovery by the Element Zero Respondents that in turn would form the basis for an attempt to access the Seized Material.

35. On 9 May 2025, DCC sent a letter to Gilbert + Tobin requesting copies of the Element Zero Respondents' discovery in native format, and separate descriptions for each document in Part 2 and Part 3 of the Element Zero Respondents' Lists of Documents. A copy of that correspondence is reproduced at page 242 to 245 **Exhibit RMD-5**.

36. On 13 May 2025, the Element Zero Respondents produced native versions of the documents already produced to the Applicants.

37. On 13 June 2025, the Element Zero Respondents filed and served Supplementary Lists of Documents which reproduced Part 1 of the Lists of Documents provided on 29 April 2025 and provided additional descriptions of the documents in Part 2 and 3.

38. At 2:13pm on Monday, 16 June 2025, DCC sent a confidential letter to Gilbert + Tobin and MinterEllison asserting deficiencies in the Respondents' discovery and disputed claims for privilege. A copy of that correspondence is reproduced at page 2 to 12 of **Confidential Exhibit RMD-6**.

39. At 4:02pm on 17 June 2025, DCC served the Applicants' IA.

40. At 3:34pm on Wednesday, 18 June 2025, Gilbert + Tobin sent a confidential letter to DCC responding to the concerns relating to privilege claims. A copy of that correspondence is reproduced at page 13 to 18 of **Confidential Exhibit RMD-6**.

41. At 11:47am on 19 June 2025, DCC sent a confidential letter to Gilbert + Tobin and MinterEllison in response to the above correspondence. A copy of that correspondence is reproduced at page 19 to 27 of **Confidential Exhibit RMD-6**.

42. At approximately 2:30pm on the same day, the parties appeared before Justice Markovic and a timetable was made for the Applicants' IA, including for the Applicants to notify the Respondents of the alleged deficiencies in the Respondents' discovery.

43. On 4 July 2025, DCC sent Gilbert + Tobin and Minters a letter setting out the alleged deficiencies in the Respondents' discovery. On 14 July 2025, DCC sent Gilbert + Tobin and Minters a letter setting out further alleged deficiencies in the Respondents' discovery. A copy of those letters appears at pages 28 to 54 and 55 to 64 of **Confidential Exhibit RMD-6**. In total, the Applicants have amassed 486 alleged deficiencies in the Element Zero Respondents' discovery and 50 deficiencies in the Third Respondent's discovery.

44. On 24 July 2025, Gilbert + Tobin sent DCC a letter setting out the Element Zero Respondents' responses to the alleged deficiencies in the two letters referred to in paragraphs 43 above. A copy of that letter appears at pages 65 to 104 of **Confidential Exhibit RMD-6**. I note that the letter includes (at Annexure A) a table which summarises the alleged deficiencies and details the Element Zero Respondents' response to each of those deficiencies (the **Element Zero Respondents' response**). The Element Zero Respondents refer to and rely on that response in answer to the Applicants' IA.

Approach to discovery by the Element Zero Respondents

45. As the solicitor responsible for causing discovery to be given and ensuring that the Element Zero Respondents have complied with their discovery obligations, I have set out below a summary of what I have caused to be done in this process. In doing so, I do not waive or intend to waive, nor am I authorised to waive privilege in any

communications that I have had with the Element Zero Respondents and service providers retained for the purposes of assisting me with the discovery process, or including any privileged advice, work product or work undertaken by lawyers of Gilbert + Tobin in connection with this process.

46. In summary, to answer the discovery categories, I caused documents to be searched for and obtained from several sources, including directly from the Element Zero Respondents and the Seized Material.

47. Once processed, there were approximately 3 million records in the Seized Materials on which searches described below were run. Where a discovery category identified specified documents (for example categories 2A(e), 2A(f), 2A(g) and 6), searches for those specific documents were carried out using the Seized Material. The file names, as well as any folder names and MD5 checksums where available, were used to conduct searches for specific documents in the Seized Material. Where it was appropriate to use search terms for a category (for example category 1 and category 6A), searches were carried out using search terms I had determined to be appropriate. The searches included searches for documents as well as any artefacts of access (such as a Jump List or Link File). Where I considered it appropriate in light of the contents of the categories, I caused searches for technical documents to be undertaken across the Element Zero Respondents' records (for example in categories 11, 12 and 13).

48. I also caused searches to be undertaken of documents in the Fourth Respondent's possession, including his personal devices, relevant to the categories of discovery. The Fourth Respondent was not a recipient of the Search Orders.

49. Lawyers at Gilbert + Tobin under my supervision, and with my input, reviewed documents using the document review platform known as Relativity. I personally reviewed the documents to be produced by way of discovery.

50. The following is a summary of the documents produced by the Element Zero Respondents in respect of each of the applicable discovery categories.

Cat.	Subject matter of the discovery category	Documents produced by Element Zero	Documents produced by Dr Kolodziejczyk	Documents produced by Mr Masterman
1	Any work on "electrochemical	0	**205**	0

Cat.	Subject matter of the discovery category	Documents produced by Element Zero	Documents produced by Dr Kolodziejczyk	Documents produced by Mr Masterman
	reduction process involving Ionic Liquid"			
2A(a)	Documents copied while 2R at home	0	0	0
2A(b)	Documents taken by 2R to finish of work	0	**6**	0
2A(c)	Documents saved to local drive on 2R Fortescue laptop	0	0	0
2A(d)	Files on the local drives deleted from 2R Fortescue laptop	0	0	0
2A(e)	TempSD folder	0	**588**	0
2A(f)	Toshiba USB Kingston USB	0	**69**	0
2A(g)	bjornwj@gmail.com email documents	0	0	0
3	Documents re location, storage of documents in categories 1 and 2A	0	**260**	0
5	Documents re confidentiality of the documents in categories 1 and 2A	0	0	0
6	First Specified Documents	**1**	**1**	**1**

Cat.	Subject matter of the discovery category	Documents produced by Element Zero	Documents produced by Dr Kolodziejczyk	Documents produced by Mr Masterman
6A	Documents re "green iron pilot plant", taken or copied by 2R or 3R from Fortescue	0	0	0
7	Second Specified Documents	0	0	0
8	Use of documents produced in answer to categories 6 and 7	0	0	0
11(a)	Design documents for pilot or trial plants	**70**	**70**	**70**
11(b)	Piping, instrumentation for pilot or trial plants	**9**	**9**	**9**
11(c)	Laboratory books	**4**	**4**	**4**
11(d)	Documents provided to Playground Ventures	**115**	**115**	**115**
11(e)	Documents re "retirement 'project"	0	0	0
11(f)	Element Zero Process	**224**	**224**	**224**
12	Expenditure on 1R pilot or trial plants	2	2	2
13	Patents and patent applications	**5** (Part 1) **25** (Part 2)	**5** (Part 1) **25** (Part 2)	**5** (Part 1) **25** (Part 2)

Cat.	Subject matter of the discovery category	Documents produced by Element Zero	Documents produced by Dr Kolodziejczyk	Documents produced by Mr Masterman
14	Use of documents in categories 1, 2A, 6 and/or 7	0	0	0

51. I make the following additional comments about searches conducted by the Element Zero Respondents for specific categories.

52. **Category 1** (Research involving Ionic Liquid): searches were conducted of the Seized Material for documents created between 25 March 2019 and 12 November 2021 containing the words "ionic liquid", "molten salts"; "eutectics"; "molten hydroxide-based electrolytes"; "molten carbonate-based electrolytes"; "hydroxide alkali melt"; "eutectic melt"; "molten hydroxide eutectic"; "electrowinning"; "electroplating"; "electrolyte"; or "electrochemical reduction process". These search terms were identified by me and lawyers working under my supervision based on the very broad definition of the term Ionic Liquid in the Discovery Categories.

53. **Category 2A(a) and (b)** (documents alleged to have been taken or copied by Dr Kolodziejczyk or the Third Respondent from Fortescue, and documents said to be copied by Dr Kolodziejczyk while working from home in October and November 2021): I identified based on the terms of the categories that there were no search terms that could be used to answer the categories. I caused searches of Dr Kolodziejczyk's Gmail account to be conducted by Dr Kolodziejczyk in relation to his work product, and documents in answer to the category were identified and have been produced, namely the documents he received from and sent to Matthew Roper (previously the subject of evidence given by Dr Kolodziejczyk in his affidavit sworn 19 June 2024).

54. **Category 2A(c) and (d)** ("Local Drive" documents): Categories 2A(c) and (d) seek documents on the "Local Drive" of the Fortescue issued laptop that had been in Dr Kolodziejczyk's possession until he returned it to Fortescue when he resigned. Given that the laptop is in Fortescue's possession, and without a record of the contents of the local drives, it was not possible to conduct searches by reference to search terms. I was informed by Dr Kolodziejczyk, and I believed, that: (1) he has no recollection of the documents which were stored on the local drives of his Fortescue laptop and (2) he has no recollection of copying any Fortescue documents from those local drives. To the

extent the local drives contained documents which were saved in the TempSD folder see response to category 2A(e) below.

55. **Category 2A(e)** (TempSD documents): This category seeks documents on the "TempSD" folder of the Fortescue laptop once possessed by Dr Kolodziejczyk. Those documents are identified in the McKemmish Report and the spreadsheet "entitled "AU24024 – Chronology of activity" (**TempSD spreadsheet**) annexed to the affidavit of Adrian Huber sworn 1 May 2024. I caused searches to be undertaken of the Seized Materials for the TempSD documents using the TempSD spreadsheet. Those documents were then manually reviewed by lawyers at Gilbert + Tobin cross-checking documents in the TempSD spreadsheet (for the name and file date) and responsive documents were produced. I also caused Mr Masterman to review the TempSD spreadsheet and identify any documents within his control.

56. **Category 2A(f)** (USB documents): This category seeks documents on two USBs, **Toshiba USB** device (serial 07080A078F186304) and on the **Kingston USB** device (serial 900042ACAE668708). The McKemmish Report describes documents which were accessed on the Toshiba USB and the Kingston USB from Dr Kolodziejczyk's computer. I caused searches to be undertaken of the Seized Materials and of Dr Kolodziejczyk's devices for each of the documents listed in the McKemmish Report. I also caused Mr Masterman to review the documents described in the McKemmish Report and identify any documents within his control.

57. **Category 2A(g)** (Documents emailed by the Third Respondent): As Gilbert + Tobin does not act for the Third Respondent and has no access to the Third Respondent's devices, I caused searches to be undertaken by reference to the documents particularised in paragraph 20 of the Further Amended Statement of Claim (which are also captured under the definition of "First Specified Documents" in category 6 below). I describe the searches that were conducted for the documents falling under Category 2A(g) under Category 6 below.

58. **Category 3** (location and storage of 1 and 2A documents): I caused searches of the Seized Material to be undertaken for all emails containing the documents which were identified as responsive to categories 1 and 2A. This is consistent with the intention of the Applicants in seeking category 3 (see the comments from the Applicants' Senior Counsel on 6 February 2025 at T41.23.-26) and reflects the notation on the Discovery Orders that this category does not require forensic investigation by the Element Zero Respondents.

59. **Category 5** (confidentiality of 1 and 2A documents): I caused searches to be undertaken for the term "confidential" within any documents identified as responsive to categories 1 and 2A. I manually reviewed all documents which contained the word "confidential" and determined whether they could be considered to refer to the confidentiality of documents referred to categories 1 and 2A.

60. **Category 6** (First Specified Documents): I caused searches of the Seized Material and of Mr Masterman's personal devices to be undertaken for the 106 documents identified by Fortescue as 'First Specified Documents'. One relevant document was identified, being an excel spreadsheet entitled "Ore Composition After Drying".

61. **Category 6A** (Fortescue plant documents): I caused searches to be undertaken of the Seized Material for any document containing the words "Fortescue" and "plant" during the relevant period, which I identified as broad search terms that would produce any documents responsive to the category. I manually reviewed all documents which contained the word "Fortescue" and "plant" and determined whether they were relevant to category 6A. In addition, Dr Kolodziejczyk and Mr Masterman informed me, and I believe, that they do not have any documents in their possession, custody or control falling with category 6A, and that they do not recall taking or copying any such documents when employed by Fortescue. No documents falling under category 6A were identified.

62. **Category 7 and 8** (Second Specified Documents and use or disclosure): There was one document to produce in answer to category 6, being the "Ore Composition After Drying" document referred to in more detail below. The searches of the Seized Material I caused to be undertaken for the First Specified Documents would also have returned results for documents referring to any of the First Specified Documents contained in the Seized Material (such as a version of the document which was saved in a different location or an email attaching this document). No documents or access artefacts which referred to the spreadsheet "Ore Composition After Drying" were identified.

63. **Category 11(a), (b), (f)** (Plant and process documents): I caused searches to be undertaken of the Element Zero Respondents' records for basis of design documents, or any documents describing the design of Element Zero's trial and pilot plants, piping and instrumentation documents and documents recording the research and development of the Element Zero process.

64. **Category 11(c)** (Laboratory Books): All laboratory books which were seized during execution of the Search Order were produced by the Element Zero Respondents. Dr

Kolodziejczyk informed me that there were no further laboratory books to produce and that he does not, and did not, use a laboratory book.

65. **Category 11(d)** (Documents provided to Playground Ventures): I caused emails to or from the playground.global domain and Element Zero addresses to be extracted from the Seized Materials. I also caused searches to be conducted of Mr Masterman's personal devices and of Element Zero's data room, which contained documents provided to Playground Global during due diligence. Those documents were then manually reviewed by lawyers at Gilbert + Tobin and responsive documents were produced.

66. **Category 11(e)** (Documents recording the Third Respondent's "retirement project" and other matters referred to in his affidavit affirmed 8 July 2024): Gilbert + Tobin does not act for the Third Respondent and I was not able to obtain instructions from him in relation to this category. I observed that there appeared to be a cross-over between category 11(e) and 11(f) and took the view that to the extent the Element Zero Respondents had documents in their control relevant to the Element Zero process (which could also have been relevant to the retirement project) they would be produced under category 11(f).

67. **Category 12** (Expenditure on pilot or trial plants): Two documents have been produced under Category 12: EZR.0001.0001.1308 (expenditure on the First Respondents' trial plant); and EZR.0001.0001.1309 (expenditure on the First Respondents' pilot plant). I caused Ms Melissa Gravina, Element Zero's Corporate and Finance Operations Manager, to prepare these from information extracted from Element Zero's accounting system.

68. **Category 13** (Patents and patent applications): The Element Zero Respondents have produced copies of all patent applications and patents in which Dr Kolodziejczyk was named as an inventor, that he has worked on since 2019. I obtained copies of the final patents from Dr Carolyn Rolls from Oxygene IP (Element Zero's patent attorney). In discovery, the Element Zero Respondents have produced 5 documents in Part 1 of the Lists of Documents and 25 documents in Part 2 to the Lists of Documents, being documents which are the subject of patent attorney privilege for draft patent applications on the basis that they are documents made for the dominant purpose of a registered patent attorney providing intellectual property advice to a client pursuant to s 200 of the *Patents Act 1900*.

69. **Category 14** (Use of documents in categories 1, 2A, 6 and/or 7): Based on my review of the categories and my understanding of the searches conducted over the Seized

Material, I formed the view that the searches for categories 1, 2A, 3, 6, 7 and 8 would have caught any use of the documents in categories 1, 2A, 6 and/or 7 in answer to category 14. I am informed by Dr Kolodziejczyk, and believe, that none of the documents produced in answer to categories 1, 2A or 6 were used for preparing or inventing any of the patent or patent applications (noting no documents were produced in answer to category 7).

Response to Mr Dewar Affidavit

70. In paragraphs 17 to 191 below, I set out responses to assertions in Mr Dewar's affidavit about each of the **Items** referred to in the Applicants' letters, and the Element Zero Respondents' response to these letters (he describes them as "Deficiencies"). I have adopted the section numbers used by Mr Dewar and where I refer to paragraph numbers I mean to refer to the corresponding paragraph numbers of Mr Dewar's Affidavit.

Response to section C.1, C.2 and C.3

71. Section C.1 of Mr Dewar's affidavit summarises the matters relied on by the Applicants in support of the Applicants' IA. Whilst I have addressed sections C.4 to C.14 in detail below, I do not agree with the characterisation of the issues described by Mr Dewar in section C.1.

72. Mr Dewar's reference to "admitted deficiencies" of the Respondents' discovery in section C.2 mischaracterises the Element Zero Respondents' response. The Element Zero Respondents have not admitted that their discovery was deficient. Rather, the Element Zero Respondents have acknowledged that a small number of documents were inadvertently not produced and have agreed to produce those documents. Similarly, Mr Dewar relies on the fact that the Element Zero Respondents have agreed to produce further documents in section C.3, which mischaracterises that agreement. In an attempt to resolve the issues between the parties, the Element Zero Respondents have agreed to conduct a small number of additional searches and produce documents which were produced by the Third Respondents, without admissions as to relevance. The Element Zero Respondents have now produced the additional documents. In the circumstances, I consider the issues raised in sections C.2 and C.3 to be resolved.

Response to section C.4

73. In response to Section C.4, I do not agree that there is a "general deficiency" in production by the Element Zero Respondents because they have not discovered documents that the Third Respondent has discovered in categories 2A, 6, 6A, and 7, or any documents in category 8 (which relates to the use or disclosure of documents under

categories 2A, 6, 6A and 7). The Element Zero Respondents' approach to discovery in categories 2A, 6, 6A, 7 and 8 is set out above.

74. The analysis in Mr Dewar's affidavit focuses on two documents produced by the Third Respondent: the "Ore composition after drying" document" and the "Technology Base Presentations". In my view, neither of those issues reveals a problem with the discovery given by the Element Zero Respondents.

"Ore composition after drying" document

75. In paragraph 55, Mr Dewar says that he identifies that the only common document produced by the Element Zero Respondents and the Third Respondent under categories 2A, 6, 6A and 7 is a document entitled "Ore composition after drying.xlxs". The Element Zero Respondents produced that document in answer to category 6, as it is a First Specified Document.

76. I note from paragraph 58, that Mr Dewar identifies the file paths of the two copies of the "Ore composition after drying document" produced by the Third Respondent (in response to categories 2A and 6). Those file paths appear to Mr Dewar to indicate that the documents were located on a HP laptop belonging to the Third Respondent which was collected during execution of the search orders, and a Toshiba hard drive disk belonging to the Third Respondent and collected during the execution of the search orders.

77. The Element Zero Respondents discovered a copy of the "Ore composition after drying document" (EZR.0002.0002.0084) in response to category 6. It had a different source file path from those referred to by Mr Dewar (emphasis added):

> *Element Zero SharePoint / OneDrive\Export Sharepoint 20240515_Export\05.16.2024-0712AM\SharePoint\admin_elementzero_green\Documents\EZAdmin\Element Zero Pty Ltd\Bjorn Computer\NewPro*

78. I am informed by Mr Masterman, and believe, that:

(a) From prior to on or around 7 May 2023, the Third Respondent used his personal device for his work at Element Zero;

(b) From on or around 7 May 2023 onwards, the Third Respondent used a laptop owned by Element Zero which is branded Lenovo;

(c) In or around January 2024 (following the Third Respondent's resignation from Element Zero), the Third Respondent returned the Element Zero laptop to Element Zero;

(d) In or around March 2024, Element Zero copied all of the contents stored locally on the Third Respondent's Element Zero laptop to Element Zero's cloud-based document storage platform, in a folder labelled "Bjorn Computer";

(e) In or around April 2024, the laptop was wiped so that it could be used by another Element Zero employee.

79. The file path for the "Ore composition after drying" document (referred to in paragraph 77 above) indicates to me that it formed part of the upload of the Third Respondent's laptop to Element Zero's cloud-based storage platform. This is evident by the reference to "Bjorn Computer" in the file path.

80. At paragraph 61(c) of his affidavit, Mr Dewar suggests that based on the "Ore composition after drying" document, he believes the Third Respondent and the Element Zero Respondents used that document for Element Zero's purposes, including in engaging "NewPro" (being a reference to third-party engineering consulting firm, NewPro Consulting & Engineering Services Pty Ltd) to develop Element Zero's pilot plant. This is an issue for trial however there are no documents in the possession of the Element Zero Respondents that indicate use of the document (based on the Element Zero Respondents' response to category 8). I am informed by Dr Kolodziejczyk and Mr Masterman that they did not see the document until they were undertaking their discovery in February 2025 and were shown the document by Gilbert + Tobin.

81. Finally, contrary to paragraph 57 of Mr Dewar's affidavit, the information in the "Ore composition after drying" document is of a type that is publicly available. See for example, the document titled "Fortescue Ore Reserves and Mineral Resources Update: Operating Properties" which was provided to the ASX on 23 August 2019. A copy of that document appears at pages 246 to 297 of **Exhibit RMD-5**. At page 13 of that document, assays of Fortescue iron ore across all mines are set out, including iron ore grade and other matters.

Technology Base Presentations

82. In paragraphs 62 to 67 of the Dewar Affidavit, there is a reference to documents produced by the Third Respondent titled or named "Technology base" (which he defines as the Technology Base Presentations), in response to categories 2A, 3, 11(e) and 11(f).

83. One of the Technology Base Presentations produced by the Third Respondent appears to have been emailed to Dr Kolodziejczyk by the Third Respondent on 25 July 2025. It was not a document identified by the Element Zero Respondents in answering the categories.

84. Following receipt of the Third Respondent's discovery, I caused searches for this email to be conducted including over the Seized Material. This email was not identified in the searches.

85. I have reviewed the Technology Base Presentations identified in Mr Dewar's affidavit at paragraph 63. Given the contents of the presentations, it is not clear to me why they were produced in answer to categories 2A (which calls for documents copied, taken or otherwise obtained by the Second and Third Respondents during a specified period of their employment at Fortescue). To the extent the document contains information that the Third Respondent copied, took or otherwise obtained, that was not a matter known to the Element Zero Respondents or their lawyers at the time the Element Zero Respondents produced their discovery.

86. Dr Kolodziejczyk and I have both reviewed the Technology Base Presentation. I am informed by Dr Kolodziejczyk, and believe, that in his view it contains limited outcomes of experimental results but does not record research and development of the Element Zero Process and as such he does not consider it relevant to category 11(f).

87. I am also of the view that the document does not fall within category 11(f).

88. In paragraph 66 of the Dewar Affidavit, Mr Dewar states that the Third Respondent's email to Dr Kolodziejczyk attaching a Technology Base Presentation was notified as part of Items #52-#375, and at paragraph 66(c) he states that the Element Zero Respondents' response "was that unknown number of documents "*inadvertently omitted*" from EZR's Discovery, and that they will produce unknown number of documents" (sic).

89. That is not correct. Items #52-#375 state that "The EZRs have not discovered documents which were discovered by the Third Respondent in response to category 11(f), which documents were sent or received by, or copied to, one or more of the EZRs". The Element Zero Respondents' response to deficiencies #52-#375 is that:

> *The Element Zero Respondents' position is that they have provided proper discovery in answer to category 11(f). The Element Zero Respondents have reviewed the documents discovered by the Third Respondent (which were not discovered by our clients) and are of the view that the majority of those*

documents are not relevant to category 11(f). In any event, without admissions as to relevance, and in order to progress the matter, the Element Zero Respondents' will produce further documents by reference to the Third Respondent's discovery in answer to category 11(f).

90. There was no reference to documents being 'inadvertently omitted' in the Element Zero Response. The Element Zero Respondents' position is that the documents are not relevant, however they have nevertheless agreed to produce further documents because they were produced in the Third Respondents' discovery.

Element Zero's responses

91. In response to paragraph 68 of the Dewar Affidavit, Mr Dewar's abbreviation of the Element Zero Respondents' responses to Items #4 and #10 is not correct.

92. Item #4 is that: "The EZRs have not discovered any documents in response to categories 2A(a), 2A(c), 5, 6A, 7, 8, 11(e) and 14". The Element Zero Respondents' response is that:

The Element Zero Respondents' position is that they have given proper discovery in answer to categories 2A(a), 2A(c), 5, 6A, 7, 8, 11(e) and 14.

The Element Zero Respondents have conducted extensive searches for documents in these categories, including where appropriate across the seized materials. There are no documents in these categories in the Element Zero Respondents' control and therefore there is nothing further to produce.

93. Item #10 states: "The EZRs have discovered only one document in response to category 6; and none of the documents particularised at FASOC [19]". The Element Zero Respondents' response is:

The Element Zero Respondents' position is that they have provided proper discovery in answer to category 6.

94. In response to paragraph 69, Mr Dewar expresses his belief that the Element Zero Respondents have not sufficiently searched for or considered the discoverability of documents that are or were in their control by reason of the Third Respondent's roles, at least including the documents in the Third Respondent's discovery marked categories 2A, 6, 6A and 7. I respond as follows.

95. At paragraph 69(a), Mr Dewar relies on the fact that in responding to Item #4, the Element Zero Respondents' response states that "The Element Zero Respondents have conducted extensive searches for documents in these categories, including where appropriate across the seized materials" and that on the basis of the qualification the extent to which the Element Zero Respondents searched the Seized Material is unclear.

96. I disagree. The Element Zero Respondents caused searches to be conducted across the Seized Materials in relation to categories 2A(e), 2A(f), 6, 6A and 7 and the Element Zero Respondents responded to categories 2A(a)-(d) by way of searches of records outside the Seized Materials. The reference to "appropriate" was a reference to this approach.

97. At paragraph 69(b), Mr Dewar refers to the Element Zero Respondents' response to Item #10, that they have conducted extensive searches across the Seized Material for all of the First Specified Documents but have not identified what searches were conducted for documents in the Element Zero Respondents' control by reason of the Third Respondent's role at Element Zero. I have outlined the extensive searches by the Element Zero Respondents in answer to category 6 above. Those searches covered the Seized Materials, including documents on the Element Zero Respondents' systems relating to the Third Respondent's role with Element Zero. The issue raised by Mr Dewar in paragraph 69(b) does not support his view that the Element Zero Respondents have not given proper discovery in the relevant categories

98. At paragraph 69(c), Mr Dewar asserts that a statement in the Element Zero Respondents' letter, being *"None of the documents produced by the Third Respondent* [in Category 6] *are, or have been, in* [the EZ Respondents'] *control"* is incorrect, because the Element Zero Respondents produced the "Ore composition after drying document". Mr Dewar relies on this in support of his belief that other documents discovered by the Third Respondent are or were in the Element Zero Respondents' control. Mr Dewar is incorrect in this regard, and this paragraph of his evidence mischaracterises the Element Zero Respondents' letter.

99. I have outlined the extensive searches conducted by the Element Zero Respondents in answer to category 2A, 6, 6A and 7 above. The statement relied on by Mr Dewar is taken out of context. Reproduced here is the statement relied on as well as the statement immediately preceding that statement: "*The only document in the possession, custody and control of our clients is EZR.0002.0002.0084. None of the documents produced by the Third Respondent are, or have been, in our clients' control.*" These statements were directed at the alleged deficiency and were intended to convey that other than the "Ore composition after drying document" (which is directly referred to in

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the sentence before that quoted by Mr Dewar), the Element Zero Respondents did not have any of the category 6 documents in their possession, custody or control. The issue raised by Mr Dewar in paragraph 69(c) does not support his view that the Element Zero Respondents have not given proper discovery in the relevant categories.

100. At paragraph 69(d), Mr Dewar relies on the Element Zero Respondents' indications in their response that they would produce further documents by reference to the Third Respondent's discovery, and says this suggests those documents had not been previously searched for or considered. As set out above, the Element Zero Respondents conducted reasonable searches in answer to all categories and to the extent documents produced by the Third Respondent but not the Element Zero Respondents were reviewed as a result of those searches, the majority of the documents were not relevant to the discovery categories. This includes the Technology Base Presentation, for the reasons set out in paragraphs 86 and 87 above. Nevertheless, the Element Zero Respondents were prepared to produce further documents by reference to the Third Respondent's discovery.

101. At paragraph 69(e), Mr Dewar refers to a letter from Gilbert + Tobin dated 8 August 2025 and selectively quotes that letter by saying that the Element Zero Respondents are "conducting further searches" and that this suggests to Mr Dewar that "*the searches that the EZ Respondents had* ***not*** *previously done* are time-intensive and substantial" (Mr Dewar's emphasis). This is not correct.

102. The purpose of the letter from Gilbert + Tobin on 8 August 2025 was to confirm that the further documents the Element Zero Respondents would produce (without admissions) in response to the alleged deficiencies were not necessary for the Applicants to prepare their evidence in support of Applicants' IA. The reference to "further searches" were confined to searches for documents produced by the Third Respondent but not yet by the Element Zero Respondents, and a small number of other targeted searches. They are not extensive searches.

103. The Element Zero Respondents have conducted extensive, reasonable and appropriate searches in answer to the discovery categories. Given the matters above, Mr Dewar's conclusion in paragraph 71 is wrong.

Response to section C.5

104. The complaint in Section C.5 relates to the fact that the Element Zero Respondents have not discovered documents in categories, 2A(a), 11(e) and 14 (Item #4, #47-#51). While Item #4 as notified also referred to categories 2A(c) and 5, Mr Dewar does not address

these categories and I am proceeding on the basis that the complaint is no longer pressed.

Category 2A(a)

105. In response to paragraphs 75 and 76 to 82, Mr Dewar's belief that documents in category 2A(a) must exist and be in the Element Zero Respondents' control is wrong.

106. The steps taken by the Element Zero Respondents to comply with category 2A(a) and 2A(b) are set out above. In particular, Dr Kolodziejczyk searched his Gmail account for correspondence with Fortescue employees in relation to that work and the only documents he could identify in answer to the category were the documents he received from and sent to Matthew Roper (referred to in his affidavit sworn 19 June 2024). On that basis there were no documents to produce in answer to category 2A(a).

107. At paragraph 82 of his affidavit, Mr Dewar states that he considers that Dr Kolodziejczyk must have taken drafts of the documents he emailed to Mr Roper. I am informed by Dr Kolodziejczyk, and believe:

(a) that he does not recall taking drafts of the documents and believes that he drafted them from memory;

(b) it is likely that any documents he did take to complete his work for Fortescue were located on the Toshiba and Kingston USBs referred to at paragraph 56 above which he no longer has in his possession. As set out at paragraphs 56 above in relation to the steps taken by the Element Zero Respondents to comply with category 2A(f), and further below in response to section C.12 of Mr Dewar's affidavit, the Element Zero Respondents searched across the Seized Material for all documents identified by Mr McKemmish as being located on those USBs. No documents falling within category 2A(a) were identified as part of those searches. To the extent those documents are no longer in the Second Respondent's possession, that is dealt with in Part C of the Second Respondent's List of Documents.

Category 11(e)

108. At paragraphs 75 and 83 to 91, Mr Dewar sets out his belief that documents in category 11(e) must exist and be in the Element Zero Respondents' control.

109. Category 11(e) seeks documents regarding the Third Respondent's retirement project as outlined in his affidavit affirmed 8 July 2024. In responding to this category, it was not possible to obtain instructions that would enable production in answer to that category

(given it required consideration of what the Third Respondent considered to fall into the category and Gilbert + Tobin does not act for the Third Respondent). To the extent the Element Zero Respondents had documents in their possession, custody or control that could have been responsive to this category (if they were seized of the Third Respondent's views), those documents would in any event have been produced in answer to category 11(f), which requires production of documents recording research and development of the Element Zero Process.

110. At paragraph 90(d)-(e) of his affidavit, Mr Dewar says that some documents in answer to category 11(e) would not have been produced in answer to category 11(f) because category 11(f) incorporates a date limitation as the Element Zero Respondents' Defence states that the Element Zero Respondents' Process was developed since around July 2022. As such, Mr Dewar seems to be concerned that documents prior to July 2022 would not be produced in answer to category 11(f) (but would be in answer to 11(e)). However, as Mr Dewar records at paragraph 90(e)(i), the Element Zero Respondents did produce documents during the period January to June 2022. As such, there is no basis for the criticism.

Category 14

111. In response to paragraphs 75 and 92 to 94, in which Mr Dewar sets out his belief that documents in category 14 must exist and be in the Element Zero Respondents' control, based on Element Zero Respondent's discovery for categories 1, 2A, 6 and 7, I disagree. For the reasons set out above (in relation to categories 2A, 6 and 7) and paragraph 112 to 125 below (in relation to category 1) the Element Zero Respondents' discovery in those categories is not deficient, and therefore there is no deficiency in category 14.

Response to section C.6

112. Section C.6 relates to what Mr Dewar describes as a "general deficiency", being that the Element Zero Respondents have failed to discover relevant documents in category 1 (Item #5).

113. At paragraphs 95 and 96 of his affidavit, Mr Dewar sets out the terms of category 1 and the definition "Ionic Liquid". The breadth of that definition is relevant in considering the Element Zero Respondents' production in answer to category 1, and the matters raised by Mr Dewar in his affidavit.

114. At paragraph 12 of the FASOC, the Applicants plead that "In a period not precisely known to Fortescue, but during their roles in FFI, each of Dr Kolodziejczyk and Dr Winther-Jensen undertook, and caused other employees of FMGPS to undertake, confidential research and development work into one or more Direct Electrochemical Reduction processes" having certain specified features and define that work as the "Ionic Liquid R&D". At paragraph 13 of the FASOC, the Applicants define the information created by Dr Kolodziejczyk, the Third Respondent and/or other employees in undertaking Ionic Liquid R&D as "Ionic Liquid R&D Information".

115. During the hearing of the Applicants' Discovery Application, there was a dispute between the parties about the definition of "Ionic Liquid" to be incorporated into category 1. The Element Zero Respondents' position was that the proposed definition of "Ionic Liquid" was far broader than the concept of "Ionic Liquid R&D" contained in the Applicants' pleaded case. However, the broader definition was ultimately ordered.

116. As such, the definition of "Ionic Liquid" ordered, and the subject of category 1, is much broader than the definitions of Ionic Liquid R&D and Ionic Liquid R&D Information as defined in the FASOC. As a result of the very broad definition, and in order to ensure that any documents responsive to the category were produced, the Element Zero Respondents adopted search terms reflecting the various words and phrases in the definition of Ionic Liquid as ordered. As set out in paragraph 52 above, those words and phrases were searched across the Seized Material. A manual review of the results by lawyers under my supervision, and by me, resulted in the documents which were ultimately produced under this category.

117. At paragraph 97 of Mr Dewar's affidavit, he indicates that he has caused a solicitor under his supervision to review the 205 documents produced by the Element Zero Respondents under category 1 and says that he is informed by that solicitor that "none" of the documents are responsive to category 1. That is wrong. Mr Dewar does not indicate that he has reviewed the documents himself.

118. The basis for Mr Dewar's view (or the solicitor's view on which Mr Dewar bases his evidence) appears to be that the documents produced relate to Dr Kolodziejczyk's contributions to external publications on what he says is subject matter not related to an electrochemical reduction involving Ionic Liquid. Mr Dewar provides some examples of such documents at paragraph 98. It is correct that the documents produced in answer to category 1 are documents relating to Dr Kolodziejcczyk's contributions to external publications and research. This is because:

(a) Those documents involved work undertaken by Dr Kolodziejczyk during the relevant period;

(b) Those documents contained words or phrases that arose from the very broad definition of Ionic Liquid included in category 1; and

(c) Given the broad definition of Ionic Liquid, the approach taken to the category was deliberately broad.

119. On this basis, I do not agree that the documents are not relevant to category 1, or that the Element Zero Respondents (or I) have misunderstood the scope of the category (contrary to Mr Dewar's contentions at paragraph 97 of his affidavit). The very broad definition of Ionic Liquid required production of the documents that were ultimately produced by the Element Zero Respondents in this category. The fact that they are not relevant to the case does not mean that they are not relevant to the category and required to be produced.

120. At paragraphs 99 and 100, Mr Dewar refers to the Element Zero Respondents' response to this alleged deficiency and says the response is inconsistent with the Element Zero Respondents' discovery. This is incorrect. It is relevant to quote the Item to properly understand the response. Item #5 is:

> The EZRs have not discovered documents recording the "*work undertaken by the Second Respondent and/or Fortescue … and/or the Third Respondent … in relation to an electrochemical reduction process involving Ionic Liquid*" in response to category 1; notwithstanding admissions as to the existence of such documents in emails sent by Dr Kolodziejczyk (see, e.g., Part D of the Affidavit of Anand Indravadan Bhatt affirmed on 1 May 2024).

121. The response is:

> *The Element Zero Respondents' position is that they have provided proper discovery in answer to category 1.*
>
> *The Element Zero Respondents conducted extensive searches for documents falling into this category, including over the seized materials.*
>
> *There are no such documents in the Element Zero Respondents' control and therefore there is nothing further to produce.*

We reject the characterisation of comments by Dr Kolodziejczyk as "admissions" that Ionic Liquid R & D documents exist. See Defence dated 30 October 2024 paras 12(e)-(f) and 13 (b), and 14(b)(iii).

122. Mr Dewar relies on the statement "There are **no** such documents in the Element Zero Respondents' control" (his emphasis) and indicates that the statement is inconsistent with the fact that the Element Zero Respondents have produced 205 documents in answer to category 1. It is apparent that the response was directed at Item #5, namely that the Element Zero Respondents had not produced <u>further</u> documents (beyond those produced) in answer to the category.

123. At paragraph 101, Mr Dewar indicates that Fortescue "relies on admissions in documents by Dr Kolodziejczyk as to the existence of documents in Category 1". There are no such admissions, and I am concerned by this characterisation of the documents referred to in Dr Bhatt's affidavit, and by Mr Dewar's failure to refer to the Element Zero Respondents' position on this matter in their Defence and recent correspondence. I respond as follows:

(a) The Element Zero Respondents' Defence dated 30 October 2024 denies that any Ionic Liquid R&D was undertaken and that there was any Ionic Liquid R&D Information (paragraph 13);

(b) In response to deficiency #5, the Element Zero Respondents' response states, *inter alia*, "We reject the characterisation of comments by Dr Kolodziejczyk as "admissions" that Ionic Liquid R & D documents exist. See Defence dated 30 October 2024 paras 12(e)-(f) and 13 (b), and 14(b)(iii)"; and

(c) The judgment of the Court quoted at paragraph 101 does not record any admission by Dr Kolodziejczyk.

124. At paragraph 102, Mr Dewar indicates that Fortescue relies on the fact the Third Respondent produced documents in answer to category 1 and that the file path metadata that Mr Dewar caused TransPerfect to reconstruct from the Third Respondent's discovery contains a folder entitled "ILs and molten salts". It is not clear how that file path was reconstructed. No representative of TransPerfect filed any evidence and nor does Mr Dewar explain the process. On that basis, Mr Dewar asserts that the file path metadata appears "to show that Dr Winther-Jensen copied research on ionic liquids and molten salts". This paragraph elides multiple concepts. I respond as follows:

(a) None of the documents produced by the Third Respondent appear to record research on ionic liquids and molten salts undertaken by Dr Kolodziejczyk or the Third Respondent.

(b) Mr Dewar does not say he has reviewed the documents produced by the Third Respondent in category 1. Mr Dewar does not identify any document that the Third Respondent has produced relating to ionic liquids and molten salts.

(c) Mr Dewar instead relies on a reconstruction of file path metadata. Even if that file path is correct, it is not clear whether the Third Respondent downloaded any documents from that file path.

(d) I have caused the Third Respondent's discovery to be searched in an attempt to identify the document Mr Dewar may be referring to. There is no document entitled "ILs and molten salts" in the Third Respondent's discovery.

(e) Mr Dewar seems to suggest that the document (which he does not identify) was saved onto a Toshiba external hard drive by the Third Respondent. To the extent that is correct, the Third Respondent's conduct is not relevant to the Element Zero Respondent's compliance with category 1.

125. In summary, based on the matters identified in paragraphs 112 to 124 above, there is no deficiency in the Element Zero Respondents' discovery in answer to category 1. The Element Zero Respondents conducted extensive searches over the Seized Material to answer category 1. In the circumstances, the fact that there was no Ionic Liquid R&D Information produced does not mean the discovery is deficient, it simply means that the Element Zero Respondents do not have any such documents in their control.

Response to section C.7

126. Section C.7 relates to what Mr Dewar describes as a "general deficiency", which he characterises as an admission that the Element Zero Respondents have failed to properly search Dr Kolodziejczyk's and Mr Masterman's non-Element Zero email addresses. This issue relates to alleged Items #41-#46, being a complaint that the Element Zero Respondents have not discovered documents in answer to category 11(d) that were discovered by the Third Respondent.

127. As set out at paragraph 65 above, the Element Zero Respondents adopted a careful process in responding to category 11(d), including gathering all emails to or from Element Zero email addresses and the playground.global domain, reviewing the data room which was provided to Playground Global, and conducting additional searches of

Mr Masterman's personal devices for relevant documents. In my view, these were reasonable searches to conduct to answer the category.

128. At paragraphs 105 and 106, Mr Dewar refers to Element Zero's response to this alleged deficiency. As set out in that response, upon notification of the deficiency, I caused lawyers under my supervision, and with my input, to review the documents produced by the Third Respondent but not by the Element Zero Respondents in answer to category 11(d). I also reviewed those documents. We identified that the additional documents produced by the Third Respondent involved emails to and from non-Element Zero email addresses belonging to Dr Kolodziejczyk and Mr Masterman. Once that was identified, I caused further searches to be conducted across those additional email addresses for any communications between those addresses and Playground Global. In the Element Zero Respondents' response to this alleged deficiency, the Element Zero Respondents confirmed that they would produce any further relevant documents as a result of those searches. Those documents have now been produced (10 in total).

129. In my view:

(a) it was reasonable to search Element Zero email addresses for communications with Playground Global given any documents were being provided to Playground Global on behalf of Element Zero;

(b) the Element Zero Respondents' approach to this category was appropriate and reflected a reasonable approach to responding to the category;

(c) when I identified the issue in relation to the non-Element Zero email addresses, I took steps to resolve it and provide any further discovery in the category;

(d) this is a minor issue in what has been a large discovery exercise and has now been rectified.

130. At paragraphs 106 and 107, Mr Dewar indicates his belief that this issue is not limited to category 11(d). That is wrong for the reasons explained above.

Response to section C.8

131. Section C.8 relates to what Mr Dewar describes as the Element Zero Respondents taking an allegedly inappropriately narrow view of category 11(f). I do not agree.

132. The basis for this alleged deficiency appears to be that the Third Respondent produced documents in answer to category 11(f) that were not produced by the Element Zero Respondents (see Item #52-#375).

133. The steps taken by the Element Zero Respondents to comply with category 11(f) are set out at paragraph 63 above. In summary, searches were conducted to identify documents relevant to the research and development of the Element Zero process. Those documents were then reviewed by lawyers under my supervision, and by me, and produced as part of the discovery where relevant to the category.

134. I have reviewed the documents produced by the Third Respondent but not by the Element Zero Respondents in answer to category 11(f). In my view, based on my experience as set out in this affidavit, the majority of the documents produced by the Third Respondent are not relevant to category 11(f). By way of example only, these documents include the Third Respondent's weekly timesheets, flight details and meeting logistics, invoices, award applications, pitches made by Respondents to obtain funding from venture capital firms, and negotiations regarding the execution of Non-Disclosure Agreements (see for example, BWJ.5000.0005.6008, BWJ.5000.0005.5359, BWJ.5000.0004.2137, BWJ.5000.0003.8994 and BWJ.5001.0001.0294). In my view, these documents cannot be said to fall within category 11(f).

135. There are a small number of documents that I do consider are relevant to category 11(f). Dr Kolodziejczyk had not previously provided those documents to Gilbert + Tobin. I am informed by Dr Kolodziejczyk, and believe, that he did not provide those documents as he did not consider them relevant to the research and development of the Element Zero process.

136. I note that Mr Dewar does not indicate in his affidavit that he has reviewed the documents produced by the Third Respondent or by the Element Zero Respondents in category 11(f), and nor does he express a view as to their relevance.

137. In any event, as indicated in the Element Zero Respondents' response, the Element Zero Respondents agreed to produce further documents in answer to category 11(f) by reference to the Third Respondent's discovery. Those documents have now been produced.

138. In summary, based on the matters identified in paragraphs 131 to 137 above, there is no deficiency in the Element Zero Respondents' discovery in answer to category 11(f). The Element Zero Respondents conducted appropriate and reasonable searches for documents in answer to the category.

Response to section C.9

139. Section C.9 relates to what Mr Dewar describes as a "general deficiency", being that the Element Zero Respondents have "admitted" that documents were not recognised as "families" of related documents, such that an "unknown number" of documents have not been discovered (Item #1).

140. At paragraph 114, Mr Dewar suggests that the Element Zero Respondents have failed to discover an unknown number of documents because of this alleged deficiency. This is incorrect.

141. Item #1 is:

> *In processing documents on their Relativity platform, certain documents were not recognised as "family" documents (i.e. not identified as related), such that the EZ Respondents (**EZRs**) have failed to discover an unknown number of documents: see G+T's letter dated 18 June 2025: "We have investigated this issue and confirm that these documents were inadvertently omitted as they were not recognised as "family" documents by Relativity...".*

142. The Element Zero Respondents' response is:

> *See response to item 376 - 378 below.*
>
> *We have investigated this issue and confirm that no other documents are affected by this issue.*

143. The response at Item 376 – 378 is:

> *The Element Zero Respondents will produce Appendices 10.2, 10.4, 10.5, 10.6, 10.7.*
>
> *These documents were initially not produced because they were inadvertently not coded as "family" documents. We have investigated and confirm that this is a confined issue, with no other documents impacted.*

144. There are therefore 5 documents subject to this issue, contrary to Mr Dewar's contention that there are an "unknown number" of documents subject to this issue. These documents have now been produced by the Element Zero Respondents.

145. At paragraph 125, Mr Dewar states that the Element Zero Respondents have not explained what steps they took to identify the "family" of documents associated with the

Overview Feasibility Study Report or why we were able to confirm that this was a confined issue. My response is:

(a) The documents the subject of this issue were provided to Gilbert + Tobin as separate and unrelated documents;

(b) As such, they were processed onto our Relativity platform as separate documents, without family relationships and coded for relevance as separate documents;

(c) Once the issue was raised by the Applicants, I caused lawyers under my supervision and with my input, to review all documents provided to Gilbert + Tobin in this manner;

(d) From this review, I was satisfied that the only document impacted by this issue was the Overview Feasibility Study Report and its appendices. By this I mean that there were no other such documents that had appendices or attachments not actually connected to or embedded into the source document.

146. Given the matters in paragraphs 139 to 145 above, Mr Dewar's statements at paragraphs 126 and 127 are incorrect. This was a confined and minor issue which has been dealt with.

Response to section C.10

147. Section C.10 relates to what Mr Dewar describes as a "general deficiency", which relates to "unspecified technical error/s" and alleges that the Element Zero Respondents' responses to deficiencies related to technical errors has been inconsistent (Items #2, #3, #383 and #384). This is a minor administrative issue which has been explained and, in my view, should not be the subject of an application such as this in a large commercial matter where many thousands of documents have been searched, reviewed and discovered.

148. At paragraph 128, Mr Dewar says the Element Zero Respondents have failed to discover an unknown number of documents due technical errors. This is incorrect. As specified in the Element Zero Respondents' response, after further investigations, it was confirmed that this only affected **4** documents. I confirm that the investigations in relation to Items #2 and #3 were as follows:

(a) Throughout the review process, lawyers at Gilbert + Tobin under my supervision marked certain documents as "Technical Issue" within the review platform (Relativity)

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in circumstances where the documents could not be opened because of their file type or because they appeared to the reviewer as unreadable.

(b) At the end of the review process, the documents marked as "Technical Issue" were inadvertently not re-reviewed.

(c) Therefore, in response to the Applicants' concerns raised, lawyers at Gilbert + Tobin under my supervision re-reviewed each of the documents marked as "Technical Issue", and considered whether they were relevant to the discovery categories.

(d) This resulted in the production of 4 further documents (EZR.0001.0001.0010, EZR.0001.0001.0011, EZR.0001.0001.0084 and EZR.0009.0004.0056).

149. At paragraph 129 to 138, Mr Dewar outlines his concerns in relation to the Element Zero Respondents' explanation to Items #2, #3, #383 and #384 based on inconsistent explanations between their initial response (being in the letter dated 18 June 2025 referred to at paragraph 40 above) and with the Element Zero Respondents' response to the Applicants' deficiency letters.

150. In relation to Item #383, my response is:

(a) Item #383 relates to a document discovered by the Element Zero Respondents which was prepared for Element Zero by NewPro.

(b) As referred to in paragraph 38 and 40 above, the initial response was prepared by the Element Zero Respondents in approximately 48 hours in an attempt to address the Applicants' concerns in relation to discovery.

(c) At the time of preparing the initial response, I was informed by Dr Kolodziejczyk that the "PID and Flow Sheet update" was referring to EZR.0003.0003.0074, 3D models hyperlinked in that document titled "Model 20231129" and an additional 3D model titled "Model 20231102". The 3D models are only accessible using Autodesk Navisworks Freedom software and so were originally marked as "Technical Issue" as referred to in paragraph 148 above.

(d) On further investigations, including those outlined in paragraph 158 below, those are not the documents relevant to "PID and Flow Sheet update" as no such documents exist.

151. In relation to Item #384, my response is:

(a) Item #384 relates to a document discovered by the Element Zero Respondents (EZR.0001.0001.0069) with the document title "Process Design Criteria Rev E.pdf".

(b) This is a document that was authored by NewPro. I caused further enquiries to be made with NewPro and revision A of the document was identified and has now been produced. It was not in the Element Zero Respondents' control at the time they gave verified discovery. I am informed by Mr Newling (Managing Director of NewPro) and believe, that NewPro was not able to locate any other revisions of this document.

(c) The document "Process Design Criteria Rev C.pdf" (which contains a version of revision A) was subject to the same "Technical Issue" referred to in paragraph 148 above and has now been produced.

152. In paragraph 134, Mr Dewar suggests the Element Zero Respondents' initial response suggested there were two (or more) technical issues and that the Element Zero Respondents subsequent response suggested there to only be one technical issue. This is not the case. As outlined, the technical issue was interrelated and has now been resolved.

153. For the reasons set out above, this was a confined issue which has been resolved. The suggestion at paragraph 138 of the Dewar Affidavit that the issue was more widespread is wrong.

Response to section C.11

154. Section C.11 relates to what Mr Dewar describes as inadequate explanations for deficiencies and/or cross-referenced documents, which in his view, do not cure the deficiency (being Items #383, #402, #405-406 and #428-429). As an overall comment, I note that this is a minor issue which has been explained and in my view, should not be the subject of an application such as this in what has been a large discovery process.

155. At paragraph 140 to 144, Mr Dewar outlines his concerns in relation to the Element Zero Respondents' explanation to deficiency #383. Item #383 is:

> *The piping and instrumentation documents in respect of the task entitled "PID and Flow Sheet update" (referred to in the "Element Zero Phase 2A" Gantt chart ("16012024 EPCM Schedule.pdf") dated 16 January 2024 have not been discovered by the EZRs.*

156. This Item is in relation to a document discovered by the Element Zero Respondents titled "16012924 EPCM Schedule" (being EZR.0001.0001.0050). A copy of this document is reproduced at page 105 to 107 of **Confidential Exhibit RMD-6**. Within this

document, which is a Gantt chart, there are 165 items listed under "Task Names", one of these being "PID and Flow Sheet update" (at item 9).

157. The Element Zero Respondents' response was:

> *The Element Zero Respondents have conducted further searches for documents referred to in item 383, and there are no such documents in the Element Zero Respondents' control and therefore there is nothing further to produce.*

158. At paragraph 144, Mr Dewar suggests that the Element Zero Respondents' initial response (being in their letter dated 18 June referred to at paragraph 40 above) was inconsistent with the Element Zero Respondents' response to the Applicants' deficiency letters. My response is:

(a) The initial response was prepared by the Element Zero Respondents in approximately 48 hours in an attempt to address the Applicants' concerns in relation to discovery.

(b) When the Applicants drew the Element Zero Respondents' attention to the concern extracted in paragraph 143 of Mr Dewar's affidavit, the Element Zero Respondents conducted additional searches in relation to the "PID and Flow Sheet update" referred to in EZR.0001.0001.0050.

(c) This is a document that was authored by NewPro. I am informed by Mr Newling, and believe, that the "PID and Flow Sheet update" was planned however it was not advanced, and therefore no further documents exist.

(d) Given the matters in this paragraph, this issue is resolved as no further documents exist.

159. At paragraphs 145 to 152, Mr Dewar outlines his concerns in relation to the Element Zero Respondents' explanation for Items #402, #405 and #406 which are as follows:

> #402: *The EZRs have not discovered documents recording the research and development work into "dissolution and deposition tests" using FMG "Iron Bridge Magnetite concentrate 68% Fe, 30 µm" from at least around 2 November 2023 (EZR.0006.0001.0013, slide 6 to 3 February 2024 (EZR.0003.0003.0005, slide 28).*
>
> #405: *The EZRs have not discovered documents recording the research and development work into "dissolution and deposition tests" using FMG "Iron Bridge Magnetite concentrate 70%, Fe 30 µm", including between 3 November 2023 (EZR.0003.0003.0031) and 3 February 2024 (EZR.0003.0003.0005).*
>
> #406: *The EZRs have not discovered documents recording the research and development work into "deposition tests" using Roy Hill "WHIMS cons 60% Fe*,*

80 µm" ore between 3 February 2024 and 3 November 2023 (EZR.0003.0003.0005, slide 28; cf. EZR.0003.0003.0031, slide 6).

160. These alleged deficiencies relate to the following documents discovered by the Element Zero Respondents under category 11(d) which relate to documents provided to Playground Ventures:

(a) EZR.0003.0003.0005 which is a document titled "Element Zero – 6 Feb 2024 Board Meeting – Final". A copy of this document is reproduced at page 108 to 153 of **Confidential Exhibit RMD-6**.

(b) EZR.0003.0003.0031 which is a document tiled "Element Zero – 3 Nov Board Meeting – Final". A copy of this document is reproduced at page 154 to 192 of **Confidential Exhibit RMD-6**.

(c) EZR.0006.0001.0013 and EZR.0003.0003.0026 which are the same documents as (b) above, "Element Zero – 3 Nov Board Meeting – Final", attached to emails.

161. The Applicants' concern appears to be regarding documents underlying testing of iron ore supplied by different mines as referred to in those documents. I am informed by Dr Kolodziejczyk, and believe, that, to the best of his knowledge:

(a) these documents are presentations that were created for the board of Element Zero to facilitate discussion at board meetings and develop future plans for the company;

(b) the pages relating to the testing of different iron ore (for example page 6 of EZR.0003.0003.0005 and page 28 of EZR.0003.0003.0031) were predominantly prepared by the Third Respondent and Orawan Winther-Jensen;

(c) the experimental work that contributed to these presentations was undertaken by the Third Respondent and/or Orawan Winther-Jensen;

(d) to the extent the tests were recorded, they would be in the Third Respondent and/or Orawan Winther-Jensen's possession. The lab reports in the Element Zero Respondents' control have been produced. Any additional lab reports are not in the Element Zero Respondents' possession;

(e) that iron ore grade in the Pilbara region ranges from 55% to ~67% Fe ("Fe" being the chemical symbol for iron) and that the same ore body may produce very different iron grade. Therefore, often when referring to iron ore grade, scientists, including at Element Zero, will round the % amount or use an average iron ore grade based on the arithmetic mean from multiple assays of the same sample.

162. At paragraph 147, Mr Dewar suggests that EZR.0001.0001.0422 cannot be responsive to Item #402 or #405 as the document is dated 1 September 2023 to 31 October 2023, which is before the time period set out in relation to Item #402 or #405. My response is:

(a) Item #402 and #405 are related to the testing of "Iron Bridge Magnetite".

(b) As referred to at paragraph 161(b) above, the Third Respondent and Orawan Winther-Jensen prepared the pages of the presentations which contain the references to testing of Iron Bridge Magnetite.

(c) EZR.0001.0001.0422 is a document titled "2310 OWJ EZ lab report for Oct 23" suggesting it is a lab report of Orawan Winther-Jensen for October 2023. On page 7 of that document, there is a title "Task 5: To test IB Magnetite (66.8% conc)".

(d) I am informed by Dr Kolodziejczyk, and believe, that "IB" refers to Iron Bridge and that he considers this to be a test relating to the statement in the presentations. To the extent any other tests were undertaken by the Third Respondent or Orawan Winther-Jensen, these are not known to the Element Zero Respondents.

(e) As referred to in the Element Zero Respondents' response (which is reproduced at paragraph 146 of Mr Dewar's affidavit), the Element Zero Respondents have conducted further searches and there are no other documents in the Element Zero Respondents' control recording testing on Iron Bridge Magnetite.

163. At paragraph 148, Mr Dewar suggests that EZR.0001.0001.0420 cannot be responsive to Item #402 or #405 because the document is dated 31 July 2023 to 31 August 2023, which is before the time period set out in relation to Item #402 or #405. My response is:

(a) Item #402 and #405 are related to the testing of "Iron Bridge Magnetite".

(b) As referred to at paragraph 161(b) above, the Third Respondent and Orawan Winther-Jensen prepared the pages of the presentations which contain the references to testing of Iron Bridge Magnetite.

(c) EZR.0001.0001.0420 is a document titled "2308 OWJ EZ lab report for Aug 23" suggesting it is a lab report of Orawan Winther-Jensen for August 2023. On page 3 of that document, there is a title "Task 2: To test IB magnetite (66.8% conc)…"

(d) I am informed by Dr Kolodziejczyk, and believe, that "IB" refers to Iron Bridge and that he considers this to be a test relating to the statement in the presentations. To

the extent any other tests were undertaken by the Third Respondent or Orawan Winther-Jensen, these are not known to the Element Zero Respondents.

(e) As referred to in the Element Zero Respondents' response (which is reproduced at paragraph 146 of Mr Dewar's affidavit), the Element Zero Respondents have conducted further searches and there are no other documents in the Element Zero Respondents' control recording testing on Iron Bridge Magnetite.

164. At paragraph 151 and 152, Mr Dewar suggests that EZR.0001.0001.0420 and EZR.0001.0001.0419 cannot be responsive to Item #406 because they are dated out of the time period set out in relation to Item #406. My response is:

(a) Item #406 is in relation to testing of "Roy Hill" ore.

(b) As referred to at paragraph 161(b) above, the Third Respondent and Orawan Winther-Jensen prepared the pages of the presentations which contain the references to testing of Roy Hill ore.

(c) EZR.0001.0001.0420 is a document titled "2308 OWJ EZ lab report for Aug 23" suggesting it is a lab report of Orawan Winther-Jensen for August 2023. On page 4 and 6 of that document, there is a reference to "62% Fe WHIMS concentrate from Roy Hill".

(d) EZR.0001.0001.0419 is a document titled "2307 OWJ EZ lab report for Jul 23" suggesting it is a lab report of Orawan Winther-Jensen for July 2023. On page 3 of that document, there is a title "Task 2" which refers to "62% Fe WHIMS concentrate from Roy Hill".

(e) I am informed by Dr Kolodziejczyk, and believe, that he considers these to be the tests relating to the statement in the presentations. To the extent any other tests were undertaken by the Third Respondent or Orawan Winther-Jensen, these are not known to the Element Zero Respondents.

(f) As referred to in the Element Zero Respondents' response (which is reproduced at paragraph 150 of Mr Dewar's affidavit), the Element Zero Respondents have conducted further searches and there are no other documents in the Element Zero Respondents' control recording testing on Roy Hill ore.

165. At paragraph 153 to 155, Mr Dewar outlines his concerns in relation to the Element Zero Respondents explanation to Item #428-429 which is as follows:

The EZRs have not discovered documents recording the "Experiments" (nos. 1 and 3) and "Additional experiments and considerations" (each of nos. 1–6) in their totality.

166. The Element Zero Respondents' response is:

The Element Zero Respondents' position is that these documents are not relevant to a category of discovery.

To the extent any of the categories required production of such documents, they have already been produced. See for example, see EZR.0001.0001.0198 EZR.0001.0001.0333, EZR.0001.0001.0335, EZR.0001.0001.0336, EZR.0001.0001.0337, EZR.0009.0005.0112.

In any event, the Element Zero Respondents have conducted further searches for documents referred to in items 428 - 429. Without admissions as to relevance, and in order to progress the matter, the Element Zero Respondents' will produce 2 further documents, one of which will be produced in response to item 426. Further documents fall outside the date range in category 11(f).

167. At paragraph 155, Mr Dewar relies on a draft of the affidavit of Grant Jacobsen to suggest that there should be other documentation recording the experiments referred to in this document. My response is:

(a) EZR.0001.0001.0111 and EZR.0001.0001.0112 are documents which were produced by the Element Zero Respondents in response to category 11(f) which are documents recording the research and development of the Element Zero process during the period from January 2022 to **February 2024**.

(b) EZR.0001.0001.0111 and EZR.0001.0001.0112 are both documents dated **21 February 2024**. Any "additional experiments" referred to those documents would fall *after* February 2024 and are not relevant to a category of discovery.

(c) Based on Mr Dewar's comments, Dr Grant Jacobsen does not appear to have been provided with the Element Zero Respondents' response which includes that "Further documents fall outside the date range in category 11(f)."

(d) As referred to in the Element Zero Respondents' response extracted at paragraph 154 of Mr Dewar's affidavit, the Element Zero Respondents conducted further searches and have located 2 further documents, which have now been produced.

168. The effect of the alleged deficiencies in section C.11 (and Mr Dewar's evidence at paragraphs 156 to 163) is not clear as his affidavit does not say what follows from his views in those paragraphs. However, given the matters in paragraphs 154 to 167 above, I consider Items #402, #405, #406 and #428-429 to be resolved.

Response to section C.12

169. Section C.12 relates to what Mr Dewar says is a deficiency based on allegedly inconsistent explanations of certain USBs (Item #9).

170. As set out at paragraph 156 of the Dewar Affidavit, the search orders included two USBs as Listed Things that were sought under the search orders, being **a Toshiba USB** and a **Kingston USB**.

171. Mr Dewar observes at paragraph 157 of his affidavit that the Toshiba USB and Kingston USB were not seized during execution of the search orders. At paragraph 158, Mr Dewar refers to a letter sent by Gilbert + Tobin to DCC on 14 June 2024, shortly after the first return date in the matter on 30 May 2024. In that letter, Gilbert + Tobin identified that Dr Kolodziejczyk had undertaken a search for the USBs but was unable to locate them, had not provided them to any other person, and that in the event he located them he undertook not to access them and to provide them to Gilbert + Tobin.

172. Category 2A(f) of the Discovery Categories sought production of all documents contained on the Toshiba USB and Kingston USBs. The searches conducted for those documents are described at paragraph 56 above.

173. As set out at paragraph 32 above, on 29 April 2025, the Element Zero Respondents filed and served their Lists of Documents. Those Lists of Documents contained what, in my experience as set out in this affidavit, is a standard form of wording in Part 3 of the Lists, relating to documents that have been but are no longer in the control of the discovering party). That form of wording is extracted at paragraph 160 of Mr Dewar's affidavit, and is as follows:

Part 3 – Documents that have been but are no longer in the control of Second Respondent

No.	Description of document	Date of document	What became of document
3	Documents which may have been lost, deleted or destroyed over time or in the ordinary course of business which documents cannot be identified	Unknown	Lost, deleted or destroyed
4	Emails and other documents stored electronically which may have been deleted and which cannot now be recovered from back-up tapes or databases, and which therefore cannot now be identified	Unknown	Lost, deleted or destroyed

174. As set out at paragraph 35 above, on 9 May 2025, DCC sent a letter to Gilbert + Tobin complaining that the Element Zero Respondents' Lists of Documents did not contain a description, *inter alia*, of documents which have been but are no longer in the Element Zero Respondents' control, pursuant to rule 20.17(2)(b) of the Federal Court Rules.

175. The parties exchanged further correspondence about this issue on 21 May 2025 (email from Gilbert + Tobin to DCC), 30 May 2025 (email from DCC to Gilbert + Tobin) and 6 June 2025 (email from Gilbert + Tobin to DCC dated 6 June 2025). Copies of that correspondence appears at pages 298 to 301 of **Exhibit RMD-5**. In the email I sent in relation to this issue on 6 June 2025 I stated:

> *We reject the suggestion that our clients' Lists of Documents are "defective". In our experience, the content of Parts 2 and 3 align with standard practice in this Court, consistent with filings from various law firms, including your own.*
>
> *In any event, we are in the process of preparing new Lists of Documents which provide additional descriptions of documents falling within Parts 2 and 2 of the Lists. We anticipate serving those Lists early next week.*

176. As indicated in that email, the Element Zero Respondents produced Supplementary Lists of Documents which were filed and served on 13 June 2025. Part 3 of Dr Kolodziejczyk's Supplementary List of Documents addressed the Toshiba USB and the Kingston USB in the terms set out at paragraph 161 of the Dewar Affidavit, as follows:

Part 3 - Documents that have been but are no longer in the control of Second Respondent

No.	Description of document	Date of document	What became of document
1	Documents on the Toshiba USB device (serial 07080A078F1B6304) except for documents referred to in Part 1 of this List of Documents	Various	To the best of my recollection, the USB on which the documents were located was lost or disposed of at some time in or after December 2021
2	Documents on the Kingston USB device (serial 900042ACAE668708) except for documents referred to in Part 1 of this List of Documents	Various	To the best of my recollection the USB on which the documents were located was disposed of at some time in or after December 2023

177. Mr Dewar expresses a view that Gilbert + Tobin's 14 June 2024 letter is inconsistent with Part 3 of Dr Kolodziejczyk's Supplementary List of Documents (at paragraph 162). I do not agree. The letter of 14 June 2024 sets out the position as best it was known at that time, in the immediate wake of the execution of the search orders. In the process of completing discovery (some 6 to 9 months later), a greater degree of specificity could be given and was given to the Applicants by way of the Supplementary List.

178. Mr Dewar also expresses a view that Part 3 of Dr Kolodziejczyk's List of Documents and Supplementary List of Documents are inconsistent. This is incorrect. The Supplementary List provides more detail about the Toshiba and Kingston USBs, but there is no inconsistency between the two lists.

179. The effect of this alleged deficiency (and Mr Dewar's evidence at paragraphs 156 to 163) is not clear to me as his affidavit does not say what follows from his views about the descriptions referred to above. However, for the reasons set out above, there is no deficiency by reference to Dr Kolodziejczyk's explanations (via solicitor letter in 2024 and verified lists in 2025).

Response to section C.13

180. Section C.13 relates to what Mr Dewar describes as "specific deficiencies" in relation to revisions or versions of documents produced in answer to category 11(f). Mr Dewar suggests that Items #384, #385 and #386 are examples of this category of deficiencies. As Mr Dewar has not put on evidence in relation to other alleged deficiencies concerning revisions or versions, I consider these resolved. I respond as follows to Mr Dewar's evidence.

181. Section C.13.1 relates to revisions B-D of a document titled "General and Process Design Criteria for Green Metal Project Stage 2A Pilot Plant" (Item #384). I have dealt with this concern at paragraph 151 above. There is no issue.

182. Section C.13.2 relates to a document discovered by the Element Zero Respondents titled "10182-1000-MB-0001 Mass Balance Rev B Green Metals.pdf" (EZR.0001.0001.0081).

183. At paragraphs 170 to 178, Mr Dewar suggests that the Element Zero Respondents have failed to discover all revisions and versions of "10182-1000-MB-0001 Mass Balance Rev B Green Metals.pdf". My response is:

(a) The Element Zero Respondents conducted specific searches for additional revisions of this document and were unable to locate any such documents.

(b) I am informed by Dr Kolodziejczyk, and believe, that this is a document that was authored by NewPro. I am informed by Mr Newling, and believe, that NewPro was unable to locate any other revision of this document.

(c) As to Mr Dewar's concern in paragraph 171, the Element Zero Respondents have now produced the equivalent of BWJ.5000.0005.7463 (EZR.0009.0006.0631), as it was produced by the Third Respondent under category 11(f), for the reasons referred to at paragraph 137 above.

(d) Given the matters in this paragraph, Item #385 is resolved as no further revisions of this document exist.

184. Section C.13.3 relates to a document discovered by the Element Zero Respondents titled "General and Process Design Criteria" (EZR.0001.0001.0085):

(a) The Element Zero Respondents conducted specific searches for additional revisions of this document and were unable to locate any such documents.

(b) This is a NewPro document. I am informed by Mr Newling, and believe, that NewPro was unable to locate any other revision of this document.

(c) The Element Zero Respondents do not have an "xlsb" version of the document in their control.

(d) I have addressed paragraph 185 of Mr Dewar's affidavit at paragraph 148 above.

(e) Given the matters in this paragraph, Item #386 is resolved as no further revisions of this document exist.

185. The effect of this alleged deficiency (and Mr Dewar's evidence in section C.13) is not clear as his affidavit does not say what follows from his views about the descriptions referred to above. However, for the reasons set out above, there is no relevant deficiency and any issues have been resolved.

Response to section C.14

186. Section C.14 relates to what Mr Dewar describes as "specific deficiencies" in relation to documents cross-referenced and appended to documents. Mr Dewar suggests that Item #420-#422 and #510-#512 are samples of this category of deficiencies. As Mr Dewar has not put on evidence in relation to other alleged deficiencies concerning cross-references or appended documents, I consider these resolved.

187. C.14.1 relates to Orawan Winther-Jensen's laboratory reports (EZR.0001.0001.0419 EZR.0001.0001.0420 and EZR.0001.0001.0421) which are dated between July and September 2023. At paragraph 189 to 191, Mr Dewar suggests there should be other documentation available to the Element Zero Respondents in relation to statements made in those laboratory books. My response is:

(a) Element Zero is a start-up. I am informed by Dr Kolodziejczyk, and believe, that (as opposed to a commercial laboratory), there are not strict document control processes and procedures in place, particularly at the beginning of the company's incorporation;

(b) Orawan Winther-Jensen is no longer employed by Element Zero;

(c) the Element Zero Respondents have conducted extensive searches to comply with category 11(f). To the extent there is any other material available, it is not in the Element Zero Respondents' control.

188. Section C.14.2 of Mr Dewar's affidavit is related to the Third Respondent, being Item #520-512. Gilbert + Tobin does not represent the Third Respondent.

189. The effect of this alleged deficiency (and Mr Dewar's evidence in section C.14) is not clear as his affidavit does not say what follows from his views about the descriptions referred to above. However, for the reasons set out above, there is no relevant deficiency.

Further comments section of Mr Dewar's affidavit

190. In paragraph 197 to 200, Mr Dewar appears to suggest that there are missing lab reports of Dr Wickramaarachchi in the period January to February 2024. My response is:

(a) I am informed by Mr Masterman, and believe, that Dr Wickramaarachchi started her employment with Element Zero on 26 October 2023.

(b) January to February 2024 is a two-month time period, occurring at the very beginning of the year. To the best of his knowledge, Mr Masterman recalls Dr Wickramaarachchi being on leave for at least some of this period.

(c) Various of Dr Wickramaarachchi's reports have already been produced by the Element Zero Respondents.

191. The effect of this complaint is not clear in Mr Dewar's affidavit as he does not say what follows from his observations. However, to the extent Mr Dewar is asserting this is a deficiency, I do not consider there to be a deficiency.

Response to section on privilege

192. At paragraph 204 of his affidavit Mr Dewar indicates that the Applicants continue to seek production of 5 documents in Part 2 of the Element Zero Respondents' Supplementary List of Documents. As indicated in the List, the Element Zero Respondents claim that those documents are subject to common interest privilege. As indicated in the Element Zero Respondents' response, they are documents that were provided to Playground Ventures, who had a common interest in the subject matter of the advice and an ongoing intention to preserve the confidentiality and privilege of the advice.

193. I am informed by Mr Masterman, and believe, that:

(a) EZR.0003.0003.0122 is a legal advice provided to Element Zero by Katrina O'Leary who is an intellectual property lawyer engaged by the Element Zero Respondents.

(b) EZR.0002.0001.0255 is an email from the Second Respondent to Playground containing intellectual property advice from Element Zero's registered patent attorney and intellectual property lawyer, Carolyn Rolls of Oxygene IP. EZR.0002.0001.0256 is the attachment to EZR.0002.0001.0255.

(c) EZR.0002.0001.0266 is an email from the Second Respondent to Playground containing intellectual property advice from Element Zero's registered patent attorney and intellectual property lawyer, Carolyn Rolls of Oxygene IP. EZR.0002.0001.0267 is the attachment to EZR.0002.0001.0266.

194. At paragraph 207 of his affidavit, Mr Dewar notes that the dates of some of the documents are late June 2023 and refers to a company search of Element Zero which indicates that Playground Ventures became a shareholder until 21 August 2023.

195. I am informed by Mr Masterman, and believe, that:

(a) From on or around January 2023, Element Zero and Playground Ventures were in discussions about potential investment in Element Zero;

(b) In pursuance of those discussions, Element Zero set up a confidential data room to share documents with Playground Ventures for the purpose of consideration of the investment opportunity;

(c) Documents were also shared with Playground Ventures via email;

(d) The documents shared with Playground Ventures included the documents the subject of the common interest privilege claim;

(e) Element Zero and Playground Ventures had a common interest in legal advice on the basis that as a potential investor in Element Zero, Playground Ventures had an interest in Element Zero's legal position;

(f) On 21 July 2023, Element Zero and Playground Ventures entered into a Subscription Deed which contains obligations of confidentiality including in relation to information exchanged between the parties during negotiations preceding the entry into the deed. A copy of that deed appears at pages 193 to 229 of **Confidential Exhibit RMD-6**.

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Response to Revised Discovery Category 2

196. At paragraphs 212 to 219, Mr Dewar gives evidence about a further amended version of category 2. As set out above, the Applicants have sought various versions of category 2 on multiple occasions and those versions of the category have been rejected.

197. Revised category 2 contains search terms at Annexure B. Those search terms would require the following searches to be conducted across Element Zero Respondents' records:

(a) For category 2(a), suggested search terms (1) could involve up to 156 iterations of search term combinations.

(b) For category 2(b), suggested search terms (3) could involve up to 1,296 iterations of search term combinations and (4) could involve up to 1080 iterations of search term combinations.

(c) For category 2(c), suggested search terms (5) could involve up to 252 iterations of search term combinations.

(d) The suggested search terms involve complex Boolean search combinations which could not be carried out by individual respondents.

198. On the basis of the number of search term combinations contained in Annexure B, in my view it is likely that a large number of documents would be returned and required to be reviewed if the category required those searches to be undertaken. Such a process would be time consuming, expensive and in all of the circumstances would be oppressive, particularly where the Element Zero Respondents have already provided discovery in relation to broad discovery categories.

Proposed Amended Interlocutory Application

199. I understand that the Applicants intend to seek leave to file an Amended Interlocutory Application which seeks:

(a) Discovery from the Respondents of documents falling within eight new discovery categories (prayer 3A of the draft Amended Interlocutory Application)

(b) An order that the Applicants are only required to produce parts of document FRT.001.0002189, with redactions for relevance and privilege (prayer 3B of the draft Amended Interlocutory Application).

200. The Applicants' draft Amended Interlocutory Application was not foreshadowed prior to the service of the Dewar Affidavit on 19 August 2025. At 5.53pm on 9 September 2025, the Applicants provided orders to the Court including an order that they have leave to file the Amended Interlocutory Application. The Element Zero Respondents oppose that order.

201. In the time available, I have not been able to respond to paragraphs 220 to 241 of the Dewar Affidavit which relate to the additional orders sought in the draft Amended Interlocutory Application.

202. If the Court grants the Applicants leave to file the Amended Interlocutory Application, I will endeavour to file a supplementary affidavit which addresses proposed new discovery categories and the variation of the production order as soon as possible.

CONCLUSION

203. For the reasons set out in this affidavit, the Element Zero Respondents respectfully request that the Applicants' IA should be dismissed with costs.

Sworn by the Deponent)
at Barangaroo)
in New South Wales)
on 9 September 2025)
Before me:)



Signature of deponent



Signature of witness

Caitlin Aisling Meade, Solicitor
Level 35, International Tower Two
200 Barangaroo Avenue
Barangaroo NSW 2000

No. NSD527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

FORTESCUE LIMITED ACN 002 594 872 and another

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others

Respondents

Exhibit RMD-5

This is a bundle of documents marked "**Exhibit RMD-5**" to the Affidavit of **Rebecca Mary Dunn** sworn before me on 9 September 2025.

Signature of witness

Name: Caitlin Aisling Meade

Level 35 Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Solicitor

Filed on behalf of (name & role of party) *The First, Second and Fourth Respondents*
Prepared by (name of person/lawyer) *Michael John Williams, Partner*
Law firm (if applicable) Gilbert + Tobin
Tel (02) 9263 4271 Fax (02) 9263 4111
Email mwilliams@gtlaw.com.au
Address for service Level 35, International Tower Two
(include state and postcode) 200 Barangaroo Avenue, Barangaroo NSW 2000

Daisy Cullen

From: Paul Dewar <PDewar@dcc.com>
Sent: Friday, 24 May 2024 6:44 PM
To: Rebecca Dunn
Cc: Michael Williams; Siabon Seet; Amelia Cooper; ACameron@dcc.com; RDighe@dcc.com; KHuang@dcc.com
Subject: Proceeding NSD 527 of 2024 - Fortescue Limited & Ors v Element Zero Pty Ltd & Ors
Attachments: 20240524 FMG v EZ - SMOs (24 May 2024).docx

Dear Colleagues

We **attach** the Applicants' proposed short minutes of order.

We acknowledge that an appropriate confidentiality regime should be in place prior to the Applicants being provided with the materials contemplated in orders 2 and 3. We will shortly provide you with a proposed confidentiality agreement.

We ask that you please indicate the First, Second and Fourth Respondents' position regarding the proposed short minutes by **5pm Monday 27 May**.

Kind regards

Paul Dewar
Principal

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T +61 2 9293 1000 | **F** +61 2 9262 1080

We extend our respect to all Aboriginal and Torres Strait Islander peoples throughout Australia and acknowledge the Traditional Owners and Custodians of the lands on which we work.
We recognise their ongoing connection to land, sea and community.

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Form 1
Rule 2.13(2)

Proposed Short Minutes of Order

No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

FORTESCUE LIMITED ACN 002 594 872
and others named in the schedule
Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081
and others named in the schedule
Respondents

THE COURT ORDERS THAT:

Suppression and confidentiality

1. Order 4 made on 9 May 2024 (interim suppression order) to continue to have effect until the next case management hearing in this proceeding or further order.

Access to search materials

2. On or before [**6 June 2024** / ***1 week from return date***], the Independent Computer Experts make and provide to each party's solicitors a copy of all things referred to in paragraph 20(e)(iv) of the search order made on 14 May 2024.

3. On or before [**6 June 2024** / ***1 week from return date***], the Independent Lawyers make and provide to each party's solicitors a copy of the Listed Things removed from the Premises by the Independent Lawyers pursuant to paragraph 16 of the search order made on 14 May 2024.

Delivery of search materials to court

4. The Independent Lawyers are to deliver all Listed Things in their custody to any registry of the Federal Court of Australia on or before **6 June 2024**, and notify the Associate to Justice [**insert] and the parties' solicitors when they have done so.

Case management

5. The matter be listed for case management on **17 June 2024**.

Date: 24 May 2024

Schedule

No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

Applicants

Second Applicant:	**FORTESCUE FUTURE INDUSTRIES PTY LTD**
	ACN 625 711 373
Third Applicant:	**FMG PERSONNEL SERVICES PTY LTD**
	ACN 159 057 646

Respondents

Second Respondent:	**BARTLOMIEJ PIOTR KOLODZIEJCZYK**
Third Respondent:	**BJORN WINTHER-JENSEN**
Fourth Respondent:	**MICHAEL GEORGE MASTERMAN**

APPLICANTS' DRAFT DISCOVERY CATEGORIES

Definitions

a. "**directly relevant**" means a document that falls within any of the criteria in rule 20.14(2) of the Federal Court Rules.

b. "**document**" has the meaning given to that term in Schedule 1 of the Federal Court Rules 2011 (Cth).

c. "**First Specified Documents"** means the documents referred to in the particulars of paragraphs 19 and 20 of the ASOC including:

No.	Name	Ref
1	Green Iron Update (02.08.2021).pdf	see ASOC [19(i)(1)]
2	35557986AU- Specification as filed (35557986).pdf	see ASOC [19(i)(2)], see ASOC [20(i)(4)]
3	35557986AU - Drawings as filed (35557986).pdf	see ASOC [19(i)(2)], see ASOC [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 ASOC [19(i)(3)]
5	Bumblebee PID markups 26_10_21.pdf	see ASOC [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 ASOC [19(ii)], see ASOC [20(iv)]
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024	see ASOC [19(iii)], see ASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH.R1.docx	see ASOC [20(i)(1)]
9	211014_FFI Green Steel_Ore Leach_ASH_XRF results.csv	see ASOC [20(i)(2)]
10	211014_FFI Green Steel_Ore Leach_ASH_ICP results.csv	see ASOC [20(i)(3)]
11	Technical Evaluation.xlsx	see ASOC [20(i)(5)]

No.	Name	Ref
12	Email from David White sent on 4 November 2024 with Subject “Technical Evaluation of Green Iron process”	see ASOC [20(i)(5)]
13	Green Iron Update (01.11.2021).pdf	see ASOC [20(i)(6)]

d. “**Fortescue**” has the meaning given to that term in paragraph 4 of the Amended Statement of Claim filed 17 June 2024 (**ASOC**).

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 and/or molten carbonate-based electrolytes.

f. “**Search Orders**” means the orders made by Justice Perry on 14 May 2024 providing for the conduct of a search pursuant to Division 7.5 of the *Federal Court Rules 2011* (Cth).

g. “**Second Specified Documents**” means any:

i. modified forms of First Specified Documents, including previous or subsequent drafts;

ii. documents created directly or indirectly using the First Specified Documents.

Reasonable Search

For the avoidance of doubt, a “reasonable search” for the purposes of r 20.14 of the *Federal Court Rules 2011* (Cth) includes a search over the copies of materials seized or imaged pursuant to the Search Orders.

Categories

Ionic Liquid documents

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 in relation to an electrochemical reduction process involving Ionic Liquid.

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 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 AIB-5 p 25, or AIB-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 AIB-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;

(j) "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 AIB-17;

(v) the work concerning "water, ionic liquids, and molten carbonate", being the work referred to in Bhatt AIB-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.

3. All documents recording or evidencing the location and storage of any of the documents referred to in category 1 and 2 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 and 2 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 and 2 above.

Specified Documents

6. All documents constituting or referring to the First Specified Documents.

7. All documents constituting or referring to the Second Specified Documents.

8. All documents recording of 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.

9. All documents directly relevant to any of the matters pleaded or particularised in paragraph 31, 33 and/or 78 of the ASOC.

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.

11. All versions, including drafts, of the following documents (howsoever described):

    (a) basis of design documents for the First Respondent's pilot plant;

    (b) piping and instrumentation documents for the First Respondent's pilot 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.

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

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, and/or Fourth Respondents are named as an inventor concerning any aspect of the Ionic Process, leaching and/or any aspect of a pilot plant for the electrochemical reduction of ore, including drafts thereof, and including but not limited to:

    (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 Ionic Process;

    (f) any patent application concerning leaching;

    (g) any patent application that relates to the features of a pilot 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, 6 and/or 7 above for or in preparing or inventing any of the patents or patent applications referred to in category 13 above.

From:	Rohit Dighe
To:	Michael Williams; Rebecca Dunn; Caitlin Meade; Daisy Cullen; Mike Hales; Daniella Lambert; Lachlan McLean; Edward Fearis
Cc:	Paul Dewar; Ashley Cameron; Kevin Huang
Subject:	NSD527/2024 Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]
Date:	Wednesday, 6 November 2024 4:03:24 PM
Attachments:	image001.png external.png Fortescue"s Proposed Discovery Categories (6 November 2024).docx

External email

Dear Colleagues

We refer to order 5 of the orders of Justice Markovic made on 23 October 2024.

We **attach** the Applicants' proposed categories of documents for which they will seek an order for discovery pursuant to r 20.15 of the *Federal Court Rules 2011* (Cth).

Yours sincerely

Rohit Dighe
Associate

Paul Dewar
Principal Lawyer

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APPLICANTS' DRAFT DISCOVERY CATEGORIES

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(ii)], see FASOC [20(iv)]
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024	see FASOC [19(iii)], see FASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH.R1.docx	see FASOC [20(i)(1)]
9	211014_FFI Green Steel_Ore Leach_ASH_XRF results.csv	see FASOC [20(i)(2)]
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)]

No.	Name	Ref
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. “**Search Orders**” means the orders made by Justice Perry on 14 May 2024 providing for the conduct of a search pursuant to Division 7.5 of the *Federal Court Rules*.

g. “**Second Specified Documents**” means any:

i. modified forms of First Specified Documents, including previous or subsequent drafts;

ii. documents created directly or indirectly using the First Specified Documents.

Reasonable Search

For the avoidance of doubt, a “reasonable search” for the purposes of r 20.14 of the *Federal Court Rules* includes a reasonable search over the copies of materials seized or imaged pursuant to the Search Orders.

Categories

Ionic Liquid documents

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 in relation to an electrochemical reduction process involving Ionic Liquid.

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 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 AIB-5 p 25, or AIB-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 AIB-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;

   (j) "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 AIB-17;

(v) the work concerning “water, ionic liquids, and molten carbonate”, being the work referred to in Bhatt AIB-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.

3. All documents recording or evidencing the location and storage of any of the documents referred to in category 1 and 2 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 and 2 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 and 2 above.

Specified Documents

6. All documents constituting or referring to the First Specified Documents.

7. All documents constituting or referring to the Second Specified Documents.

8. All documents recording of 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.

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.

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) piping 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.

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, 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:

(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, 6 and/or 7 above for or in preparing or inventing any of the patents or patent applications referred to in category 13 above.

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged:	Interlocutory Application - Form 35 - Rule 17.01(1)(a)
Court of Filing:	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	20/11/2024 6:29:09 PM AEDT
Date Accepted for Filing:	21/11/2024 8:50:41 AM AEDT
File Number:	NSD527/2024
File Title:	FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	Hearing
Time and date for hearing:	06/02/2025, 10:15 AM
Place:	Please check Daily Court List for details

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.

Form 35
Rule 17.01(1)

Interlocutory application

No. NSD527 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

To the Respondents

The Applicants apply for the interlocutory orders set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

Time and date for hearing:

Place:

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

Filed on behalf of (name & role of party) Fortescue Limited, Fortescue Future Industries Pty Ltd and FMG Personnel Services Pty Ltd (the Applicants)
Prepared by (name of person/lawyer) Paul Alexander Dewar
Law firm (if applicable) Davies Collison Cave Law
Tel (02) 9293 1000 Fax (02) 9262 1080
Email PDewar@dcc.com
Address for service (include state and postcode) Level 4, 7 Macquarie Place, Sydney NSW 2000

Interlocutory orders sought

1. By [DATE], each of the Respondents give non-standard discovery pursuant to rules 20.15 to 20.17 of the *Federal Court Rules 2011* (Cth) of all documents within the categories set out in **Schedule 1** to these orders.

2. The Respondents pay the Applicants' costs of this application.

3. Such further or other orders as the Court sees fit.

Service on the Respondents

It is intended to serve this application on all the Respondents.

Date: 20 November 2024

Signed by Paul Alexander Dewar
Lawyer for the Applicants

SCHEDULE 1

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(ii)], see FASOC [20(iv)]
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024	see FASOC [19(iii)], see FASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH.R1.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:

i. modified forms of First Specified Documents, including previous or subsequent drafts;

ii. documents created directly or indirectly using the First Specified Documents.

Categories

Ionic Liquid documents

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 in relation to 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 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 AIB-5 p 52, or AIB-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 AIB-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;

(j) "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 AIB-17;

(v) the work concerning "water, ionic liquids, and molten carbonate", being the work referred to in Bhatt AIB-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.

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) piping 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, 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.

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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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TRANSCRIPT OF PROCEEDINGS

O/N H-1993996

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

MARKOVIC J

No. NSD 527 of 2024

FORTESCUE LIMITED and OTHERS

and

ELEMENT ZERO PTY LIMITED and OTHERS

SYDNEY

10.44 AM, THURSDAY, 6 FEBRUARY 2025

MR J.S. COOKE SC appears with MR D.B. LARISH and MS S.K. YATES for the applicant
MR HENNESSY appears with MR C.D. McMENIMAN for the 1st, 2nd and 4th respondents
MS F. ST JOHN appears for the 3rd respondent

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HER HONOUR: Apologies for this morning's delay.

MR COOKE: May it please the court, I appear with my learned juniors, MR LARISH and MS YATES for the applicant.

HER HONOUR: Thank you, Mr Cooke.

MR HENNESSY: May it please the court, I appear with my learned friend, MR McENIMAN, for the first, second and fourth respondents, the so-called Element Zero respondents.

HER HONOUR: Yes. Thank you, Mr Hennessy.

MS ST JOHN: May it please the court, I appear for the third respondent.

HER HONOUR: Thank you, Ms John.

MR COOKE: Your Honour, there's - - -

HER HONOUR: We're going to have a lot of fun this morning, aren't we?

MR COOKE: I thought your Honour might say that.

HER HONOUR: I remain an optimist.

MR COOKE: Yes. Well, hopefully, we can get through this as efficiently as possible, your Honour.

HER HONOUR: Well, I'm wondering how we do that. I think the most efficient thing, I don't know what you think, I will let you – is to go – we will have to go application by application and category by category, unless someone feels the need or feels that the world needs a set of reasons on why a category of discovery ought be given or not, I did not propose to give reasons. I will make my rulings as we go, so we all know the answer and are not left guessing. Is there any objection to that course?

MR COOKE: Not now.

HER HONOUR: Mr Hennessey.

MR HENNESSY: I'm just getting instructions to confirm that that's – yes, that's .....

HER HONOUR: Ms St John?

MS ST JOHN: Yes, your Honour.

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HER HONOUR: All right.

MR COOKE: Thank you, your Honour. Your Honour, I should read some evidence in relation to our application. So it's our application and, I think, our evidence in answer to our friend's application, and I was just – I understand your Honour has a copy of the court book?

HER HONOUR: Of the court book. I'm just seeing if I actually have it open.

MR COOKE: Thank you.

HER HONOUR: All right. I have it now. Thank you.

MR COOKE: Thank you. Your Honour, I will use the court book index. That might be - - -

HER HONOUR: Yes, and I will read them onto the record using the index, as well, just so my – I think my associates can follow on that way.

MR COOKE: Thank you. So I read – it's item 13. I read the affidavit of Paul Alexander Dewar affirmed 20 November 2024.

HER HONOUR: The affidavit item 13 of the court book is read by the applicant.

MR COOKE: Next is item 19, the next affidavit of Paul Alexander Dewar affirmed 29 November 2024.

HER HONOUR: The affidavit of item 19 is also read by the applicant in support of its application for discovery.

MR COOKE: Thank you. We would tender item at 21, which is an exhibit.

HER HONOUR: Now, that replicates material in relation to which there are already confidentiality orders; is that correct?

MR COOKE: Yes.

HER HONOUR: It's not always good to replicate material. The exhibit at item 21 will be exhibit PAD-B on this application, and it will be tendered subject to – do you have an order for me?

EXHIBIT #PAD-B EXHIBIT AT ITEM 21

HER HONOUR: Proposed order?

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MR COOKE: We will find that. It's an order your Honour - - -

HER HONOUR: I've already made?

MR COOKE: - - - already made.

HER HONOUR: I probably need to make a fresh order, I think.

MR COOKE: All right. Well, we will prepare that for your Honour.

HER HONOUR: Yes. It will be tendered, so I better put this on the record. It will be tendered subject to an order to be made pursuant to section 37AF of the Federal Court of Australia Act on the ground that it reproduces material, which is already subject to such an order and has been previously tendered in this proceeding.

MR COOKE: Thank you, your Honour. The next item is item 26. It's the affidavit of Dr Bhatt of 1 May 2024.

HER HONOUR: Is it just the paragraphs that are referred to in the index?

MR COOKE: Yes, and the annexures.

HER HONOUR: And the annexures. That part of the affidavit and annexures to it of Dr Bhatt, referred to at item 26 of the court book.

MR COOKE: Yes. And the next is item 33. It's an affidavit of Dr Winther-Jensen. My friend may or may not be reading it, but we would tender paragraph 47.

HER HONOUR: All right. I'm proceeding on the basis that there's no objection to any of this evidence. Am I wrong about that?

MR HENNESSY: That's correct, your Honour.

HER HONOUR: Yes. Is there any objection to that tender, Ms St. John?

MS ST JOHN: No, your Honour.

HER HONOUR: Paragraph 47B of the affidavit at item 33 of the court book is read by the applicant on its application.

MR COOKE: Thank you. Your Honour, sorry. We also would seek to tender the paragraphs of Dr Kolodziejczyk's affidavit at item 31, which is paragraphs 49 to 51.

HER HONOUR: I take it there's no objection to that.

MR HENNESSY: No, your Honour.

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HER HONOUR: The paragraphs of the affidavit referred to at item 31 of the court book index are read by the applicant on the application.

MR COOKE: And finally, your Honour, we would seek to tender an article. If I could hand up a copy for your Honour and your Honour's associate.

HER HONOUR: Has that been circulated?

MR COOKE: And, your Honour, this is an article by Dr Abbott, who your Honour will hear evidence through Ms Dunn, being the EZ Party's solicitor. And we seek to tender this article. The reasons will become evident when we address category 1.

MR HENNESSY: I need to reserve our position on that. It has just been dropped on us now.

HER HONOUR: All right.

MR HENNESSY: And there was – some considerable time ago, the parties foreshadowed what they were going to be relying upon. So I just don't know.

HER HONOUR: Well, if anyone thinks I'm going to resolve a dispute today about what the term ionic liquid means, then, I can tell you now, I will not be resolving that dispute. It's obvious there is a dispute.

MR COOKE: Yes. That's our position, your Honour.

HER HONOUR: I don't know if that assists anybody.

MR COOKE: Perhaps - - -

HER HONOUR: Perhaps we will just put that aside, and you can renew your tender in due course.

MR HENNESSY: Yes.

HER HONOUR: Right.

MR COOKE: That's the evidence.

HER HONOUR: Mr Hennessy.

MR HENNESSY: Your Honour, if it assists, I have a list of the evidence, the affidavits we're going to read with a cross-reference to the court book index.

HER HONOUR: All right. That may assist. So this is on Mr Cook's client's application.

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MR HENNESSY: Your Honour will see we've included both applications. So dealing with my learned friend Mr Cooke's first.

HER HONOUR: All right. So dealing with the applicants.

MR HENNESSY: The applicant's interlocutory application.

HER HONOUR: So items 3 to 6 of your index.

MR HENNESSY: That's correct.

HER HONOUR: All right. And are they court book - - -

MR HENNESSY: You will see in the far column the court book tab references.

HER HONOUR: I see. In the far corner. Okay. Take it we can proceed. No objection to this?

MR COOKE: No objections, your Honour.

HER HONOUR: And only particular pages, is that right? I see. That's pages of the court book.

MR HENNESSY: Those pages are just the pages of the court book, your Honour.

HER HONOUR: I'm sorry. All right. The affidavits of items 15 and 16 of the court book are read by the first, second and fourth respondents on the applicant's application for discovery. Exhibit MJW5 to the affidavit at item 15 of the court book will be exhibit MJW5 on this application.

EXHIBIT #MJW5 EXHIBIT MJW5 TO THE AFFIDAVIT AT ITEM 15 OF THE COURT BOOK

HER HONOUR: And exhibit RMD2 to the affidavit at item 16 of the court book – which is actually at item 24 of the court book, will be exhibit RMD2 on this application.

EXHIBIT #RMD2 EXHIBIT RMD2 TO THE AFFIDAVIT AT ITEM 24 OF THE COURT BOOK

HER HONOUR: Does that complete your evidence?

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MR HENNESSY: No, your Honour. May I just ask you to turn to page 3 of the index to the court book?

HER HONOUR: Yes.

MR HENNESSY: And items 32 and 33 we tender.

HER HONOUR: So items – so Mr Masterman's affidavit and that exhibit.

MR HENNESSY: Correct, your Honour.

HER HONOUR: Or only the exhibit? Is it only the exhibit?

MR HENNESSY: I think we can actually just get away with the confidential exhibit.

HER HONOUR: Yes. Looks like it's only three pages. So the document at item 32 of the court book is relied on by the first, second and fourth respondents and remains subject to the orders already made pursuant to section 37AF of the Federal Court of Australia Act in relation to that item. And was it 33? Sorry, 32 and - - -

MR HENNESSY: That was 32. And then 33, we tender as well.

HER HONOUR: So just those paragraphs?

MR HENNESSY: Yes, your Honour.

HER HONOUR: 27 to 28. And you don't tender 31? No. All right. And those parts of the affidavit referred to at item 33 of the court book are read by the first, second and fourth respondents - - -

MR HENNESSY: May it please the court.

HER HONOUR: - - - in response to the application. I take it my associates are getting all this. All right. Ms St John.

MS ST JOHN: Your Honour, I read the affidavit behind tab 14 in the court book. That's the affidavit of Michael Geoffrey Hales being referred to as Hales 3.

HER HONOUR: The affidavit at item 14 of the court book is read by the third respondent in response to the applicant's application.

MS ST JOHN: And that's together with item 22, which is annexure 88.

HER HONOUR: And annexure MG – I think they're annexures. I think they form part of the affidavit.

MS ST JOHN: Yes, your Honour.

HER HONOUR: Yes.

MS ST JOHN: I was merely pointing out that that's where - - -

HER HONOUR: All right.

MS ST JOHN: - - - your Honour can find the annexure.

HER HONOUR: So the items, yes.

MS ST JOHN: And also, I read item 17, which is the affidavit of Michael Geoffrey Hales made 21 November 2024. And that has been - - -

HER HONOUR: Is that in support of your own application?

MS ST JOHN: Yes, your Honour.

HER HONOUR: I was doing these in order, so we might come to that, just so I don't get too confused. All right.

MR COOKE: Thank you, your Honour. Your Honour, just turning to category 1 of the applicant's discovery application, the interlocutory application, your Honour, is behind court book tab 1. Now, your Honour, the main dispute – there's two disputes in relation to this category as we understand it. The respondents want to delete the words in the category "in relation to an electrochemical reduction process involving ionic liquid" and then replace it with the words in paragraph 14 of the EZ party's written submissions behind tab 5. The effect, your Honour, is to remove words from the definition of ionic liquid which is set out in our discovery categories at part E, namely:

> *The removal of 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 in which the salt or mixture is in its liquid form.*

Does your Honour see those words in the definition of ionic liquid?

HER HONOUR: Yes.

MR COOKE: They're the words which the respondents would seek to remove by the introduction of their words in paragraph 14. Now, your Honour, if your Honour turns – those words, we submit, should be in and categories should stand as it has been drafted for the following reasons. If your Honour turns to the further amended statement of claim behind tab 10 of the court book.

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HER HONOUR: Yes.

MR COOKE: And, in particular, paragraph 12, an allegation of what Dr Kolodziejczyk and Dr Winther-Jensen undertook during the course of their work at the applicant in relation to the direct electrochemical reduction process, having certain features set out at (a) through to (f), and that's defined as the ionic liquid R and D. Now, paragraph 12(e) is that that process included utilising an ionic liquid electrolyte. Now, the issue in dispute on this interlocutory application is the meaning of the words "ionic liquid electrolytes". So our position is that the words objected to in the definition of ionic liquid, which indicates that there is no temperature limitation on ionic liquids, is – is a natural meaning, or is the meaning of the phrase:

...ionic liquid electrolytes –

at (12)(e) of our further amended statement of claim. Where the respondents' position is that that should be limited to a temperature which is below 100 degrees Celsius. That's how they say they interpret paragraph (12)(e) – melting point. That's how they interpret paragraph (12)(e) of the further amended statement of claim. Now, it matters, your Honour - - -

HER HONOUR: Well, hang on. Can I just follow – I just need to follow you. So all the words, starting at – all the words in the definition of schedule 1 to the applicants' interlocutory application after the words "means any" - - -

MR COOKE: Yes.

HER HONOUR: - - - all go to the question of temperature, do they?

MR COOKE: All the words where it says:

...means any salt or mixture of salts that is capable of - - -

HER HONOUR: Yes. Right to the end of that.

MR COOKE: Yes. Up to - - -

HER HONOUR: They all concern – they're all about temperature, are they?

MR COOKE: It's mainly about temperature. There's a little – other little electrowinning or electroplating dispute, but that's going to fall away. It's mainly – this dispute is mainly about temperature.

HER HONOUR: So are the words that are really offensive:

...irrespective of the temperature range - - -

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MR COOKE: They – the respondents object to all of the words I've indicated, your Honour.

HER HONOUR: I know they do, but - - -

MR COOKE: Yes. I think so. Yes. I will explain – I will explain why that is. So what the dispute is, when one turns to paragraph (12)(e), the respondents want to interpret those words – they say those – in (12)(e), those words should be interpreted as being referable to being a melting point below 100 degrees C. And we say by a category, no, no, no. We want it irrespective of temperature. So that's the dispute. It matters because EZs electrochemical reduction process uses a molten hydroxide-based electrolyte that is above 100 degrees. Namely, 170 degrees. We have evidence of that from Dr Winther-Jensen. So it matters. Now, if I could ask your Honour to turn to Dr Bhatt's evidence, please, at tab 26 of the court book. And in particular, it's paragraphs 37 to 42.

HER HONOUR: Well, he expresses one opinion, and - - -

MR COOKE: Exactly.

HER HONOUR: - - - someone else expresses another.

MR COOKE: Exactly. And - - -

HER HONOUR: So as I said, there's an issue.

MR COOKE: There's an issue. And our point is, your Honour - - -

HER HONOUR: And not an issue I can resolve today, or will resolve today.

MR COOKE: Exactly. Exactly.

HER HONOUR: So you say, well, on that view, we should have the wider interpretation - - -

MR COOKE: Exactly.

HER HONOUR: - - - because it will cover both. And ultimately - - -

MR COOKE: Yes.

HER HONOUR: - - - the person who will decide what it means - - -

MR COOKE: Precisely.

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HER HONOUR: - - - surprising though that might be, is me, and with the assistance of, no doubt, experts in the field. And we will know what documents are relevant and what not; correct?

MR COOKE: That's exactly right. Because if your Honour somehow decides the issue on this interlocutory application – you can't – which is what the respondents want, your Honour - - -

HER HONOUR: I can't decide the issue today. That's what I tried to make clear right at the beginning.

MR COOKE: - - - that's what the respondents want your Honour to do - - -

MR HENNESSY: No - - -

MR COOKE: - - - then you would exclude potentially relevant information, which, we would submit, your Honour would need to determine at trial. So that's the short point.

HER HONOUR: I thought the respondents' argument – and I might have misunderstood this – is a bit more – it's rather about tying you to your pleading.

MR HENNESSY: Correct.

HER HONOUR: But if there is an ambiguity in the pleading, that is, the – that – and by ambiguity I mean no one agrees on what that part of the pleading means – that's ultimately a question to be determined – then that – that's what needs to be addressed.

MR COOKE: But it's a bit circular, because, really, it's the meaning of the word at paragraph - - -

HER HONOUR: (12)(e).

MR COOKE: - - - (12)(e). And we say that, on our evidence on this interlocutory application, it's irrespective of temperature. On the respondents' evidence, it's below 100 degrees. Now, that's an issue. We say - - -

HER HONOUR: It's – well, Mr Hennessy is going to address me next on this category. But what I am – one of the things I am, perhaps, interested in is whether – putting to one side that there is clearly a debate about what this means - - -

MR COOKE: Yes.

HER HONOUR: - - - is there a concern about – whether it be confidentiality, or oppression, or some other issue that arises because of the wider definition. That's a question for Mr Hennessy.

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MR COOKE: Well, it's a question for Mr Hennessy - - -

HER HONOUR: I understand your submission.

MR COOKE: But the – your Honour, just be very clear on this, EZs process is above 100. That's why the respondents want to try to cut this off at the knees. I mean, you know - - -

HER HONOUR: No, I take that - - -

MR COOKE: I mean, my goodness.

HER HONOUR: I understand the point.

MR COOKE: Now, just, I will shorten this, because I understand your Honour doesn't want to be burdened with all this evidence. I will just summarise it.

HER HONOUR: Yes. And we won't get through this.,

MR COOKE: No. Exactly.

HER HONOUR: I think this is listed for half a day.

MR COOKE: Yes. Exactly.

HER HONOUR: I don't like our chances.

MR COOKE: Yes, your Honour. So Dr Bhatt's evidence I've just taken you, he says it can be above 100 or below 100, it doesn't matter. Winther-Jensen, tab 33, 47(b) says, "No, no, no, it has got to be below 100". Dr Bhatt, tab 20 at paragraph 101, disagrees. He joins issue with Dr Winther-Jensen. Then we get Professor Abbott's evidence through Ms Dunn, tab 16. He says, "No, it has to have the melting point below 100 degrees. It is an essential characteristic of ionic liquid"; however, the article that I sought to tender at page 11062, first column - - -

MR HENNESSY: Well, are you going to tender it or not, because - - -

MR COOKE: - - - paragraph - - -

HER HONOUR: Well, I think there was a reservation on the tender. Perhaps I should mark it.

MR HENNESSY: Well, if he's – if my learned friend is going to take your Honour to the document, then - - -

MR COOKE: It be marked for indentification..

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MR HENNESSY: - - - he ought to go about doing it appropriately and I will object to it.

MR COOKE: Well, I haven't made my submission about the relevance yet, but, anyway, it will be marked for identification.

HER HONOUR: Well, perhaps I should start by the article titled Chemical Reviews Deep Eutectic Solvents (DESs) and their Applications, by – which has been co-authored by, among others, Andrew P. Abbott, will be MFI 1.

MFI #1 CHEMICAL REVIEWS DEEP EUTECTIC SOLVENTS (DESs) AND THEIR APPLICATIONS JOURNAL ARTICLE

MR COOKE: Yes. Page 11062, using the bottom numbers, which is the second – well, it's actually the third page. At the top it says:

> *The arbitrary definition that an ionic liquid is a class of fluid which consists of ions and a liquid at temperatures of less than 100 degrees C was used traditionally to differentiate between ionic liquids and classical molten salt, which melt at higher temperatures; however, ionic liquids are now generally referred to as solvents, which consist solely of ions.*

So we say, your Honour, that's relevant, because it matches up with Dr Bhatt's evidence that the term is used for both above and below. So it's part of the evidentiary mix. So, your Honour, in summary, at best, there's an issue and dispute between the experts on this introduction application as to the meaning of the words used in paragraph 12(d) – 12(e) of the pleading, and we submit that's a ..... in issue for your Honour at trial. Your Honour would include my client's words and the definition of "ionic liquid" in the categories, otherwise we fear it's going to exclude important evidential material, including particular work done by the respondents, when they were working at my client using electrolytes that have a melting point above 100 degrees, which is as reflected in the EZ process, which is at 170 degrees.

That's the first issue for this category. The second issue is a date issue. Our category proposes a start date of 25 March 2019 to reflect the start date of the second respondent's employment. Now, the third respondent, Dr Winther-Jensen, submits that the start date for him should be the start date of his employment, being 15 February 2021; however, we press the earlier date as reflected in the category, because there is evidence that Dr Winther-Jensen was communicating with the second respondent about his research about ionic liquids before Dr Winther-Jensen started at Fortescue. And your Honour referred to that evidence in your Honour's judgement on the strikeout application in paragraph 50, sub paragraph (10), which is at court book page 825. In other words, this - - -

HER HONOUR: That refers to – that's a communication? That's December 2020? Is that what you're referring to?

MR COOKE: Yes. So that is before Dr Winther-Jensen started employment. And so we say that the earlier start date reflected in the category is appropriate. It's the start date for the second respondent's employment, and we also have evidence that Dr Winther-Jensen was communicating with the second respondent before he started employment. So the date that is advanced by the third respondent wouldn't include such material. We say it's not appropriate. Thank you, your Honour. They're our submissions in chief in relation to category 1.

HER HONOUR: Mr Hennessy.

MR HENNESSY: Thank you, your Honour. Your Honour's, with respect, correct as to what the nature of the dispute is in relation to this category, and that is whether it's directly relevant to the pleaded case. May I start by taking you to the list of authorities that the parties have combined. And behind tab 1 - - -

HER HONOUR: Just a moment. I will just have to find that. Yes. I've got that. Thank you. Which one?

MR HENNESSY: First two. The Full Court decision of Clifton v Kerry J Investment, your Honour.

HER HONOUR: Okay. I am - - -

MR HENNESSY: Your Honour may - - -

HER HONOUR: It's a judgment I'm familiar with, but I can't open it. There's something wrong with the electronic - - -

MR HENNESSY: I've got a hard copy. If I may hand one up.

HER HONOUR: Thank you. Yes.

MR HENNESSY: If I may take your Honour – your Honour may recall there were a number of grounds of appeal the Full Court was dealing with. But one was - - -

HER HONOUR: There was a question of inadequate discovery.

MR HENNESSY: Correct, your Honour. If your Honour turns to paragraph 170, this is on page 640 of the case.

HER HONOUR: Yes.

MR HENNESSY: And there, you see the Full Court was dealing with the question of non-standard discovery. And at 171, noted that the rules in relation to standard

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discovery apply to non-standard discovery as a matter of course. And then, at 172, in making an application for non-standard discovery pursuant to rule 20.15, there is a positive obligation imposed on the applicant to identify a number of the things included in the criteria in 20.15(1) and (2) that should not apply. And then, the court said:

> *It follows that on a proper construction of rule 20.15, where an order for non-standard discovery is made, the requirements of rule 20.14 will continue to apply –*

that's the rule 20.14, the rule related to standard discovery –

> *will continue to apply unless an application is made to have them excluded.*

Pausing there. There's no such application by the applicant before your Honour. The requirements for rule 20.14 include that the documents are, as your Honour observed, directly relevant to the issue raised in the proceeding. And then, lastly, over at 173, the court noted on the second line:

> *Rule 20.14 gives guidance to parties as to how to proceed with discovery.*

There is a logic to the parameters it sets continuing to apply to non-standard discovery that is particularly so in relation to an order for non-standard discovery by way of discovery in categories. It could not be the intent of such an order that the discovery to be provided would have a wider ambit than standard discovery in the same proceeding. The intent of discovery, by categories, is, in the usual case, to refine and narrow the range of discovery to remove the requirement of direct relevance to the issue as a matter of course would be contrary to that intention. Your Honour, if I can next take you within that same bundle to another Full Court decision in Jilani v Wilhelm behind tab 5. This again relates to the need for direct relevance. And it - - -

HER HONOUR: I understand all of that, and I will let you take me there. But isn't the issue, then – doesn't it become one of – it seems to me if an ultimate issue to be determined is what is the meaning, and I will use the shorthand of "ionic liquid", then aren't the documents, whether they're above or below 100 degrees, relevant?

MR HENNESSY: You - - -

HER HONOUR: Isn't there, in the broader category, the relevant category.

MR HENNESSY: I understand. No, your Honour, my learned friend - - -

HER HONOUR: Because, ultimately, experts will need to be briefed, presumably, with the range of the right – correct range of material, whatever each side thinks is the correct range of material.

MR HENNESSY: Yes.

HER HONOUR: They will have to prepare their reports. Those reports will come in front of me, and I will have to decide the question with the assistance of the experts who may or may not agree.

MR HENNESSY: Yes.

HER HONOUR: But because of that very issue, that – isn't the wider category the relevant category?

MR HENNESSY: No, with respect. For this reason: it will only become an issue if the applicant actually pleads a case, raising it as an allegation and that allegation is denied. So the quickest way to demonstrate that to your Honour is to take you back to the further amended statement of claim, which is behind tab 9.

HER HONOUR: Yes.

MR HENNESSY: I beg your pardon.

HER HONOUR: I've got a hard copy.

MR HENNESSY: And my learned friend took you to paragraph 12.

HER HONOUR: Yes.

MR HENNESSY: And the issue arises in this way, your Honour: the case that the applicant brings is one in respect of what it calls the "ionic liquid R&D", or at least this aspect of the case. And the allegation is that Dr Kolodziejczyk and Dr Winther-Jensen were, individually and with other employees of Fortescue at the time they were employed at Fortescue, undertaking work on this process called ionic liquid R&D. And you will see that that process that they're alleged to have undertaken work on is defined as being comprised of six components, at least. But those six components are pleaded in a conjunctive manner. And relevantly, at D, one of those components is that it operates at a low temperature. And then E utilises an ionic liquid electrolyte.

And what has transpired is that the applicant served or proposed a category for this wider concept of ionic liquid. And when the respondents took issue and referred the applicant back to the pleaded case, the applicant has relied on one component only, being the component at E, and focused its effort at obtaining discovery on that as though the other four components that are said to be joined with it do not exist, namely, operating at a low temperature. So there is an attempt via discovery to try and obtain other documents to then, it would seem, formulate another claim or a different claim to the one that's presently made in the further amended statement of claim.

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And so we're dealing with an argument by the applicant, the logic of which is that they should be able to seek discovery solely in relation to one element only of the ionic liquid R and D in circumstances where they've pleaded it as a component that must be joined by the other five components. Your Honour was taken to Dr Bhatt's affidavit about it. May I – and I will return to that, but briefly take you to Mr Dewar's affidavit behind tab 13. He provides his opinion on what Dr Bhatt meant, and you will see starting on page 3, the bottom there's a heading Definition of Ionic Liquid, and at 12 he advises the court that he considers the definition is appropriate. And then at 13 he commences this section improper, by referring to Dr Bhatt's evidence about the meaning of the phrases "ionic liquids" and how they're used interchangeably.

He then notes in 14 on the third line that Dr Winther-Jensen's evidence is that ionic liquids include melting below 100 degrees. My learned friend made reference to that earlier, your Honour, and then at 17 he contends that Fortescue's claim is that the research was into an electrochemical reduction process using an ionic liquid electrolyte, and that extends in the way that he asserts it extends in paragraph 17. So if you then turn to Dr Bhatt's affidavit behind tab 26, turning to paragraph 37, he begins a discussion of the term, framing it in a broad manner, and you will see that he creates, if you like, this controversy in 38 on the third line towards the end by saying:

> *This definition does not impose particular temperature requirements.*

Just pausing there for a moment, your Honour. This is said in the abstract, but, with respect, reminding your Honour that the term, as it is used in the case as pleaded in paragraph 12 of the further amended statement of claim, refers to low temperature. So it doesn't, in one respect, matter whether Dr Bhatt is trying to create some issue in the abstract, because we are dealing with a pleaded case in which at 12(d), one element of what's said to be the research and development is that the – a feature of the process is that it operates at a low temperature.

Just to round this out, in terms of Dr Bhatt's evidence, if your Honour goes down to paragraph 42, he then notes that ionic liquids, et cetera, are differentiated on the basis of temperature, and then on about the fourth line towards the end, he says:

> *For example, sometimes ionic compounds that are liquid below 100 degrees celsius are considered an ionic liquid, whereas compounds that are above it are considered molten salts; however such definition is not definitive –*

and there's a variety of arbitrary temperatures, but there is nothing arbitrary, we say, about the way the case is framed against us at the moment and - - -

HER HONOUR: Except that the – I take your point, Mr Hennessy, but I don't know what "low temperature" means.

MR HENNESSY: Well, your Honour, if you then turn to - - -

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HER HONOUR: Is it 50 degrees, 20 degrees.

MR HENNESSY: If your Honour then turns to page 15 of this affidavit, you then encounter Dr Bhatt's analysis of what the second and third respondents' work and product was at Fortescue, and at 60, you see there's the emphasis on low temperature oxide reduction technology, and then – and I will just cover this briefly. There's the same emphasis again on low temperature at 61, 63, 65(a) and (b), 67, 70, and so it goes on and on. It's all about low temperature. And what we're dealing with is an attempt by the applicants, we say, wrongfully misusing non-standard discovery to try and access material, it would seem, in the hope of finding some other case. But our obligation with respect is to give discovery in relation to the pleaded case, and hence, the attempt by the respondents to resolve this possible impasse by suggesting alternate wording to our friends for category 1. Excuse me for one moment, please. Excuse me for one moment, your Honour.

HER HONOUR: Your client proposes an amended version, I think.

MR HENNESSY: I beg your pardon, your Honour?

HER HONOUR: Your client proposes an amended - - -

MR HENNESSY: Yes, and the location - - -

HER HONOUR: I'm just trying to find that.

MR HENNESSY: - - - for that proposal is in our written submissions at paragraph 14, which is behind tab 5.

HER HONOUR: So that – so these are alternatives, that is, on your amendment, the documents you would need to discover would be those in (a) and those in (b).

MR HENNESSY: Correct, which goes beyond the pleading, but we are prepared to give that discovery but in a way that is categorised. So, ultimately, there will be a clear delineation between what has been discovered, responsive to the pleaded case against us, and then what's discovered by virtue of the formulation in 14(b), which picks up much of their proposed definition.

HER HONOUR: Other than the words "irrespective of temperature"; is that correct?

MR HENNESSY: Yes. And I should just make plain – you're all probably aware of this – but it also picks up - - -

HER HONOUR: Your defence.

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MR HENNESSY: - - - what our clients in the defence at 29 say was the work they were undertaking for Fortescue.

HER HONOUR: But it's not bound by issues of temperature, so it could be high or low temperatures, could it?

MR HENNESSY: It could be.

HER HONOUR: I will – thank you.

MR HENNESSY: May it please the court.

HER HONOUR: I will hear from Ms St John next.

MS ST JOHN: Thank you, your Honour. Your Honour, as you will have seen in my written submissions, we adopt the submissions of EZ respondents, but there is one additional matter that concerns Dr Winther-Jensen.

HER HONOUR: The date question?

MS ST JOHN: ..... to address your Honour .....

HER HONOUR: Is that the date? Yes. Can you – Ms St John, that microphone which is pointed towards Mr McMeniman – I – yes. Thank you.

MS ST JOHN: Thank you, your Honour. Your Honour will see that category 1, as sought by Fortescue, 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. Mr Winther-Jensen didn't start working at Fortescue until nearly two years later on 15 February 2021. Has your Honour got the updated version of annexure A to my submissions that were sent last night?

HER HONOUR: I do have that, yes.

MS ST JOHN: So your Honour can see there the amendments - - -

HER HONOUR: I just have to find – you just have to bear with me because I have a lot of submissions. Yes, I have that.

MS ST JOHN: Thank you, your Honour. Your Honour can see there the amendments proposed by my client to address this issue, and I will explain why to your Honour in a moment, but your Honour can see that the categories, should I submit, read:

> *Work undertaken by the second respondent and/or Fortescue at any time during that whole period.*

So that's the period beginning 25 March. Pausing there, this would oblige my client to give discovery of documents, recording or evidence in work undertaken by the second respondent or Fortescue during that period. So the first part of that category still requires my client to give discovery in relation to that work or, I interpolate, work undertaken by the third respondent at any time during the period from – and then dates reflecting when he was at Fortescue.

HER HONOUR: So your point is to the extent there's evidence that there was communication between the second respondent and your client prior to his commencement, your client's commencement of work - - -

MS ST JOHN: Yes.

HER HONOUR: - - - those communications, if they occurred in writing, for example, would be picked up by the first part?

MS ST JOHN: That's right, your Honour, because that would be work being done by Dr Kolodziejczyk, and so if he is emailing Dr Winther-Jensen about the work he's doing at Fortescue, for example, those documents would still be captured by this category. What my client, I submit, should not be required to discover is documents showing work that he was doing, his own work, before he took up employment at Fortescue. There's no suggestion that work that he was doing – no suggestion, as I understand it, that work that he was doing in this long period before he started work at Fortescue is relevant to the allegations that are made against him in this proceeding.

HER HONOUR: Yes, all right.

MS ST JOHN: Your Honour, my friend has referred to your Honour's reasons, saying that Dr Winther-Jensen was recruited in December 2020, and your Honour may recall the emails where it was suggested that Dr Winther-Jensen be brought over to Fortescue to assist with this project, and there's a suggestion that a phone call would be made to him to bring him into Fortescue. After that, there are some emails between Dr Kolodziejczyk and my client, but they're about work that Dr Kolodziejczyk was doing at Fortescue; they're not about independent work being done by Dr Winther-Jensen in that period. The emails do indicate that my client is doing some reading of papers, and so on, but I submit that's – any more of that sort of communication would be captured – excuse me – by the first part of that category.

Further, your Honour – excuse me, your Honour. And my friend, your Honour, reminds me that those documents would have, nevertheless, been discovered by the EZ respondents. At any rate, your Honour – so there's a point that documents of that sort would already be captured by the category as redrafted, and the second point, your Honour, is that even if your Honour is with my friend about the issue of there being some correspondence, some recruitment in December 2020, that's still some 21 months after the category now begins. So there's 21 months where there's no

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suggestion that Dr Winther-Jensen is engaging with Fortescue materials at all, and he would, nevertheless, be required - - -

HER HONOUR: So the earliest date would be December 2020?

MS ST JOHN: Yes, your Honour.

HER HONOUR: Yes.

MS ST JOHN: Excuse me a moment, your Honour. Your Honour, Dr Winther-Jensen has had many years of experience in electrochemistry, and so it's perfectly feasible that he may have documents about electrochemical work during that earlier period. That has been the focus of his career, but they would be – well, I submit the documents would have no relevance to the allegations in this proceeding, and Fortescue hasn't impugned any work that Dr Winther-Jensen did before the period your Honour sees any proposed amended category. Thank you, your Honour.

HER HONOUR: Thank you.

MR COOKE: Thank you, your Honour. In relation to Mr Hennessy's submissions if I could address that briefly, your Honour, this category, category 1, is addressed to part of the ionic liquid R&D referred to in paragraph 12, and that's because, your Honour, of course, when one develops a process, one, of course, will work on part of the process, which is recorded in the document, and then, of course, add it to the other parts. Now, that's what we're after; we're after the part where it's utilising ionic liquid electrolyte. Now, Mr Hennessey - - -

HER HONOUR: But if – sorry.

MR COOKE: Sorry.

HER HONOUR: But if your case is bound by the definition - - -

MR COOKE: Yes.

HER HONOUR: - - - and it's conjunctive, I mean, your case is really about ionic liquid R&D as defined.

MR COOKE: Absolutely, but - - -

HER HONOUR: - - - which specifies low temperature - - -

MR COOKE: Yes, but the - - -

HER HONOUR: - - - again, whatever that means.

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MR COOKE: Yes, but the – this category is directed to finding the documents which refer to part of the process – part of the pleaded process, being the ionic liquid part. And there's other categories which will deal with the other parts. But the ionic liquid part of this - - -

HER HONOUR: So do you say category 2 deals with the other parts of the definition?

MR COOKE: I would say, yes, they will deal with other parts. Category 2.

HER HONOUR: So category 2 is - - -

MR COOKE: And 2(a), which I will get to. But – so that's the first point. I mean, one can have a document – one can imagine one is developing in the lab. You've got a document and I'm going to work on a part of the process I'm developing. So I write out, "This is what I'm going to do with the ionic electrolyte part of the process," in that – in this document. I'm not I'm not going to talk about the membrane in this particular document, right.

Now, in Mr Hennessy's view of the world, I would never get document notwithstanding that it's highly relevant to the composite R&D, and that would be a problem. And I will illustrate it, your Honour, further in this way. If your Honour turns to Dr Winther-Jensen's evidence, at tab 33. It's at page 802 of the court book. It's 47(b). I just want to point out there that it says:

> *Element Zero uses a molten hydroxide based electrolyte with a melting point above 170 degrees C.*

Do you see that your Honour?

HER HONOUR: Sorry.

MR COOKE: 47 - - -

HER HONOUR: Yes.

MR COOKE: Yes.

HER HONOUR: Yes.

MR COOKE: So noting that temperature. And yet, notwithstanding that, your Honour, if your Honour now turns to court book tab 26, at page 161.

HER HONOUR: 161 of the affidavit, court book tab 26.

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MR COOKE: Yes, 161 of the affidavit. It's 632 of the court book. It's sort of a green colour copy document from their website – Element Zero website. So you've just got the evidence they use 170 degrees C, and there you will see Read More:

The low temperature.

So they're saying they use a low temperature, ie, 170 degrees is a low temperature. And so that deals with Mr Hennessy's other point about the reference to low temperature at paragraph 12(d) of our further amended statement of claim. And your Honour asked a very pertinent question, "Well, how do I know what low temperature is? Is it above 100?" Absolutely. It includes 170 degrees. So your Honour – absolute danger – if your Honour follows Mr Hennessey's submissions, were in grave danger of missing out on probative evidence for your Honour to decide the very issues in dispute between the case.

HER HONOUR: And the alternative category - - -

MR COOKE: Misses this out.

HER HONOUR: - - - doesn't speak of temperature at all.

MR COOKE: The alternative category, as in Mr Hennessey's?

HER HONOUR: Yes.

MR COOKE: That's exactly right, your Honour. Because he doesn't want your Honour to go anywhere near that.

HER HONOUR: Well, I apprehend that that is the issue, but - - -

MR HENNESSY: Leave me out of it, thanks.

HER HONOUR: If it doesn't speak of temperature, doesn't temperature become an irrelevancy in that, whether it's above or below, it must be discovered if it otherwise meets the category?

MR COOKE: No, because what – no, because what – on the amended category – so if one turns to category 5.

HER HONOUR: I'm looking at B – on the amended category B.

MR COOKE: B.

HER HONOUR:

An electrochemical reduction process involving electrolytes –

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I, no doubt, will show my ignorance of this – of what this process – of this process –

that may be described as –

all those things. It doesn't talk of temperature at all. So whether it's at 90 degrees or 112 degrees, I would have thought it had to be discovered.

MR COOKE: No, your Honour, because the effect of it – and the respondents have made this clear in their submissions. They do not want to discover, they want to exclude - - -

HER HONOUR: They want to exclude the words "irrespective of temperature".

MR COOKE: Yes. And that will have the effect of - - -

HER HONOUR: Well, I could put them back in to be, couldn't I?

MR COOKE: Well, put these words back in, your Honour. Yes.

HER HONOUR: I could put the words "irrespective of temperature" in.

MR COOKE: Put the words, means any salt or mixture of salts that is - - -

HER HONOUR: I mean, ultimately what needs to happen is, the relevant material needs to be discovered so that the matters in issue can be properly resolved, and no party is fighting this case with one hand tied behind their back. That is what needs to happen.

MR COOKE: That's exactly right, your Honour.

HER HONOUR: And sensible, sophisticated parties such as those sitting in front of me ought to be able to resolve these sorts of disputes between them in a proper way. We've spent an hour talking about this. It seems to me that the wider category should be discovered to ensure that happens.

MR COOKE: May it please the court.

HER HONOUR: You want to say something to me?

MR HENNESSY: Well, I just thought I should draw your attention, with respect, to the – this – one aspect of the alternative category. It was put to the applicant in (b), your Honour will see at the end of it, is tied to molten - - -

HER HONOUR: Hydroxide eutectic.

MR HENNESSY: - - - hydroxide, etcetera.

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HER HONOUR: I don't know what that is.

MR HENNESSY: And there's a reference to 29C of Dr - - -

HER HONOUR: Yes.

MR HENNESSY: - - - Jensen's affidavit. And in that affidavit - - -

HER HONOUR: Is a defence.

MR HENNESSY: Sorry, defence. Behind tab 12, paragraph 29C. There is again a reference to "above". That is, so it's above and then below 170 degrees Celsius.

HER HONOUR: Yes. Well, then - - -

MR HENNESSY: So the idea that - - -

HER HONOUR: Where's that? Denies - - -

MR HENNESSY: 29D.

HER HONOUR: Twenty – "otherwise" - - -

MR HENNESSY: I beg your pardon. C.

HER HONOUR: C.

MR HENNESSY: So denies using the feature pleaded at 29E, and says, "Further, the element zero process used an electrolyte at melting temperature above 170 degrees Celsius."

HER HONOUR: There's "of above 250" in mine. No. Hang on. 170C. Yes.

MR HENNESSY: No. That's D – B, your Honour. I'm looking at C.

HER HONOUR: Right.

MR HENNESSY: The point being this, your Honour, that there should be some attempt to tie this to temperature, rather than escaping from the pleaded case and seeing whether they can find another case. And that's why, with respect, the alternative, the proposal that we put forward is an attractive one.

HER HONOUR: Well, how does your proposal – your proposal is tied to temperature as well, is it? It's tied to 170 degrees, do you say?

MR HENNESSY: Yes. By reference to the defence.

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HER HONOUR: But what does that mean? Does that mean your client would discover everything up to 170 degrees?

MR HENNESSY: Yes.

HER HONOUR: Well, then why does – well, then the words "irrespective of temperature" shouldn't matter, seems to me.

MR HENNESSY: Well - - -

HER HONOUR: In any event, I will order the wider category on – however, I'm with Ms St John on dates.

MR COOKE: I won't say anything more about the dates.

HER HONOUR: So that Ms St John's alternative drafting on the dates should be incorporated.

MR COOKE: The twenty – it was the December or - - -

HER HONOUR: I think it says it uses the earlier date for the EZ respondents, and it uses the later date for Dr Winther-Jensen.

MR COOKE: So just to be clear, the later dates for Dr Winther-Jensen - - -

HER HONOUR: So if you take up - - -

MR COOKE: Sorry.

HER HONOUR: - - - the revised annexure A - - -

MR COOKE: Yes.

HER HONOUR: - - - that I received from Ms St John, which I've now lost. "The chapeau will be all documents recording or evidencing work undertaken by the second 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," and then your definition.

MR COOKE: I see.

HER HONOUR: Your category.

MR COOKE: And your Honour wasn't minded to use the recruitment date of December 2020 for Dr WInther-Jensen.

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HER HONOUR: Well, you – I think you were proposing - - -

MR COOKE: I was proposing an earlier date.

HER HONOUR: - - - an earlier date.

MR COOKE: But then - - -

HER HONOUR: Then I said, the earliest it would be was December 2020.

MR COOKE: Which is when he actually started.

HER HONOUR: All right.

MR COOKE: But he – I think the alternative proposal was the recruitment date, which was December 2020.

HER HONOUR: Well, there's no reason why that date can't be used, is there?

MS ST JOHN: Well, only, your Honour, and I must just say that was not an alternative proposal for me, it was an additional argument as to why the category as drafted by Fortescue shouldn't be ordered. But, your Honour, the documents – the few documents that your Honour has seen during that earlier period, for one thing, don't concern work undertaken by my client – work undertaken by Dr Kolodziejczyk, and secondly - - -

HER HONOUR: And you say they would be discovered in any event.

MS ST JOHN: Yes, your Honour, and - - -

HER HONOUR: The 15 February – it's 15 February - - -

MS ST JOHN: - - - my friends.

HER HONOUR: - - - which is the employment date.

MS ST JOHN: Please the court.

HER HONOUR: All right. That's category 1.

MR COOKE: Please the court.

HER HONOUR: Category 2.

MR COOKE: Category 2.

HER HONOUR: We will keep going until 1 o'clock.

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MR COOKE: Thank you.

HER HONOUR: See how far we get.

MR COOKE: Yes. Thanks, your Honour. Category 2. To the extent not covered by category 1, all documents recording evidence were undertaken by second respondent, third respondent and of Fortescue at any time during the period 25 March 2019 to 12 November 2021 in relation to, and it lists a number of matters.

Now, those matters are – they're basically quotes taken out of documents authored by the second and third respondent. Now, as we understand it, the entire category is in dispute. The respondents object on the following basis, as we understand, from their submissions, I will just deal with it. Their first objection, as we understand, is that it's duplicative and unnecessary in light of category 1.

It goes beyond the pleaded case. A certain of the subcategories require value-added judgments, and it's oppressive. Now, we respectfully submit that none of these asserted bases justify refusing category 2 for the following reasons. First - - -

HER HONOUR: Can I just ask about the category so I understand it?

MR COOKE: Yes.

HER HONOUR: The period there, putting to one side Dr Winther-Jensen's position, is the period of employment of the second respondent at Fortescue; correct?

MR COOKE: Yes.

HER HONOUR: And this is – these quotes – so I will take A as an example – in relation to low temperature oxide, predominantly iron ore reduction technology work are all referred to in various documents which are annexed to Dr Bhatt's May 2024 affidavit; correct?

MR COOKE: Yes.

HER HONOUR: And to that extent, and I haven't gone into these documents, they are emails, are they, exchanged between the parties referring to the type of work being done?

MR COOKE: Yes.

HER HONOUR: And your concern is that the respondents have taken this material or have this material in their possession, custody or control relating to this work?

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MR COOKE: So the quotes set out in category 2 are quotes from emails sent by the second and third respondents, and so - - -

HER HONOUR: I'm trying to understand. If I was sitting there trying to work out what it is you want, if I was the solicitor, just come out of university, sitting there in front of a computer trying to work out exactly what it is I'm meant to be looking for, because I think that's part of the complaint.

MR COOKE: That's part of the complaint.

HER HONOUR: I have to look for a document, and irrespective of that document's date, that might evidence work that was undertaken by the second respondent in relation to low temperature oxide reduction technology, which was work that the second respondent also undertook when he was at Fortescue; is that correct?

MR COOKE: That is correct, and - - -

HER HONOUR: It seems to me to be a very difficult task.

MR COOKE: No, with respect, for the following reason, because only reasonable searches are required. They can take instructions, as they should, from the second and third respondents. They're the authors. What's the meaning of those doc – what was the many of those phrases.

HER HONOUR: But is this trying to capture work that's done on those topics after they have left Fortescue - - -

MR COOKE: No. No.

HER HONOUR: - - - or work being – that was done on those topics whilst at Fortescue?

MR COOKE: The latter.

HER HONOUR: I see. So in other words, it's work done whilst at Fortescue and the implicit if not express issue must be that they took the work with them?

MR COOKE: Yes.

HER HONOUR: Right. So it remains in their position, custody and control.

MR COOKE: Yes.

HER HONOUR: Because it's on the computers that were imaged, for example.

MR COOKE: Yes.

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HER HONOUR: Correct? I see, and why can't Fortescue identify that material itself?

MR COOKE: Because we don't have it.

HER HONOUR: I see. So it's the – your assertion is that it forms part of the material that was taken?

MR COOKE: Yes.

HER HONOUR: I see. Okay.

MR COOKE: So, your Honour - - -

HER HONOUR: So it's a limited date range.

MR COOKE: It's a limited date range. And it's not duplicative in respect of category 1 because it's ..... to the extent not covered by category 1. So it's not duplicative in that sense. It doesn't go beyond the pleaded case because the text is extracted from emails and attachments that are referred to in the affidavit of Dr Bart, which are particularised at paragraph 12 of the further amendment statement of claim, sub-Roman numerals (i) through to (iii). And as I've said, the solicitors in fulfilling their reasonable search required would take instructions from the second and third respondents as to the documents. And if they are in their possession, they should be discovered, of course, because they're highly relevant to the issues in dispute.

One can imagine her trial, one would be cross-examining the respondents about these very documents, saying, "Well, what did – where's the work that you've referred to there?" So we respectfully submit that of course they're highly relevant. There's no oppression because they simply ask, "Get instructions", ask, "Where are the documents? What are they?" And if the respondents say, "They don't have them any more." Well, they're put in their discovery list, still, to the extent of their memory. So, "Well, we had a document, it's no longer – it got destroyed", or whatever. Right? And, of course, they can't produce it, but it still has to go in the discovery list. And that's all part of the probative evidentiary record - - -

HER HONOUR: And if they never had it?

MR COOKE: Well, if they never had it, they never had it.

HER HONOUR: They don't have to discover it, is your point.

MR COOKE: Exactly. So no oppression. Exactly, your Honour. And so for those reasons, we respectfully submit that this category should be ordered.

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HER HONOUR: Could this category, subject to hearing from Mr Hennessy – perhaps, Mr Hennessy, you could address this, too. So my recollection is that one way of skinning the cat when you had a category like this was to agree search terms. Why isn't that a way of dealing with a category like this? I mean, it is a very extensive category, Mr Cooke.

MR COOKE: Yes.

HER HONOUR: It has got – I can't – I don't know what, A to X. Is that 26 subcategories? 24?

MR COOKE: Yes.

HER HONOUR: It is an enormous task. You say it's only a matter of getting instructions. It seems to me, at a practical level, it is a bit more than that.

MR COOKE: We would be – yes. We could certainly alleviate the situation.

HER HONOUR: Well, I think in the form it's drafted, it really is a category that comes – it just crosses the threshold of what's possible.

MR COOKE: Yes. But it's sort of – it's a good fulcrum or starting point. Because obviously these words have particular meaning to R2 and R3. So they are meant something to the parties in this proceeding. Now, so the good starting point, with respect, is to get instructions. But we're happy to provide some search terms, as well, your Honour.

HER HONOUR: Perhaps I need to hear from Mr Hennessy and Ms St John.

MR COOKE: Thank you, your Honour.

MR HENNESSY: My learned friend conveniently forgets what it was like to be a graduate solicitor.

HER HONOUR: Well, no doubt it was a long time ago.

MR HENNESSY: And the graduate solicitor - - -

HER HONOUR: Not – it's longer for me, I think.

MR HENNESSY: The graduate solicitor, your Honour, wouldn't be faced with a discovery category. The solicitor would be faced with a document request. And to deal with an interrogatory, that is, what is the evidence of work undertaken in relation to each of those 24 documents? And said graduate solicitor, for example, when you look at the category, let's say 2(f) is a great one:

Work for getting our manufacturing and R&D facilities set up.

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Or (i):

The work over Christmas to establish our Perth manufacturing.

And that's why we say this is oppressive. We've put them on notice of that. We told them that it's effectively impossible on my instructions, because – my memories are pretty dim too of being a graduate solicitor, but that, at our end at least, it couldn't be worked out what on earth the search terms would even be in order to undertake such an exercise. So we say there is a really significant degree of oppression, and the proof is in the pudding. The applicant, as keen as it is to get its hands on every single document in our business, still couldn't come up with any search terms and suggest a way forward.

So absent that, this category should be put to one side today and, if they want to follow it up, well, they ought to do something which is a little bit more on point. Because we would say this is a sort of category – being aware of your Honour's decision in the Killer Queen case. There was a discovery argument. You looked at various categories and, in respect of one, recognised the vice of the difficulty in being able to search for these sort of things based on the imprecision of the drafting. And as I said, that's why this is a difficult category, because properly – properly analysed, it meant these 24 documents, over two pages, is not even a discovery category. May it please the court.

HER HONOUR: Thank you. Ms St John.

MS ST JOHN: Your Honour, Dr Winther-Hensen's position, as shown in annexure A, was to again make the date point and request that the category be so limited. But having heard what has fallen from your Honour this morning about the potential for search terms to be specified – Dr Winther-Jensen has previously said that he would give discovery in this category, but, your Honour, the task would be very much reduced. And so if search – if your HOnour were to order that search terms be provided to the EZ respondents, I would submit that the same approach should be applied in respect of Dr Winther-Jensen's discovery.

HER HONOUR: Yes.

MR HENNESSY: I should it plain we are not seeking search terms.

HER HONOUR: No, no. I understand that you want me to - - -

MR HENNESSY: The opportunity has passed the applicant by.

HER HONOUR: - - - to say no to this category.

MR HENNESSY: That's right, your Honour.

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HER HONOUR: So, obviously, what I've said about dates should carry through to all categories - - -

MR COOKE: Yes.

HER HONOUR: - - - vis-à-vis Dr Winther-Jensen.

MR COOKE: Yes.

HER HONOUR: What do you say? I think this is an impossible category, Mr Cooke, as it stands. I would not be – I cannot order it - - -

MR COOKE: Yes, yes.

HER HONOUR: - - - as presently drafted.

MR COOKE: No.

HER HONOUR: I don't know what Mr Dr Winther-Jensen's position would be. He has, to date, agreed to it.

MS ST JOHN: Your Honour - - -

HER HONOUR: Can't order it against the EZ respondent who oppose it, and I'm with them on that opposition. So it probably shouldn't be ordered - - -

MR COOKE: Yes.

HER HONOUR: - - - against any respondent.

MR COOKE: I hear what your Honour says. We respectfully request – having heard what your Honour said about the search terms, we respectfully request an opportunity to propose some search terms, but - - -

HER HONOUR: All right. Well, I will give you that opportunity - - -

MR COOKE: Thank you.

HER HONOUR: - - - but I'm going to reject category 2 in its present form.

MR COOKE: Yes.

HER HONOUR: If you wish to renew an application for documents that might fall within this category by agreeing some search terms, then that attempt can be made. If there's an issue, it can come back to me.

MR COOKE: Thank you, your Honour.

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HER HONOUR: But category 2, in its present form, is rejected.

MR COOKE: Thank you.

HER HONOUR: All right. 2(a).

MR COOKE: 2(a). Now, your Honour, in the course of preparing for this hearing, the applicants realised that the commencement date in this category needs to be amended, otherwise, we would exclude documents relevant to the pleaded causes of action. We notified our friends that the date period should be March 2019 to November 2021. And we understand, in relation to the third respondent, there would be – you know, following your Honour's ruling in relation to that, but there would be an extension to date.

Can I explain why that is, your Honour. Why? We realised that, if we didn't extend that date range, it would exclude important documents, and that's really because of this. Because we need to pick up documents evidencing the taking of the plant CI, as defined, in addition to the specific documents the subject of category 6, which only forms a subset of the plant CI. And indeed, in our pleading, if your Honour goes to paragraph – the first sentence, amended statement of claim.

HER HONOUR: Paragraph, sorry, I didn't catch - - -

MR COOKE: 19.

HER HONOUR: 19. And if your Honour can see there, we list a whole lot of documents in 19, the particulars. And then at (v), we say:

> *It can reasonably be inferred from one or more of the particulars above that the second respondent took documents and information in addition to those documents.*

And then we do the same with the third respondent in paragraph 20. Again, look at (vii) in that paragraph. Now, our problem is that our category 6, when we get to it, just referred to specific documents because it picked up the definition of specified – "refer specified documents", which just lists those documents, but, of course, the plant CI is not just those documents. They're the ones we've been able to find, right. It's beyond that, as self-evident from paragraphs 19 and 20. So the date amendment, which I've just indicated to paragraph 2(a), would fix that up. It would fix that up because it would pick up other documents that have been taken by the second respondent or the third respondent from the applicants in the period of March 2019 to November 2021, including – notice the word "including" at the end of paragraph 2(a) of the chapeau – including the documents listed.

But "including", of course, is non-limiting, it's non-exhaustive, and it would include not only the listed documents, but all documents, for example, just concentrating on

the plant CI, the additional ones, evidencing information taken by either of the second or third respondents, including in respect of the design or engineering construction and so forth of the pilot plant. Now, as we understand the respondents submissions, this category is objected to on the basis that:

> *The documents sought are not adequately described; the documents are already within the applicants possession, custody or control and oppression.*

And we respectfully submit that none of these asserted bases are made good.

HER HONOUR: Yes.

MR COOKE: First, the documents sought are adequately described. This is because the chapeau is clear in its terms. The documents taken are during the period of employment from our client, which they're obviously the documents which are in issue in this proceeding, and includes non-limiting examples from (a) to (g). Secondly, the documents are not limited to documents that are in the applicant's possession, custody or control because of the use of the word "including", and we don't know whether in fact we have all the documents that fall within this category. And we're entitled to test the respondents position in respect of them having only taken, for example, certain documents which they say they require to complete their employment duties at the end. And we don't accept that.

We're entitled to test it, and we do that through discovery. And if, for example, the respondents are aware that, "You've already got a document because in the strikeout application, you know, we can see that you've already got one of the documents which we took for the end of our employment." Well, the usual practice is you still discover it in the list, but you don't have to produce it because you say, "You've already got a copy of that," you know, but you still discover this material. And in relation to an allegation of impression, we say - - -

HER HONOUR: They might have to produce it if your copy looks a bit different, or you've written on it or - - -

MR COOKE: Sure. Yes. But really, I mean, there's minimal documents, as your Honour knows, that are listed. And, anyway, that's not really a matter of oppression. But it's not beyond the pleading because in paragraphs 14, 19 and 20, which I've taken you to, it's not limited to the documents that we're aware of. It includes particulars of those documents we are aware of, but, of course, it says, "We're going to amend following discovery." And I've taken you to those two paragraphs, subparagraphs (v) and (vii) in paragraphs 19 and 20. We infer they've got other documents.

We're aware of this, and we infer that they've taken others, and there's a piece of evidence from Mr Williams ..... respondent solicitors that it would be oppressive because of, well, for example, the documents were deleted from the second respondent's laptop, and therefore he doesn't have them. Well, there's a couple of

answers to that one, your Honour. If he doesn't have the documents, then you don't produce them, but he could still – if he remembers what those documents are, you should discover them in your discovery list and say, you know, when were they last – when were they deleted, etcetera. That's probative evidence, particularly in this case. If you can't produce them, you can't produce them. That's hardly oppressive, your Honour. And the same applies with other similar – other submissions about, "Well, I don't have these documents", etcetera, etcetera. Well, the same point applies. For those reasons, your Honour, we respectfully submit that the category 2(a) as are proposed to be amended with the date ..... and also understanding your Honour's ruling, this should be ordered, and indeed, it's important because it's going to pick up, as I've said, not only these documents but also the remaining plant CI.

HER HONOUR: Mr Hennessy.

MR HENNESSY: Your Honour, just as to the attempt to change the date range with the commencement of March 2019, so that was the date on which our client commenced employment at Fortescue, but this category is said to be directly relevant to the allegation as to what was taken a number of years later. So we say that it's oppressive on its face because it's seeking to go back to a point in time that isn't even relevant to the taking of documents, so that's why, with respect, your Honour wouldn't order that amendment. Secondly, this category, just like category 2, is a shopping list, and it is worth, with respect, going to the actual evidence rather than the paraphrase of it – an inaccurate paraphrase of it – which is Mr Williams' affidavit behind tab 15, relevantly at paragraph 38, your Honour.

HER HONOUR: 38, yes.

MR HENNESSY: It's a convenient way just to identify the points that have been raised, your Honour. In (a), there's the width of the category. Your Honour, (c) is the reference to the chapeau and the use of the words "recording or evidencing are not confined to the pleaded issues, for example, the actual documents taken". In paragraph (b), Mr Williams makes reference to the fact that the two subcategories (c) and (d) relate not, as was just submitted to you, to Dr Kolodziejczyk's laptop but to Fortescue's laptop.

HER HONOUR: Sorry, 2 - - -

MR HENNESSY: So - - -

HER HONOUR: - - - (c) to (e).

MR HENNESSY: 38(b).

HER HONOUR: (c), (d) and (e).

MR HENNESSY: Yes, relate to documents that were saves onto the second respondent's Fortescue laptop. He returned that laptop.

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HER HONOUR: Well, but this – as I understand this category, it's – he might have returned the laptop, but he might have taken a copy of the documents on it, and he might have those documents, and so what this category is about is getting copies of or getting discovery of the documents that were in fact taken, if any. Maybe there were none taken, but if they were taken, if the second respondent had his Fortescue laptop at home for a couple of days and stuck a USB into the side of it and took a copy of three files and then downloaded that USB onto his own laptop, then that's – not saying he did that, but that's one theory – then that's the material that would be discovered.

MR HENNESSY: Well, if your Honour just reads on in 38(b), your Honour sees that what Mr Williams says is a consequence of that fact that it was the Fortescue laptop that then was wiped, it is that Dr Kolodziejczyk isn't able to identify the documents which were saved on the local drives, or the - - -

HER HONOUR: But he must know if he took a copy of a document, September 2021 wasn't that long ago, and he's still got it, he must know he's got it. He doesn't need to know what's on the Fortescue Temp SD folder, because this is really about what is it – what is in his possession, if anything, that he still has that came from Fortescue. That's how I understand this category, have I misunderstood it?

MR HENNESSY: Well - - -

HER HONOUR: No. It seems very straightforward to me.

MR HENNESSY: Well, your Honour, with respect, what your Honour has just observed is in the abstract, we're dealing with a - - -

HER HONOUR: Well, you're not because it's including, it's not a long shopping list.

MR HENNESSY: Well, your Honour, in my respectful submission, we disagree. We say the very use of – the very use of the phrase evidencing and then including - - -

HER HONOUR: Well, I'm not wild about the word evidencing, and I don't know what it adds. I don't think it adds anything.

MR HENNESSY: No. With respect, I was – just going to - - -

HER HONOUR: As I understand it, they want the documents, if they were taken at all, and they want any document recording that information. So if it was copied onto another document then they want that document. I don't think evidencing adds anything, I'm prepared to delete it, and I understand your point about the date.

MR HENNESSY: And the point about - - -

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HER HONOUR: So - - -

MR HENNESSY: Sorry, your Honour. And then lastly, the point about including.

HER HONOUR: Well, I don't understand the point about including, because - - -

MR HENNESSY: Well, there's supposed to be some universe, and that they just kick off with a couple of subcategories - - -

HER HONOUR: There is a – yes. There's a subcategory, but there's – the universe is the documents that were taken.

MR HENNESSY: Well - - -

HER HONOUR: Now, I'm not saying your clients took anything, they may or may not have, but if they did, and they don't belong to one of those subcategories, then they fall within the category.

MR HENNESSY: And the last point, your Honour, is just not immediately obvious in any event to my instructing solicitors as to how one would conduct the search terms to undertake this phishing exercise. But they're the matters we raise with your Honour, and in my respectful submission, it's very well to say "Well, what they're after is if you took any documents do you still have them and can they see them", but one has to ultimately attend to the detail of how's the category formulated.

HER HONOUR: Seems to me this category is quite different to category 2, and it is at least certainly clear to me. Ms St John.

MS ST JOHN: Your Honour, the date issue.

HER HONOUR: If the date issue is – if the date is September 2021 to November 2021.

MR COOKE: The date, with respect, should be the date of their employment. The date of their employment, that's the proposed amendment I made.

HER HONOUR: Well, that's not the – well, I don't accept that amendment.

MR COOKE: Well, the problem is, is then, we have a large period of time, so let's take the second respondent. So he worked at Fortescue from March 2019 to November 2021.

HER HONOUR: But the allegation is that the material was taken in the narrower period; is it not?

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MR COOKE: No. No, it's not. No. And that's why I addressed you at the beginning, that date has to be amended. That date period should reflect the same date or period in Category 1 John was ordered. Because that's what they've taken. They've got documents – if they have got documents in their possession - - -

HER HONOUR: No, no. Well, we might be speaking at odds here. I thought this category was focused on – if I take home this document - - -

MR COOKE: Yes.

HER HONOUR: - - - and I take a copy of it today - - -

MR COOKE: Yes.

HER HONOUR: - - - and I've kept it at home, it's not my document, it's your document.

MR COOKE: Yes.

HER HONOUR: That you want my document.

MR COOKE: Yes, exactly.

HER HONOUR: And I thought the allegation was that the taking – alleged taking happened in a short period of time, not throughout the whole of the employment period.

MR COOKE: We don't know exactly when they took the documents. That's - - - it says "but at least", we don't know – and that was in relation to – if we go back to paragraph - - -

HER HONOUR: I'm not with you. It's pleaded from at least September 2021, I think that's the period I will allow.

MR COOKE: In that case, your Honour, then – let me just get some instructions, I think we're - - -

HER HONOUR: And I'm going to delete the words "for evidencing."

MR COOKE: Yes, your Honour. Now, in light of that - - -

HER HONOUR: Yes.

MR COOKE: - - - there is a body of documents which we are missing, and so in light of your Honour's ruling, it's this.

HER HONOUR: Hang on. First, so the ruling is - - -

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MR COOKE: Yes.

HER HONOUR: - - - on 2A, delete the words "or evidencing", and I will reject the March 2019. The period should be as it appears in the interlocutory application, that is from September 2021 to November 2021.

MR COOKE: Yes. Yes.

HER HONOUR: Now, are you seeking another category on your feet?

MR COOKE: I am. Because - - -

HER HONOUR: Without notice?

MR COOKE: Well, not really, because I just gave notice in my submissions, but the problem is - - -

HER HONOUR: Which part of your submissions.

MR COOKE: My oral submissions, your Honour.

HER HONOUR: I see.

MR COOKE: Oral address. Now, perhaps if I could – I could deal with the missing documents when I get to Category 6, because there is a supplemental category we're going to absolutely need based on what your Honour has just ruled in relation to 2A. I could deal with it like that.

HER HONOUR: All right. Well, let's deal with it like that.

MR COOKE: Yes. Thank you, your Honour.

HER HONOUR: All right.

MR COOKE: All right. Moving along, then.

HER HONOUR: Three.

MR COOKE: Category 3. Okay. As we understand, your Honour, the third respondent agrees to this category, save with the exception of the date issue, which your Honour has already ruled on.

HER HONOUR: Yes. Yes.

MR COOKE: So I'm not going to cavil with that. That would follow for this category. In contrast, the EZ respondents do object to this category, as we understand that the basis that category 3 is not a request for – it's a request for

evidence they say, not discovery, and then they also relate and say oppression, we say neither of those propositions are made good. First, the category is directed to documents that record or evidence the location of storage of documents in the above categories. If no such documents exist then we get a nil result in response to the category.

It's not seeking the creation of documents, and with respect, this category is relevant insofar as it can disclose documents that evidence when certain documents were taken by the second and third respondent, and how and where the documents have been kept by the respondent since. It's relevant to establishing that they took the documents when they were employed by my client, and therefore breached their fiduciary obligations to my client when they were employed by you. It's also relevant to establishing that the documents taken were stored on the EZ company, the first respondent's server, and therefore the inference can be drawn that the company has used the documents.

And your Honour will also recall that we agreed to the vacation of the infanturo obligation under order 23 of the search orders, which would have required the respondents to identify the location of the listed things because we would seek discovery at a later time in respect of a narrow pool of documents. And so, your Honour, we do submit that it's relevant. We're not, contrary to Mr Williams' evidence, we're not seeking forensic investigations and analysis or the creation of documents, we're just seeking the discovery and production of documents.

For example, if there's an email between the second respondent and the third respondent attaching a document produced in answer to, for example, category one, then – and there's emails between those two, that would establish that the other person has it and when they had it, or maybe there's the email attaching one of those documents to one of the employees at the first respondent, that would indicate that the first respondent has it. And for those reasons - - -

HER HONOUR: You're not looking for a report on the metadata, anything like that, you're just looking for that sort of material?

MR COOKE: Not at this stage, your Honour. No. Not at this stage. I'm not going to say never, but not at this stage.

MR HENNESSY: You shouldn't encourage him, your Honour.

HER HONOUR: Okay. I'm trying to get clarity, Mr Hennessy.

MR COOKE: And they're our submissions, your Honour.

HER HONOUR: All right.

MR HENNESSY: Your Honour, there is a way that you find out which party has which discovered documents. That's called a verified list. And in this case, each

respondent will provide a verified list. So to the extent my learned friend fancies the idea that some document was on Element Zero's server, Element Zero will be verifying the list. Either it has a document or it doesn't that it's discovering. That's point 1.

Point 2, true it is we have submitted that this is not a discovery category, but a request for evidence. And that's made plain by the formulation of the category. All documents, relevantly, evidencing the location and storage of any documents. And what the evidence filed by my clients on this indicates – this is Mr Williams' evidence – is that the only way to work out where the location and storage of any of these documents is is by retaining a forensic expert to interrogate the system and find that out.

HER HONOUR: But we've now been expressly told that that is not what is sought by this category.

MR HENNESSY: I'm leading to that, with respect. Sorry. I don't mean that in a rude way. If that's the only way, and the applicant is saying you don't have to do that, that is the end of the story. You wouldn't, with respect, order a category where the solicitor on the record is saying, "That is the only way we can do it." The client who's agitating for the so-called category says, "We're not asking you to do that." That is the end of the matter, your Honour.

HER HONOUR: Except for the category of documents that I think – who knows if they exist – Mr Cooke identified, which is – I don't know – I have a schedule that belonged to you, Mr Hennessy, and I send it to my associate and say, "Look at this document I took from Mr Hennessy." I think that's – if I understood Mr Cooke correctly, that's the sort of material they're looking for.

MR HENNESSY: Yes, but with respect, your Honour, that's the sort of evidence that will be discovered if it exists in answer to category 1.

HER HONOUR: Well, I don't know that it will be - - -

MR HENNESSY: Category 3 - - -

HER HONOUR: - - - discovered in answer to category 1.

MR HENNESSY: Category 3 - - -

HER HONOUR: See, in this case, I have - - -

MR HENNESSY: Sorry, your Honour.

HER HONOUR: - - - difficulty with the word – I think the word "recording the location" does suggest to me you've got to get your forensic – your IT person in to do a – one of those reports that shows when the document was created and where it's

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stored. So I would take the word "recording" out. But "evidencing," in this case, suggests to me the type of material that Mr Cooke described. And ff it falls within category 1, well, you will have produced it anyway. It's not really a lot of extra work, it seems to me. You may have nothing that answers this category. I don't know.

MR HENNESSY: The - - -

HER HONOUR: It seems to me a fairly narrow category if you take out the need to produce a forensic report. And we can expressly exclude it from the category.

MR HENNESSY: If your Honour reads category 3, and reads it as "all documents evidencing the location and storage of documents referred to in category 1."

HER HONOUR: Well, we would have to take 2 out anyway.

MR HENNESSY: Yes, I'm just using this as an example.

HER HONOUR: Yes.

MR HENNESSY: Category 1. I'm mindful that 2 is out.

HER HONOUR: Yes.

MR HENNESSY: That is a request for the production of evidence.

HER HONOUR: No.

MR HENNESSY: Not documents, but evidence.

HER HONOUR: Not if we make an express exclusion, "And does not extend to the production of any report or interrogation of a -" whatever – computer – whatever word you want to use for that. That will dramatically narrow any work needed to be done in this category, it seems to me.

MR HENNESSY: As the court please.

HER HONOUR: Ms St John, do you wish to – you've agreed, subject to dates.

MS ST JOHN: Yes, your Honour.

HER HONOUR: All right. Well, someone needs to take up that drafting exercise.

MR COOKE: Yes. We're happy to do that, your Honour. Thank you.

HER HONOUR: Category 4.

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MR COOKE: Category 4, as we understand it Ms St John's client agrees to this category, save with the exception of the date, which follows your Honour's ruling. In contrast, Mr Hennessy's clients object to this category, as we understand on the basis of relevance and/or oppression.

Now, plainly, these documents would be relevant to at least paragraph 14 of our amended statement of claim. Paragraph 14, your Honour, my client cannot locate many of the documents recording back to the ionic liquid R&D information, which we inferred that they, the respondents, took or otherwise caused those documents to be unavailable to Fortescue.

So we say it's plainly relevant to that. So there is no oppression. The respondents are only required to do reasonable searches, and they can do so by reference to the documents identified in categories 1 and 2A. So, for example, having located a document in category 1, it may be attached to an email sent between the second and third respondents referring to one of them having removed the documents from Fortescue's record. That would be a reasonable search. So for those reasons, your Honour, we submit that it's relevant and there is no oppression.

MR HENNESSY: Your Honour, may I just hand up a copy? This is a decision that has not been included in the list of authorities, but we notified our friends – learned friends this morning we may be relying on it. This is your Honour's decision in Taylor v Killer Queen in respect of a discovery dispute. By way of background only, can I just take your Honour to paragraph 103 to 105 to just, with respect, remind your Honour that your Honour had set out some principles concerning the discretion that the court may or may not exercise in respect of non-standard discovery, and at 104, your Honour discussed part 10 of the court's central practice note on discovery, noting online for the court will not approve expansive or unjustified requests, and your Honour then began at 106 to review various categories.

Relevantly, at paragraph 135, your Honour was considering a category seeking documents that were recording or evidencing the applicant first becoming aware of something, and then lastly, over at paragraph 139, your Honour observed that that category suffered two vices. The first of which was that it was difficult to sensibly comply with it and its terms lacked precision.

We would respectfully submit that category 4 sought by the applicant falls within that category. So just to revisit the wording of the category, it's recording or evidencing, and then instead of knowledge, as in the Killer Queen case, it is conduct or an attempt to make any of the documents, which will no doubt be a raft of documents in various categories, unavailable to Fortescue.

We say that is entirely lacking in precision and puts an unfair burden on our client for reasons that are not apparent to us. It is more akin to a request for evidence, and we would submit that there are no words that could be used to search for responsive documents in answer to such a category that in turn is referable to categories 1 and 2(a), as we now understand it. And again Mr Williams has given evidence that in

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turn will require the use of forensic analysis, and Fortescue has said it doesn't require that. We say that doesn't cure the vice of the category itself; it's simply a category that is unworkable. May it please the court.

HER HONOUR: Thank you. It – unlike – in Killer Queen, I said it was unlikely to lead to documents which would be of any utility; in other words, it was a relevance issue. That's less so the case here, where there is a pleaded allegation that, in paragraph 14, Fortescue - - -

MR HENNESSY: Yes, it's an allegation based on what's said to be an inference/guess.

HER HONOUR: Yes.

MR HENNESSY: But because they don't have documents – someone else must have taken them or made them – and made them unavailable – we say it's a slender pleading, and they - - -

HER HONOUR: Well, the taking - - -

MR HENNESSY: Taking is already dealt with.

HER HONOUR: - - - two ideals with the alleged taking – yes. All right.

MR HENNESSY: And then it's in search of something, some act or some thing, that is to evidence or record an attempt to make something unavailable, like – you know, "Please press the delete button," maybe that's supposed to be the search term.

HER HONOUR: Well, I think this is a difficult category. I don't know how you would go about finding these documents in a sea of documents. If you have a category that deals with the alleged taking, it seems to me that material that might be relevant to this – what you want to achieve would come out of that anyway. I don't see how anyone – I'm with Mr Hennessy, I should say.

MR COOKE: May it please the court.

HER HONOUR: I don't know where that leaves the third respondent.

MS ST JOHN: Your Honour, I submit that your Honour has ruled that that category is not an appropriate category of discovery, and that - - -

HER HONOUR: So it should be out.

MS ST JOHN: - - - my client's consent to it would not overcome your Honour's ruling.

HER HONOUR: Yes, all right. So that's 4; is that right?

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MR COOKE: 4, yes.

HER HONOUR: Yes, 4 is out. 5.

MR COOKE: Category 5. As we understand it, Ms St John's client agrees to this category, save for the date issue. In contrast, Mr Hennessy objects – Mr Hennessy's client objects primarily on the basis – we understand it – the phrase:

...consideration of the confidentiality –

is vague and is unnecessary in light of category 14. First, we would be content to amend the category to "...any of the respondents reference to the confidentiality..." And then, a reasonable search would be a term to identify the document together with the word "in confidential" which we submit would be a reasonable search. And category 14 of course is – sorry. Category 14, in contradistinction, is directed to the use of the documents, not the respondents' knowledge of the confidentiality of the documents

HER HONOUR: All right. Mr Hennessy?

MR HENNESSY: Your Honour, we say this is really a continuation of the problem that arises in category 4, and substituting "reference" for "consideration" isn't really going to help matters. It's yet another attempt to try and get evidence and seeking to oblige my client or solicitors to search for conduct that someone makes a subjective judgment about as evidencing a reference to something that's confidential. So we say, in that respect it's oppressive because of the difficulties in determining how you go about searching effectively for something as nebulous as this category – concept in this category. The second point of course, your Honour, is the question of confidentiality is to be determined by the court. Not, for example, by parties involved. So there's a secondary argument based on the relevance of it. And lastly, of course, we have submitted – as my learned friend I think rightly recorded – that to the extent that anything of relevance might be caught, it would be caught by category 14, in our respectful submission. So that would be another reason we would say why your Honour would reject this category.

HER HONOUR: All right. I think you can search for these. I think Mr Cooke's point about using the word "confidential" or some string of it will allow a search. So I'm going to allow the category with the amendment proposed by Mr Cooke. So the words "consideration of" should come out, and it should be "referring to" any of the respondents, reference to confidentiality of any of the documents in category 1 and 2(a) above.

MR COOKE: May it please the court.

I take the point that I may have to determine what's confidential or not, but I don't think this category goes to that issue. All right. 6 is agreed?

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MR COOKE: 6 is agreed.

HER HONOUR: 6 is agreed. Yes.

MR COOKE: But this is where this additional category comes in that I foreshadowed, your Honour, in my oral address because of your Honour's ruling.

HER HONOUR: All right. So it's not agreed?

MR COOKE: No, 6 is agreed. But this is where I've got to address your Honour on that supplementary category to identify, now. There's a body of documents which are now missing because, your Honour made a ruling in respect to 2(a), so I now have to deal with that body of documents. But category 6 is a good place to start because it gives your Honour an understanding why we're missing a body of documents - - -

HER HONOUR: Of why I shouldn't have – I should have allowed your amendment to category 3 – or 2(a). Is that - - -

MR COOKE: No. But I – no. But your Honour's is your Honour's ruling. Your Honour is always right. But I've got to deal with another – I've got to deal with an application.

HER HONOUR: I'm not always right, you should ask the Full Court.

MR COOKE: Well, on our side of the ledger, your Honour is most definitely right. Now, category 6, that says:

> *All documents constituting and referring to the first specified documents.*

Now, the first specified documents are defined.

HER HONOUR: Yes. I've just turned them up.

MR COOKE: Yes. And there's – it's in the – it's defined in the schedule to our categories at the front. And then that means the documents which are particularised in paragraphs 19 and 20 of the pleading. Now, they're particular documents, your Honour, which concern the plant – they're particular documents for the plant CI. And I've taken your Honour to paragraphs 19 and 20 and pointed out that we've pleaded that it can be reasonably be inferred that that's not the limitation – that's not the limit of the documents that have been taken by the respondents in relation to the plant CI.

But category 6 just deals with a subset, ie, the documents which we have identified that they've taken. So what we're missing for the plant CI is, well, what about the other documents you took that concern the plant CI in addition to the ones we know

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about? Ie, what are the documents which – if your Honour goes to 19, Roman numeral (v) and 20, Roman numeral (vii) – that it can be inferred, as pleaded, that exists? You took them, and we don't know about them. We don't have them. Does your Honour see that the pleading?

HER HONOUR: 19.

MR COOKE: So 19, you will see the documents there in the particulars, they form part of the first specified documents. But, looking at Roman numeral (v), we say it can be reasonably inferred that there's other documents we don't know about that you've taken.

HER HONOUR: Yes.

MR COOKE: And you will remember Mrs McFaull's evidence - - -

HER HONOUR: And won't that be picked up by paragraph – by category 2(a)?

MR COOKE: No. Because - - -

HER HONOUR: No?

MR COOKE: No, your Honour.

HER HONOUR: Only if they took them before September 2021. Is that your point?

MR COOKE: Well, exactly. But the point is, we do plead: we do not know. There's an unknown period before the day of pleading. We don't know when they took them. But what we do know, your Honour will recall Mr McFaull's evidence – extensive expert evidence of the strikeout about: how on earth did they get to where they got in terms of their plant by the time that they did. Now, it would be perverse, in my respectful submission, that if the respondents had taken documents concerning the design, engineering, construction, operation or feasibility of a green iron pilot plant during the period that they – from my client, during the period that they worked for it, we – that's the category I'm asking for, your Honour, because it would be perverse and your Honour would miss out on probative evidence in this case if we're not given it. So that was that that was why I was trying to amend 2(a). Your Honour is against me on that. Fine. So now I seek another discovery category of all documents concerning the design, engineering, construction, operation or feasibility of a green iron pilot plant that were taken or copied by the first respondent or the second respondent from the applicant – sorry, the second or third respondent from the – from Fortescue during the period that they were respectively employed.

HER HONOUR: Well, perhaps your opponents need to get instructions on that.

MR HENNESSY: Yes.

HER HONOUR: You've put them on notice. I don't think I will deal with it straightaway.

MR COOKE: Thank you, your Honour.

MR HENNESSY: Thank you, your Honour.

HER HONOUR: I don't think it would be fair.

MR HENNESSY: Fair enough.

HER HONOUR: All right.

MR COOKE: I will just work on my own list of all alternate categories - - -

HER HONOUR: Someone - - -

MR COOKE: - - - whenever you - - -

HER HONOUR: Whenever I - - -

MR COOKE: Whenever you don't - - -

HER HONOUR: I will let you know when I'm ready. All right. So we will park that. Six is agreed. Seven is not agreed?

MR COOKE: Category 7. Now - - -

MR HENNESSY: Sorry. We had actually – I shouldn't have made so much light of that. If they were to engage in this sort of conduct, well, then, I want my solicitors to receive some sort of a written category from these people.

MR COOKE: We can do that over lunch.

HER HONOUR: No, I think that's appropriate.

MR HENNESSY: That they obvious came here with, but didn't give to us. Thank you.

HER HONOUR: All right. So if that could be taken up between the solicitors.

MR COOKE: Yes. We will give that to our friends over lunch, your Honour.

HER HONOUR: All right. Seven.

MR COOKE: Category 7.

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HER HONOUR: That concerns the second specified documents.

MR COOKE: Yes. Now, both – all respondents have objected to this category. If your Honour turns to the definition of "second specified documents", it means:

> *Any (i) modified forms of the first specified document, including previous or subsequent drafts and (ii) documents created directly or indirectly using the first specified document.*

As we understand it, the objection concerns (ii) of the definition of second specified document, not only (i) of the definition.

HER HONOUR: Yes.

MR COOKE: Now – and that would make sense, if that's right, because (i), just talking about modified forms - - -

HER HONOUR: Yes. Is that correct? So just to be sure, it's only the second part of the definition?

MR HENNESSY: Would your Honour just give me a moment to check on that?

HER HONOUR: Yes.

MR HENNESSY: Yes, your Honour. As I understand it, my clients have agreed to (i).

HER HONOUR: Part 1 is agreed?

MR HENNESSY: To (i). So category 7, insofar as it's limited to (i).

HER HONOUR: Would be agreed. So it's (ii) that's in issue.

MS ST JOHN: Your Honour, we have a difficulty, also, with (i). The difficulty, really - - -

HER HONOUR: Well, I will come - - -

MS ST JOHN: Thank you, your Honour.

HER HONOUR: Would it help to hear what it is? Yes. Sorry.

MS ST JOHN: It's the words "modified forms". So drafts, I think, can reasonably easily be understood, but modified forms is very broad and vague, and it will be difficult to search for. For example, what extent of modification - - -

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HER HONOUR: Any modification.

MS ST JOHN: - - - would remove a document from this category.

HER HONOUR: I think any modification. If you have a document – I will use my table again – and then someone saves it as a new version, that's modified.

MS ST JOHN: Yes, your Honour.

HER HONOUR: Or if someone prints it and writes something on it, that's modified.

MS ST JOHN: Yes, your Honour. So I think those are examples that would plainly fall within a category. But if, for example, the document has 10 iterations and by the 10th version only one per cent of the original remains - - -

HER HONOUR: It's still modified.

MS ST JOHN: So that a document including only one per cent of the original would be included?

HER HONOUR: Well, it seems to me to be my – if I was interpreting it, that's how I would interpret it.

MS ST JOHN: Your Honour, that interpretation - - -

HER HONOUR: A modification is a change.

MS ST JOHN: - - - is exactly where the difficulty – is exactly where the difficulty comes from because it's difficult to search for a document where only one per cent of the original remains. It's difficult to understand what search terms could be crafted to capture a document that has been 99 per cent modified and of which only one per cent remains.

HER HONOUR: Well, I'm not sure about that, but I'm not a forensic IT person. All right.

MR COOKE: It's a reasonable search. And, look, you know, if there could be copy – you can just imagine a situation where you use the documents, the specified documents, and you put them in another document and – I mean, a change, you know, here or there. I mean, it should be produced. Different versions ..... So, with respect, we say that's probative. That should be allowed, (i). Look, (ii), which I understand is the main fight in this category, and it's all about really whether reasonable searches could be done to identify (ii). We submit you get instructions from your clients which will constitute a reasonable search, but if your Honour is against me on that, (i) stands.

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HER HONOUR: All right.

MR HENNESSY: The fact my learned friend has uncharacteristically not put that point forcefully - - -

HER HONOUR: You rely.

MR HENNESSY: - - - is something I rely on. Your Honour, I think the difficulties are rather obvious.

HER HONOUR: I think I understand the difficulty.

MR HENNESSY: May it please.

HER HONOUR: I think (i) stands, (ii) goes.

MR COOKE: May it please.

HER HONOUR: I think searches can be done for modified. It will be a matter for instructions as to - - -

MS ST JOHN: Please the court.

HER HONOUR: - - - extent of modifications. All right. 8. We're speeding now.

MR COOKE: We are. Look, the only dispute in respect of category 8 was because of the definition of second specified documents. We think that just follows your Honour's ruling.

HER HONOUR: Yes. So, now, second specified documents - - -

MR COOKE: Yes.

HER HONOUR: - - - will be limited to category 1, so I assume that all the - - -

MR HENNESSY: Yes. Thank you, your Honour.

HER HONOUR: - - - "and/ors" can – okay.

MR COOKE: Thank you, your Honour. Now, I think all parties agree that category 9 should be dealt with together with category 11 for reasons that will become clear when we address category 11.

HER HONOUR: Yes.

MR COOKE: So if we could park category 9 - - -

HER HONOUR: Park 9.

MR COOKE: - - - for a moment. Yes.

MR COOKE: Category 10 concerns all documents recorded into evidence in consideration by any one or more of the second, third and/or fourth respondents at any time during the period of their employment as to their present or future involvement in an enterprise other than Fortescue for electrochemical reduction of iron. The respondents, as we understand it, object to this category on the basis of relevance. The category we would submit is relevant to paragraphs 31 and 33 of our further amended statement of claim insofar as it's identifying the point in time as to when the confidential information was taken for the purpose of EZ. Also, your Honour, it's relevant to the alleged contraventions of the Australian Consumer Law, which commence at paragraph 75 and following. Sorry, so 75 and following.

And we see there the representation, for example, "Everything we've done was after we left Fortescue," etcetera, etcetera. And, but we want to test – and those representations are denied, your Honour, or, sorry, the falsities of those – I should say the falsities of those representations are denied. I don't think the representations themselves are denied. But we want to test the denial about when the work was done vis-à-vis with EZ in mind, and that's why it's relevant.

MR HENNESSY: Your Honour, we say it's not at all – all relevant, but to the extent it is, our friends would say fondly, cast around for something in the pleading and come up with misuse paragraphs 30 to 33, and then the related ACL claim. May I just say this, to the extent – we don't say that justifies category 10, but you should note for the purpose of considering this, that in category 9 documents would be discovered in relation to 31 and 33 - - -

HER HONOUR: Not 75.

MR HENNESSY: I understand that, I'm just drawing it to your Honour's attention. And ultimately, we are going to submit to your Honour when you consider 9 and 11 together, we will be informing your Honour as we informed our friends this morning that we would consent to category 9, subject to one variation, if it was the case that the court would be prepared to order category 9 but disallow 11. Slightly long-winded, I apologise. So returning to category 9, we say in truth - - -

HER HONOUR: Category 10 or 9?

MR HENNESSY: Sorry, category 10.

HER HONOUR: Yes.

MR HENNESSY: We say in truth it's irrelevant. The motive of the respondents and any chats they had about doing something in life after Fortescue, in relation to the broad-term electrochemical reduction of iron. In any event – so first, it's not

relevant to anything in the pleaded case, it's not a restraint of trade case, it's not a fraud case. To the extent my learned friend says it's relevant to the ACL case, we say whether the statements in the relevant AFR article were misleading or deceptive is a matter for objective assessment.

It doesn't justify the imposition of this category, and contrary to our friend's submission, a reasonable search would require subjective evaluation as to what the – what was being considered, and therefore it's imprecise in its terms, we say again, on all fours with Killer Queen and the category 4 that your Honour determined in that matter. And as to the breach of confidential information claim, of course, motive is not an element in respect of that cause of action, so there really is no relevance. This is just a fishing exercise that finds its way into this process by way of an attempt in category 10 to see what might have been said. May it please the court.

HER HONOUR: Thank you. Ms St John, anything to add?

MS ST JOHN: I adopt Mr Hennessy's submissions, your Honour.

HER HONOUR: Thank you. Anything in response?

MR COOKE: No, your Honour.

HER HONOUR: I'm going to reject this category.

MR COOKE: May it please the court.

HER HONOUR: I think it would be very difficult to identify that material in any event. Right. That takes us to – so 10 is out.

MR COOKE: Yes.

HER HONOUR: So 9 and 11 travel together.

MR COOKE: Yes. Now, this will take a little bit of time. So you've heard what the EZ's position is, they would like 9 in if 11 comes out. Now, that's not our position.

HER HONOUR: So 9 in but with an amendment; correct?

MR COOKE: Yes. I think they want to delete paragraph 78, that's EZ respondent's position, as we understand it.

HER HONOUR: I see, so it would just be 31 and 33.

MR COOKE: Yes. But that's at the price of losing paragraph – category 11. So our position, the applicant's position, is that category 11 is very important, and we would be content to not press category 9 if we get category 11, and it's – there's a

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difference between them, your Honour. So now, I'm going to deal with category 11. Now, the first objection, as we understand it, to this category, is on the basis is that it's redundant in light of category 8. Now, it's not redundant in light of category 8, because category 8 relates to a subset, the use of a subset of the plant CI, that is the specified documents. Category 8 does not include the use of the remainder of the plant CI, or any of the process CI.

Category 11 is appropriate because it allows Fortescue's independent experts to have access to particular documents that the respondents can readily attain and that were used in the development and commercialisation of the EZ process and plant. So looking down at category 11, these are particular documents, easily identifiable. They're key documents that the respondents do have, they necessarily have to have these documents, I'm going to take you to the evidence, and they were used in the development and commercialisation of the EZ process and plant.

And if I could now turn – ask your Honour to turn to Mr Dewar's affidavit behind tab 13. Page 127 of the court book, at paragraph 24 through to paragraph 25. Paragraph 25, Mr Dewar explains by reference to the evidence filed by Fortescue what each of the types of documents in subcategories 11A to C is, and why he considers the respondent should be ordered to give discovery of that type of document, for example, why it's relevant to the issues in dispute.

First, the basis of design documents, so that's referred to, your Honour, in category 11A. You might remember these kind of documents from the strikeout, very important document. The basis of design contains the detailed engineering of a pilot plant and describes the scope of the pilot plant, the limits for each of the section of the pilot plant. It refers to Mr McFaull's evidence. The basis of design is, "The core starting document for any new plant", and so forth, includes all the major processes unit and equipment.

And then there's further detail by reference to what the basis of design documents is in (ii), and then its (ii) subparagraph (2), it says:

> *The specific basis of design would be used for a competitor in designing and engineering its own electrochemical reduction pilot plant, and in particular, could be used to identify and list the fundamental assumptions with which the design team would need to contend when developing the engineering and scoping documents prior to construction.*

So that's a quote extract from the evidence that was before your Honour in the strikeout application. And then over the page at B it deals with the piping instrumentation diagrams, the P and IDs, explains what they are. They're documents containing conceptual engineering drawings that depict the locations of all instruments. And then extracting the evidence of Dr Bhatt, Mr McFaull, down at (ii)(2):

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This document would be useful to a competitor, identify the particular piping and circuitry useful for designing and constructing electrochemical reduction pilot plant, regardless of the electrochemical reduction process to be used in that pilot plant, given the aspects and so forth.

Then he deals with C, laboratory books. Laboratory books, procedures, results, etcetera, of the laboratory experiments recorded. The relevance of the identification, leaching of ores and electroplating and electro-wining, electro-light development to the issues and speeches based on concepts described in the affidavit that your Honour has already digested in the strike-out. And then finally, the retirement project, which is page 9 of Dr Winther-Jensen's affidavit, refers to his so-called retirement project.

So in short, your Honour, we need, with respect, this category 11, in order to establish how the respondent has used the plant CI and the process CI, in respect of developing and commercialising the EZ process and plant, and we would give this evidence, of course, to our independent experts, then to be able to prepare their expert evidence in relation to these documents. And of course, insofar as these documents are confidential documents, they would be protected. It wouldn't be that necessarily that people would be from in-house, that my client would be looking at these documents. They would be given to the independent experts, and they would be monitored in the usual course, your Honour, to prepare their expert evidence. Now, the reasons for ordering Category 11 instead of Category 9, your Honour, I could deal with after lunch, or I could deal with them now, your Honour.

HER HONOUR: Well, I think we should deal with it if it can be dealt with efficiently.

MR COOKE: All right.

HER HONOUR: So as I understand it?--- - - -

MR COOKE: Yes.

HER HONOUR: - - - your experts would be – if I allowed this category - - -

MR COOKE: Yes.

HER HONOUR: - - - the material that would be produced would be given to your experts, along with, presumably, Fortescue material.

MR COOKE: Yes.

HER HONOUR: So that they could provide an opinion as to whether the EZ process was really developed out of the Fortescue confidential information.

MR COOKE: Yes. Yes. Yes. Which is an essential issue in this case.

HER HONOUR: All right. And now, paragraph 9. You are prepared to give up paragraph 9 if you get 11?

MR COOKE: Yes. Yes, yes. And there's a number of reasons.

HER HONOUR: What would paragraph 9 add?

MR COOKE: Well, the reason is for ordering category 11 instead of category 9, as follows.

MR COOKE: Yes.

MR COOKE: First, as we understand - - -

HER HONOUR: Sorry, the reason why I would order 11 instead of 9, as opposed to 9 instead of 11.

MR COOKE: Yes. Yes. Exactly.

HER HONOUR: Yes.

MR COOKE: As we understand the respondent's position, they have denied paragraphs 31 and 33, and so it may well be on their view there's a nil return in respect to category 9. In contrast, category 11 would allow Fortescue to identify what it asserts is the process CI and plant CI used in the key EZ development and commercialisation documents through its independent experts for them to prepare their written expert evidence.

Secondly, as your Honour is aware, there is a difference of opinion between the parties in respect of the meaning of certain technical terms used in the pleadings, for example, iron – ionic liquid. Category 11 would sidestep any such definitional debate, because it would allow the independent experts to identify the use of this confidential information in the key EZ development and commercialisation documents.

Thirdly, we know that the respondents have contended in the course of this proceeding that they no longer have certain documents which they have deleted. So if that is the case, it can be reasonably inferred that we may never get those documents in answer to other categories. Category 11 would allow my client, through its independent experts, to analyse the key development and commercialisation documents to see whether there's been misuse of confidential information, which they may never be able to do if we never get the deleted or destroyed documents from R2 and R3. And it would be, your Honour, for those reasons, it would be preferable to order category 11 instead of category 9. I see the time, your Honour.

HER HONOUR: All right. How long will you be on this category, Mr Hennessey?

MR HENNESSY: A while, your Honour.

HER HONOUR: A while. All right.

MR HENNESSY: I beg your pardon. A while, your Honour.

HER HONOUR: All right. Well, now, we're not going to finish today, because I actually have to rise at three o'clock.

MR COOKE: Yes, your Honour.

HER HONOUR: I was told this was a half day matter. Yes, three – yes, three o'clock. So we can come back at quarter to two if that's enough time for everybody.

MR COOKE: Yes, please, your Honour.

HER HONOUR: We should at least finish the applicant's application, but we're clearly not going to get to the respondents applications. We may start them.

MR HENNESSY: We had had an agreement as to how we were going to deal with this, which was about half a day on each application, but events have overtaken us, so - - -

HER HONOUR: Yes.

MR HENNESSY: Your Honour, if we could at least have a go at some of the categories.

HER HONOUR: Yes, of course.

MR HENNESSY: And see how far we get.

HER HONOUR: We should. We should get as much as done as possible. I apologise if I misunderstood that this was half a day. It's only half a day in my diary. We will go as long as we can, and finish as much as we can, and if there is anything left, work out how to deal with it then. All right. The court be adjourned until quarter to two.

ADJOURNED **[1.04 pm]**

RESUMED **[1.49 pm]**

HER HONOUR: Mr Hennessy.

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MR HENNESSY: Your Honour, if I may start by addressing category 11, and then I will go back to category 9. It's understandable that category 11 is a category of choice for the applicant. It would, effectively, provide the applicant with access to the business records of Element Zero. And the short point is it's untethered to the pleading, by contrast to category 9. So, maybe, if I could deal with the points on category 11 in short form, your Honour, and then get you to category 9 quickly, it might assist.

So the documents range from documents in the Element Zero, including all research and development which took place over a two-year period, all the laboratory books, regardless of subject matter, documents provided to a venture fund as an investor in the business to provide seed funding and all documents relating to EZs pilot or trial plant. We say on its face it's an ..... discovery request and it fits oddly with the other categories, in the sense that if one goes back and looks at the categories sought, including after determination by your Honour this morning, what one sees that relevant materials are picked up in categories that would otherwise fall within this category, but that this category goes wider as a sort catch-all.

So, for example, category 7 – category 6 has already been agreed to by my clients. Same with category 7(i), and category 8 will also be discovered now. So they're all categories going to the Fortescue plant CI, and the confidential information, the so-called Fortescue Process CI. And those categories ought to be sufficient to deal with anything that was otherwise sought within this broad category 11. The explanation that seems to be given for why, in light of the other categories, the applicant can pursue this category is that it would somehow enable an independent expert to opine on how Fortescue's confidential information has been used.

We say in light of the other categories, it's just impermissible fishing, and it doesn't, really, in any event, justify this requirement that, as I've said, would require production of documents relating to Element Zero's entire business and spans information beyond the technology in dispute in circumstances where Fortescue and Element Zero are trade competitors. We note, in passing, that subcategories (c) and (d) have not even been addressed by the applicant in an argument, before your Honour in terms of how they could be justified, but we say, in any event, the whole category is unjustifiable. And that's made more apparent when you then turn back to category 9. And we would ask, when your Honour looks at 9 and considers it in conjunction with 11, your Honour might be struck by this. Category 9, in conformity with principles concerning non-standard discovery, is directed to the pleaded case. Most relevantly, paragraphs 31 and 33. That's the use of information.

HER HONOUR: You don't – you don't agree to paragraph 78.

MR HENNESSY: I don't, because I think it's unnecessary, and I'm going to take your Honour to that in a moment to make good that proposition. But Category 9 does conform with the principle that I addressed your Honour on this morning, by reference to Clifton v Kerry Investments, about the need for direct relevance, and

that, if anything, the framework for a category should be narrower than standard discovery in that regard. And we say that the opposite is achieved in category 11. That is, category 11 simply disregards the concept of direct relevance, and is framed in a manner that's actually broader than if standard discovery were to be given in this matter.

HER HONOUR: What do you say about the submission that your clients have denied paragraphs 31 and 33, and therefore, the real question is whether anything would be discovered under category 9?

MR HENNESSY: Well, that was supposition on my friend's part.

HER HONOUR: Well, not really.

MR HENNESSY: Well, as I recall the submission, it was – it was to the effect that – of suggesting that the reason why we would be happy to give discovery in category 9 was because we had worked out that there would be nil production.

HER HONOUR: Well - - -

MR HENNESSY: Well, I'm standing in front of you saying that's just baseless. May I take you then to the further amended statement of claim. And it's to address this point. Looking at paragraph 31 – so your Honour sees at 31 through to 33, there's the allegation of misuse of the confidential information. So it's both disclosure and use. And one sees that's through to 33 in relation to use for the Fortescue process confidential information, commercialising and using it then for the so-called EZ process. And if your Honour then turns to 78 – in fact, perhaps, if you could start at 79. 79 is the conclusion about contravention of the ACL. And you see it refers back to 75 to 78. And then 78, in turn, picks up the matters pleaded in 12, 13, 14, 19, 20, 31 and 33.

As to those paragraphs, 12 through to 20 are paragraphs that arise in relation to other categories that have been granted. And so the relevant focus, then, is on 30 and thirty – 31 and 33, which is the reason why, in my respectful submission, it's unnecessary to include 78, because it has a tendency, with respect, to make the category slightly unwieldy, in circumstances where there doesn't seem to be any real basis for having to consider the nature of that pleading when 31 and 33 are already included. So category 9 has the – as amended, or the suggested amendment we advance – has the benefit of avoiding some of the duplication that might otherwise arise because there are earlier categories that produce the relevant documents for those parts of the pleading. And it has the benefit, we say, of according with the principle as to direct relevance in circumstances where category 11 achieves precisely the opposite outcome. And so we would respectfully submit that your Honour would order category 9 and decline 11. May it please the court.

MR COOKE: Now, your Honour, with respect, category 11 is the way to prove through independent expert evidence the allegations in paragraphs 31 and 33. With

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respect, in a misuse of a confidential information case of this nature, not disclosing the alleged infringing process and plant documents is, with respect, absurd. It's a traditional way of having independent experts examine these documents so that your Honour has the probative evidence to decide the real issues in this proceeding. And my learned friend is quite wrong to submit that the earlier categories, for example, categories 6 and 7, I think he mentioned, cover the same territory. Those categories are taking categories. They're categories are about, okay, what documents have you taken? This category, category 11, is about how you have used this information.

HER HONOUR: And do you not get that material if proper discovery is given in relation to paragraph 31, for example, of the statement of claim?

MR COOKE: Well, the problem is – yes. But the problem with paragraph 31 and what you've heard from my learned friends during the course of this interlocutory application is that there's a difference of opinion in understanding the technical terms. We know, because they say – the respondents say, "We don't have any document. We've deleted some of the documents. We don't – no longer have them." So we're never going to get them on discovery – through a discovery of 31 and 32. Not necessarily. And of course, we are seriously concerned that we're going to get a nil or close to nil return on the basis of their denial. Now, these - - -

HER HONOUR: Well, if I have to discover material that goes to the allegation - - -

MR COOKE: Yes.

HER HONOUR: - - - that I used Fortescue Process CI to prepare and file each patent application, and I've denied that allegation, don't I then have to discover the patent application and all the material that went – that is relevant to the patent allegation?

MR COOKE: But let's just examine that. So one definitional issue, your Honour knows, is where it's part of - - -

HER HONOUR: Well, what's the definitional issue in that?

MR COOKE: Well, because - - -

HER HONOUR: The patent application is presumably defined somewhere. And if I have to prove that I didn't use that material, is essentially – well, I have to discover the material that is relevant to an issue, the issue being that I didn't use the material. Then I – don't I have to discover all the material that went to the patent application?

MR COOKE: Well, I think that – so, your Honour, the patent applications that dealt with - - -

HER HONOUR: I was – just picked up 31 - - -

MR COOKE: - - - yes, as an example, but that's – they're dealt with in the later categories, I think.

HER HONOUR: But I was - - -

MR COOKE: But I think they're largely agreed.

HER HONOUR: - - - just picking up 31(b)(iv) as an example - - -

MR COOKE: Yes. Yes.

HER HONOUR: - - - of how you would go about this discovery. Just testing the proposition.

MR COOKE: How you would go about that discovery – well, one – first, you – the respondents would then interpret what they understand to be Fortescue Process CI and Fortescue plant CI in the pleading. So you go back to Fortescue - - -

HER HONOUR: I understand.

MR COOKE: - - - Process CI on the pleading, and your Honour knows that that picks up at 25, what's referred to as the ionic liquid R and D information. And then you go back to paragraph 12, and then they have interpretation, apparently, of paragraph 12(e), which forms a part of it. Now, we dealt with the taking aspect back at category 1. This is about misuse. So when they get to this pleading, well, we interpret it the way we interpret it, and ..... conduct reasonable searches. And so there's a danger that we're going to out on the information about their misuse, which is what this category is dealing with. So that's that's one that's one example which we're concerned about.

And, also, the information about, you know, category 11 is how they conceived of the – of their process and their plant. I mean, that's – if there's nothing to hide, there's nothing to hide. We're not saying that Fortescue internal people are going to be looking at this documentation, your Honour. It's the independent experts. It's your Honour who is going to be looking at it, the relevant information, and that information will be protected. Now, it's – in a case such as this, if you don't have the foundation material, which is what paragraph 11 is about, the foundation material – I will put to – I withdraw that. I will say – my submission is this: if you have that foundation material that has been discovered and you start from that proposition and then you give that to your independent experts, well, your Honour not going to be – we're not going to be in danger of missing any out because your Honour is starting from the very documents which were used to create what we say is an infringing process and plant.

So there's no – there will be no danger of missing out on it. We won't waste anyone's time. We will start from where we should begin, at the very beginning, and we will make use of the information. It will be the most efficient way to conduct this

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proceeding. Otherwise, if we're going to instead go down the category 9 route instead, then we respectfully submit that there is a big danger of that occurring. Now, another thing is this, your Honour – another thing is this, is that when we get discovery, right, in relation to, you know – including in relation to other categories, when we get discovery, we will be further particularising this defence. We've told the other side and told your Honour in numerous places in our pleadings that's what we're going to be doing. That's an ordinary thing to do.

And so there's another concern. If they pick up paragraph 31 and 33 now without the benefit of us having received the other discovery and amended our pleading, then they will be – you know, that they will be shortening the exercise which otherwise would reveal real issues and dispute. None of that would be a concern if we got category 11 because we're going to have the documents, and they're documents – they're identified documents. The documents which they used to design their process, their plant. You've heard – you've read a lot of evidence which – from Mr McFaull and Dr Bhatt, which has been particularised in paragraph 31, for example, about how on earth, based upon his reference to the basis of design documents and the Fortescue PNI documents. On inference, how on earth they could have got there. So if your Honour doesn't have the equivalent documents, then one's not going to be able to properly determine that issue, because that's how Ms McFaull has worked it out. Well, they're the documents your Honour needs.

HER HONOUR: Why do you need 11D?

MR COOKE: 11D. Well, that relates – 11D relates to paragraph 33. They've commercialised it by capital raising using the venture capitalist, and your Honour is aware from the strikeout proceeding that there's documents that they've taken, yet we've got an example which are feasibility kind of documents which – so why on earth would you have that document unless you're going to be using it for commercialisation?

I can't remember the particular name of the document, but get one of my juniors to try to remind us, but so they have – we've got an example when we suspect there's a lot more, but they have – we could prove that they've misused that information in the – also in the activity of trying to commercialise – or not trying – of commercialising it, because they've got, in fact, got capital raising. So it's relevant, of course, how they got their capital raising if they've misused our documentation doing it. So that's D. Does your Honour want me to deal with E and F?

HER HONOUR: No. Well, third respondent agrees to E.

MR COOKE: Yes.

HER HONOUR: I think, Mr Hennessy – Mr Hennessy said D was also unjustifiable. No, sorry, C. C and D in my note.

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MR COOKE: Okay. So laboratory books. Well, they're not overly broad, because it's laboratory books with respect to the development of each of the beneficiation and leaching of ores and electroplating, electro-wining, and electrolyte development. So they're limited to those issues, and your Honour knows that those issues are relevant, because it covers some of the confidential information which allege has been taken. So - - -

HER HONOUR: And F. F goes to the defences pleaded.

MR COOKE: No, C, I mean, can you remember – I can remember in relation to, for example, I can remember in relation to the patent application that there's information there, evidence in relation to leaching that I identified through the – sorry, F. I've just finished that point. C is about the – in relation to the patents that they've taken some of leaching documentation. So that was in relation to that. F, that directly rises out of their defence, your Honour. If we turn to it, tab 11. Well, that's the denial of paragraph 29. Denial that they've used the process in paragraph 29, which, in fact, is the same as the liquid R&D process, to say that that's relevant, and then it's the same logic, I think, the paragraph 29(b) to (c) of Dr Winther-Jensen's defence.

HER HONOUR: All right. Ms St John, I didn't ask you if you wish to add anything to the debate.

MS ST JOHN: Your Honour, only to say further to Mr Hennessy's point that the category, if your Honour looks at the chapeau – no. I don't think I can add anything new, your Honour. Thank you.

MR COOKE: Your Honour, the document - - -

MS ST JOHN: Excuse me a moment, your Honour. Your Honour, in category 9 that includes the words "directly relevant". If your Honour looks at the definitions at the beginning of the document, "directly relevant" means a document that falls within any of the criteria in rule 20.14(2). Your Honour, that rule says the documents on which the party intends to rely, the documents adversely affect the party's own case, support the other party's case or adversely affect another party's case. So when your Honour said earlier that under category 9, which is, essentially, standard discovery, that the respondents could be expected to discover documents that would adversely affect their own case, I would direct your Honour's attention to that rule, because that's incorporated into category 9.

MR HENNESSY: With your Honour's leave, might I raise two matters. One was to make plain, my friend made something of earlier categories that I had referred to as going to taking, but not use, but you would note, category 8, as you're ordering it, relates to use or disclosure. And the second point to note is actually just more by way of observation. The rationale now on the applicant's part for inviting your Honour to order discovery in the form of category 11 is a rationale that really encapsulates the concept of impermissible fishing.

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HER HONOUR: Why is that?

MR HENNESSY: Category 9, presumably was advanced in good faith and with the pleaded case in mind and a need for direct relevance. Category 11 has all the hallmarks of an attempted catch-all at the end of the exercise and, as I've said, with respect, it is untethered to the pleaded case.

MR COOKE: Your Honour, just three points, if I may. First, in relation to category 8, I've already made the submission that that only relates to a subset.

HER HONOUR: Yes. You don't have to address me on that.

MR COOKE: Yes. And, secondly, category 9 was advanced together with category 11, but we saw our friend's position yesterday about substituting them and, you know, we don't want to be greedy, get to the real issues in dispute. Category 11, for the reason I've indicated, should be preferred over category 9. That's that point. I referred your Honour to some – to a document, which is an example of a commercialisation document, which, your Honour, was the subject, your Honour, on a strikeout application. That is the document referred to in the further amended statement of claim, paragraph 20(i)(7), which is the Green Iron forum document, which has commercialisation information in it, and your Honour was taken to that document, I think - - -

HER HONOUR: Sorry. 20?

MR COOKE: Sorry.

HER HONOUR: (i)(7).

MR COOKE: Yes. 20(i)(7).

HER HONOUR: Yes.

MR COOKE: Document named Green Iron Update, and that was that was a commercialisation document.

HER HONOUR: That was a commercialisation.

MR COOKE: They're the three points I wanted to make.

HER HONOUR: All right. In my view, nine is – nine should be refused and 11 allowed on the basis of a proper confidentiality regime. I think the undertakings should be given to the court from solicitors, and any expert retained. I think that to properly have the material – I can understand the relevance of the material. I think it is relevant. I think it goes directly to the issue as to use and I think to have that material produced in answer to paragraph 11 will give a much clearer – well, first, I

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think it will be easier to respond to and give a much clearer response than a response to paragraph 9.

MR COOKE: Category 12 is agreed. Category 13 - - -

HER HONOUR: Sorry, category 12 is agreed - - -

MR COOKE: Is agreed.

HER HONOUR: Yes.

MR COOKE: Yes. Category 13 is agreed with the exception of the words, "including drafts thereof", which I think appear - - -

HER HONOUR: Sorry, where does that appear?

MR COOKE: It's the - - -

HER HONOUR: It's on the second last line.

MR COOKE: That's it.

HER HONOUR: Or the last line, actually.

MR COOKE: Yes.

HER HONOUR: Well, perhaps I should hear from Mr Hennessy here as to what's wrong with "including drafts".

MR COOKE: Sure.

MR HENNESSY: Your Honour, this goes to breach of – the category goes to breach of confidence in respect of the filing of the patent applications.

HER HONOUR: That's the claim.

MR HENNESSY: That's the claim.

HER HONOUR: Yes.

MR HENNESSY: So that's breach of confidence with respect to the patents as filed.

HER HONOUR: What paragraph do I find that at?

MR HENNESSY: I will dig that up for you. Paragraph 34, your Honour.

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HER HONOUR: Yes. That is a particular – the PCT application, I assume that's the application referred to in subparagraph (d), is it? So 13(d) of the category is a defined term.

MR HENNESSY: PCT application is defined in paragraph 5(d), your Honour. And then it's 6 - - -

HER HONOUR: So that is actually the application referred to in category 13 subparagraph (d). And then there are provisional applications referred to. Again, they are referred to, as well. So paragraph 33 deals with one of the - - -

MR HENNESSY: Can you see – if your Honour goes to 34, each respondent disclosed.

HER HONOUR: Yes. By causing that application to be published. What about the other applications?

MR HENNESSY: And then that's a ..... that at 36 is said to have been in breach of the obligation.

HER HONOUR: Yes. And is that the only patent application that is the subject of a pleaded alleged breach?

MR HENNESSY: I think so.

HER HONOUR: So what's the point?

MR HENNESSY: So the point is there can be no justification for the production of draft applications in circumstances where the alleged breach of confidence depends on the application as lodged.

HER HONOUR: That's only in relation to the application at subparagraph (d); correct?

MR HENNESSY: Yes. But there would be – there would be no – there would be even less justification for a draft in respect of any other patent document. May it please the court.

HER HONOUR: Ms St John, do you wish to say anything further?

MS ST JOHN: Your Honour, only that the date point arises again. And your Honour will see how that has been formulated in the amended version of annexure A. So the submission is, your Honour, that Dr Winther-Jensen shouldn't give discovery of patents and patent applications that he didn't work on after he began his work at Fortescue.

HER HONOUR: After he – sorry?

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MS ST JOHN: That he didn't work on after 15 February 2021. So it's work that he did before he began at Fortescue, if he was working on patent applications before he started work at Fortescue. The evidence on from my instructor, your Honour, is that he is the author on some 32 patent applications - - -

HER HONOUR: Yes.

MS ST JOHN: - - - which mostly span a period before he began his work at Fortescue. So that proposed amendment, your Honour, is aimed at excluding those applications, and drafts of those applications, that he might have in his possession spanning back many years, so that it – so that the category picks up patents that he worked on after he began working at Fortescue.

HER HONOUR: Sorry. So you would limit the category to those that he worked on whilst at Fortescue?

MS ST JOHN: While he was there, and after he left.

HER HONOUR: And after, but not before.

MS ST JOHN: Yes, your Honour.

HER HONOUR: I see.

MS ST JOHN: Only because, your Honour, I submit patents that he worked on before he began work at Fortescue couldn't include Fortescue's confidential information. And if those aren't excluded, your Honour, that significantly increases the burden on my client, because there are so many patent applications that he worked on before 2021.

HER HONOUR: All right. Mr Cooke, presumably, you don't want any patent applications that predate these people's employment at Fortescue, do you?

MR COOKE: No.

HER HONOUR: No. All right. So it would commence from their respective dates of employment.

MR COOKE: I think we're content with Ms St John's drafting at the end of 13 – in her document.

HER HONOUR: Yes. All right.

MR COOKE: Yes. Now, just to deal with a couple of points, your Honour, in response to Mr Hennessy. So paragraph 5 of the third amended statement of claim, at (c), refers to the provisional patent applications.

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HER HONOUR: Yes.

MR COOKE: (d) refers to the PCT. It defines – 6 defines them all together as:

...the patent applications.

HER HONOUR: Yes.

MR COOKE: And then if you go to paragraph 31, each of the second and third respondents has:

(iv) used the Fortescue process CI and/or the Fortescue plant CI in preparing –

that's an important word:

...preparing and filing each patent application.

Our – and that, your Honour – because preparation means that the words:

...including drafts thereof –

should be included. Our short point is that the process and plant CI may have been used in inventing the - - -

HER HONOUR: Mr Cooke, you need to come closer to the microphone.

MR COOKE: Sorry. Inventing the inventions the subject of the patent applications. So in other words, the confidential information may have been used to come up with the invention, and appeared in the drafts, but been taken out of the versions that have been filed. So we submit that on the basis of the pleading, and the points that I've made, that those words should be included within category 13.

HER HONOUR: But commencing at the date at which each of the second and third respondents commence their employment; correct? Haven't looked at - - -

MR COOKE: I will just take some instructions, your Honour.

HER HONOUR: The third – so it's – so the – Ms St John's amendment is:

...except that the third respondent is not required to give discovery of patents and patent applications he did not work on - - -

MR COOKE: Yes.

HER HONOUR: Continuing:

...after February 2021.

I thought that was a – it was before - - -

MR COOKE: Yes.

HER HONOUR: - - - that was your client's concern.

MS ST JOHN: I think it's a combination of "did not" and "after," which is inelegant drafting, but the effect, your Honour, is if he completed it and did no more work on it before he started at Fortescue, it would not be covered.

HER HONOUR: I see. So February 2021 is the start date.

MS ST JOHN: Yes, your Honour

HER HONOUR: All right.

MR HENNESSY: And Dr Kolodziejczyk's start date was 25 March 2019.

HER HONOUR: Right.

MR COOKE: I think – yes. Look, I understand there should be some type of limitation - - -

HER HONOUR: Yes.

MR COOKE: - - - referable to the start - - -

HER HONOUR: To their respective start dates.

MR COOKE: The respective start dates of their employment, but just to make sure that – they could have been – of course you can get a scenario where they began working on a patent application before they commenced employment, and then put in information during the course of the employment to – then filed it.

HER HONOUR: Well, it's:

...did not work on –

I think.

MR COOKE: "Did not work on," yes.

HER HONOUR: Yes, so if they kept working on it - - -

MR COOKE: Yes.

HER HONOUR: - - - it's in.

MR COOKE: Thank you, your Honour.

HER HONOUR: I think, given the pleading of preparation, the drafts are in. So the categories in, including drafts, are but subject to the limitation found in Ms St John's schedule, which should also be included for the second respondent – tied to his start date. I think that then leaves category 14.

MR COOKE: Yes, and - - -

HER HONOUR: Is that agreed?

MR COOKE: Just in relation to category 14, I think that just follows – the cross-references to the categories in category 14 - - -

HER HONOUR: 2(a) is out.

MR COOKE: - - - need to - - -

HER HONOUR: 2(a) is out.

MR COOKE: Yes. Yes - - -

HER HONOUR: 2 is in, 6 is in - - -

MR COOKE: Yes, and potentially category 6(a), your Honour.

HER HONOUR: Well, we haven't dealt with 6(a).

MR COOKE: That's it.

HER HONOUR: I'm not – has Mr - - -

MR HENNESSY: We – it was emailed at 1.39, and I saw it for the first time I got up - - -

HER HONOUR: Yes, I think - - -

MR COOKE: Deferred?

HER HONOUR: - - - I can't deal with that today.

MR COOKE: All right.

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HER HONOUR: It can be deferred. We're obviously going to have to come back at some point.

MR COOKE: Sorry, just to clarify, your Honour, I think – just to make clear for the transcript – in category 14, I think it should be category 2(a) that comes out.

HER HONOUR: Sorry. 2 is out; 2(a) is in.

MR COOKE: I'm sorry, 2(a) is – I – sorry. You're right, your Honour. 2(a) is in; category - - -

HER HONOUR: And 2 is out.

MR COOKE: - - - 2 is out.

HER HONOUR: 6 is in. And what's 7? Is there an issue about 7 being in?

MR COOKE: No. No, no, because your Honour has made a ruling, I think.

MR HENNESSY: We accept that your Honour's earlier rulings feed into the cross-reference.

MR COOKE: Yes. Just to flag for the transcript, if your Honour is persuaded by what I've referred to as category 6(a) at a later date, then that should come in, in the cross-references – we will submit.

HER HONOUR: All right.

MR COOKE: Yes.

HER HONOUR: That's what you will submit to me.

MR HENNESSY: Well, I've reserved a - - -

HER HONOUR: Yes. We're all reserved on 6(a).

MR HENNESSY: - - - position to argue against this.

HER HONOUR: But what I should be – I think I've now dealt with your application, Mr Cooke.

MR COOKE: Yes, your Honour

HER HONOUR: So if some draft or some agreed – some sort of schedule that can be annexed to some orders that are – is agreed, that reflects my rulings, can come to my chambers in the next day or so - - -

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MR COOKE: Yes, your Honour.

HER HONOUR: - - - I will make orders in chambers requiring discovery to be given in accordance with whatever the schedule looks like – the categories in the schedule. Better agree some timing between yourselves. I hope I won't have to mediate on that.

MR COOKE: Hopefully not.

HER HONOUR: I assume it will need a little – decent period of time to allow the respondents to provide the discovery.

MR COOKE: Yes.

HER HONOUR: All right. Can we usefully start, Mr Hennessy, your application?

MR HENNESSY: Thank you, your Honour. So, your Honour, the application itself is behind tab 2 of the court book index.

HER HONOUR: And I've got your list of affidavits.

MR HENNESSY: And you have our list of affidavits, thank you.

HER HONOUR: So the affidavit of Mr Williams at tab 18 - - -

MR HENNESSY: Yes, your Honour.

HER HONOUR: - - - is read in support of the – I will call your clients the EZ respondents, for ease – the EZ respondents' application for discovery. And exhibit MJW-4 to that affidavit will be exhibit MJW-4.

EXHIBIT #MJW-4 EXHIBIT MJW-4 TO THE AFFIDAVIT OF MR WILLIAMS

Mr Cooke, do you have any evidence in reply? I think you do.

MR COOKE: Your Honour, I've already read the – all of the evidence.

HER HONOUR: That has all been read?

MR COOKE: Yes.

HER HONOUR: All right. And, Ms St John, is there any additional evidence in relation to the first, second and fourth respondents' application? Ms St John, do you have any additional evidence, only in - - -

MS ST JOHN: Not on that application, your Honour. Thank you.

HER HONOUR: I haven't – if there's any overlap between the third respondents – I'm not sure if there is – and the second, third and fourth respondents, then, obviously, any ruling I make in connection with the second, third and fourth would carry through to your clients, but I don't think there is much overlap, if any.

MS ST JOHN: Your Honour, category 1 of my application seeks copies of the documents given to the EZ respondents.

HER HONOUR: Yes. All right.

MS ST JOHN: And there's other categories in my application that are similar to categories sought by the EZ respondents, but I don't want to trouble your Honour with that right now.

HER HONOUR: All right. Well, we will hopefully be able to kill two birds with one stone. Mr Hennessy.

MR HENNESSY: Thank you, your Honour. So turning to our proposed category 1, your Honour, the applicants allege that the second and third respondents undertook confidential research on what is pleaded as one or more direct electrochemical reduction processes, defined as ionic liquid R and D. Your Honour remembers the debate about paragraph 12 of the further amended statement of claim. And I think your Honour made reference to – or indicated an awareness of the nature of the defence, including that the EZ respondents admit they undertook research and development work, but that it was on something that is defined in the defence as the LTE process. That is a different form of direct electrochemical reduction processing. And your Honour will see then there are denials in the defence of paragraph 12 and then the LTE process is set out in paragraph 29.

So the dispute between the parties is to the nature of the work undertaken by the second and third respondents while at Fortescue, and the applicants have produced only a limited number of documents that would be referable to this category in the course of filing evidence in support of their search order and the set-aside application. In our respectful submission, your Honour, it's necessary, in order to meet the case, to have all the relevant documents, not just the documents selected by the applicants to make its applications to the court, which show the work conducted by the second respondent and which identify the features of the direct electrochemical reduction process alleged to have been researched and developed, given your Honour has heard already there's a dispute about the nature of that work and what is and is not involved in it.

So we say the category is entirely reasonable and appropriate at this stage in order to enable my clients to have the material available to them in order to then proceed to give evidence in this case by having available to them all documents they were

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working on. It's, amongst other things, a matter of natural justice that they have access to those documents, particularly in a case that's based largely, at least at the moment, on inferences to what was and was not worked on and what was and was not taken.

HER HONOUR: Is there any issue between the parties about what direct electrochemical reduction processes are?

MR HENNESSY: I - - -

HER HONOUR: There's no dispute between the parties about that?

MR HENNESSY: No. I think, at least in broad terms, there should not be. I think – obviously, it's a matter for my learned friend to make his submissions on, but it seems that at least one point taken against us in respect of this category is that it would require some effort on the part of Fortescue in order to produce the documents, and there's a reliance on some evidence of Dr Bhatt that estimates 100,000 documents, etcetera, would be produced. Our point really is that on the evidence already available to us, the applicants plainly had a very comprehensive review of their system to locate any document that was even conceivably relevant to the work being undertaken by our clients. And it's quite unimaginable that there would be much of an additional burden to then go back to that material and produce it in answer to this category. And to that end, we're using their defined term in putting forward, in this category, the direct electronic – electrochemical reduction processes.

HER HONOUR: All right. Mr Cooke.

MR COOKE: Thank you, your Honour. The applicant opposes this category for two reasons. First, the category refers – or uses the phrase "direct electrochemical reduction processes", which is a very broad term, which includes "direct electrochemical reduction processes" which are not relevant to the causes of action in this proceeding.

HER HONOUR: Well, can we refine it?

MR COOKE: We could. We could refine it to the particular direct electrochemical reduction process in issue, which is defined as "the ionic liquid R and D". That's – because that is the direct electrochemical reduction process which was in issue in paragraph 12 of our further amended statement of claim, which is, I'm told, it's what category 2 of the respondent's discovery seeks. So this is broader than what's in issue. Now, let me explain, the second reason we oppose it is oppression – I will come to that. Now, it's evident from what my learned friend said, but also, the EZ submissions in writing, that they intend for this category to capture documents concerning electrochemical reduction processes beyond the particular ionic liquid process, the subject of the applicant's cause of action against the respondent, which includes what is defined as the LTE process, raised in the respondent's defence,

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which is non-responsive to the pleaded allegation against them concerning the ionic liquid R and D.

If I can – if your Honour – your Honour has seen paragraph 12 of the further amended statement of claim. If you would now turn, please, to the defence. Starting at paragraph 10, you will see what has been defined there is the LTE process, containing a number of constituents. Then, over at paragraph 12 – paragraph 12 of the defence – attempting to answer the allegation in paragraph 12 of our further amendment statement claim – which your Honour is aware of in relation to the liquid ionic R and D, what it refers to, then goes and refers to their work on the LTE process, and then, at 12(d) says, "Well, the LTE process does not utilise certain things." In other words, it's different to the ionic liquid process, because those features in D(i) through to (iii) are features of the ionic liquid R and D process defined in paragraph 12, and they're saying the LTE doesn't have those. Well, that culminates, then - - -

HER HONOUR: Well, they say, "We didn't work on the ionic liquid R and D. We worked on the LTE."

MR COOKE: Exactly. So it's – then you get a denial.

HER HONOUR: That's why they want the documents that show that they worked on the LTE.

MR COOKE: But that's not relevant to the cause of action. Because what's - - -

HER HONOUR: Well, it's relevant to their defence.

MR COOKE: Well, why? Logically?

HER HONOUR: Well, because that's their defence, and you've – your client has the documents. They don't, because they're not working there anymore.

MR COOKE: But let – let's – just pausing there. So I make an allegation that respondents have been working on a particular project.

HER HONOUR: They say they haven't because - - -

MR COOKE: The say – well, they deny it. But then they said, "We were working" - - -

HER HONOUR: They deny they worked on project A, but say they worked on project B - - -

MR COOKE: Project B?

HER HONOUR: - - - doesn't that mean you need to discover material on project B?

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MR COOKE: Well, how is that an answer to whether they worked or not on project A?

HER HONOUR: Well, it might not be an – well, it might be, if there's nothing showing they worked on project A, and that they only worked on project B.

MR COOKE: But if they've got - - -

HER HONOUR: So I don't know the answer to all these questions. They await my determination.

MR COOKE: That's true, but if there's evidence that they worked on project B, it doesn't mean that they didn't work on project A.

HER HONOUR: Well, no, it doesn't. No.

MR COOKE: No.

HER HONOUR: I accept that, but - - -

MR COOKE: But that - - -

HER HONOUR: It might be a part answer, might mean they didn't work very much on project A. I don't know. These are all things to be resolved, but I don't think it prevents your client from discovering the material.

MR COOKE: Can I get some instructions, your Honour.

HER HONOUR: Yes.

MR COOKE: Yes. I think then it should be – I do want to take you to the oppression evidence.

HER HONOUR: Sorry. Do you want to take me to the oppression evidence? Yes.

MR COOKE: I do want to take you to the oppression evidence.

HER HONOUR: I'm not sure that 100,000 documents is oppressive in this day and age, is it, given I get court books with - - -

MR COOKE: I think my learned friend - - -

MR .....: ....., your Honour.

MR COOKE: I think my - - -

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HER HONOUR: Well, I get court books with 30,000 documents in them, so I - - -

MR COOKE: I think my learned friend - - -

HER HONOUR: - - - might use the oppression defence next time.

MR COOKE: I think my learned friend perhaps unfairly summarised Mr Dewar's evidence. I should take you to it. It's at tab - - -

HER HONOUR: Mr Dewar?

MR .....: No. I was summarising Bhatt.

HER HONOUR: Mr Bhatt, I think.

MR COOKE: Well, then, my learned friend omitted altogether Mr Dewar's evidence about oppression. It's even worse, your Honour.

HER HONOUR: Which - - -

MR COOKE: Now, tab 19, paragraph 7, as to category 1 as presently drafted, informed by Dr Bhatt .....:

> *Dr Bhatt estimates Fortescue may hold approximately 100,000 documents concerning its research and development into all processes that may be characterised as direct electrochemical reduction processes. Those documents are held by at least 20 custodians.*

(b):

> *It would require searches to be conducted across multiple digital platforms and physical information sources.*

(c):

> *Fortescue would be required to divert its internal technical experts in various projects in order to conduct that review, require the diversion of 10 internal technical experts away from their projects for a period of approximately three months, causing significant disruption.*

That's the evidence before your Honour about oppression, which, we say, is a serious matter. It's because the phrase "direct electrochemical reduction" is such a broad phrase. It includes not only the liquid ionic R and D, it includes not only the LTE, but it includes other forms.

HER HONOUR: Well, there must be some search terms.

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MR COOKE: And so if your Honour is - - -

HER HONOUR: I think your submission was - - -

MR COOKE: Sorry.

HER HONOUR: - - - only required to undertake reasonable searches. There must be some search terms that can be applied that could be agreed with your opponents to make the 100,000 into a manageable amount and to be able to review that material.

MR COOKE: Yes. We could do some search terms, but - - -

HER HONOUR: Yes, and the parties really need to be sensible about these categories.

MR COOKE: Yes.

HER HONOUR: But I will say it again. The litigants in front of me, perhaps with the exception of the third respondent, and without meaning disrespect, appear to me to be well-resourced, sophisticated litigants who - - -

MR COOKE: Yes.

HER HONOUR: - - - come to the courts. And your client is the moving party in this, so - - -

MR COOKE: I hear what your Honour has to say, and then I will just make one more submission about, then, the category. I can hear what your Honour says about the search terms. That's a good idea, but the category itself at least should be narrowed to – instead of direct electrochemical reduction processes, it should be referable to the only two that are in issue, namely, the liquid ionic R and D and the LTE process. And, also, your Honour, the category refers to work undertaken by the second respondent, the third respondent and/or Fortescue. Those words "and/or Fortescue" should come out.

HER HONOUR: Right. I better hear from Mr Hennessy about – are they the only amendments you propose? Are they the narrowing amendments?

MR COOKE: Yes.

HER HONOUR: All right. Mr Hennessy, does "and/or Fortescue" have to be in there?

MR HENNESSY: I'm not intending to – suggesting I'm horse trading, your Honour, but - - -

HER HONOUR: No, but - - -

MR HENNESSY: - - - I could drop out "and/or Fortescue".

HER HONOUR: Yes. Okay. What about - - -

MR HENNESSY: But not the term – this is a bit rich. This is all coming from the people that - - -

HER HONOUR: Yes.

MR HENNESSY: - - - succeeded in their category 1 and who - - -

HER HONOUR: All right. All right. All right.

MR HENNESSY: And who plead the term against us.

HER HONOUR: "And/or Fortescue" is out, but the narrowing of direct electrochemical reduction processes is rejected. So category 1 is in with the – omitting the words "and/or Fortescue."

MR HENNESSY: May it please the court.

MR COOKE: May it please the court. And, your Honour, I should have said, see how it has got the word "or referring to"?

HER HONOUR: Sorry, or - - -

MR COOKE: It has got:

Documents recording or referring to - - -

HER HONOUR: Yes. You don't want "or referring to"?

MR COOKE: I think "or referring to" – I think those words should come out, "or referring to". It should be "recording". I mean, that's – they - - -

HER HONOUR: Mr Hennessy doesn't agree. I hate, "or referring to." Sorry, I dislike. I'm not meant to hate anything.

MR HENNESSY: I will - - -

MR COOKE: It's a bit too broad.

MR HENNESSY: I don't want to displease your Honour, so we will ..... - - -

HER HONOUR: Yes. I don't think "or referring to" adds anything to a category.

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MR HENNESSY: May it please the court.

HER HONOUR: I think I might have said that in that Katy Perry decision.

MR COOKE: You did, your Honour. May it please the court.

HER HONOUR: All right. Category - - -

MR HENNESSY: Category 2, your Honour.

HER HONOUR: Now, category 2, if we can deal with in about 10. We will have to rise after category 2, I'm afraid.

MR HENNESSY: Yes.

HER HONOUR: And we will have to return. What is category 2?

MR HENNESSY: Category 2 is, we accept, a subset, if you like, now, of the - - -

HER HONOUR: Yes. Of category 1.

MR HENNESSY: Of category. But importantly, it does seek to extend to the work undertaken by Fortescue. So it's the "and/or Fortescue." Because of the nature of the pleading against us in 12 as to what was being done and the fact that it was alleged that it was both the second and third respondents and others at Fortescue, we are seeking for that limited subcategory to extend the documentation to others working at Fortescue.

HER HONOUR: Right. And - - -

MR HENNESSY: And – sorry. And also then removing the "or referring to", your Honour.

HER HONOUR: Yes. I've already done that.

MR HENNESSY: May it please the court.

HER HONOUR: Mr Cooke, is there any objection to this category?

MR COOKE: No, your Honour.

HER HONOUR: No. All right. So category 2 is in, deleting the words "or referring to." We've still got time. Can we deal with category 3.

MR COOKE: Mr Larish will deal with it on our side of the ledger, your Honour.

MR HENNESSY: Your Honour, so in category 3, this goes to an allegation – a pleaded allegation – by the applicants that in the final months of their – of his employment, Dr Kolodziejczyk obtained confidential information without authorisation – emphasising without authorisation. And it's a central allegation, and it has been denied in paragraph 21 of our defence. So this category falls directly - - -

HER HONOUR: Yes. I did wonder. I must say I didn't understand the objection to this category.

MR HENNESSY: Well, with the greatest respect, it's a semantic game about what - - -

HER HONOUR: I don't need to hear from you any more, yes. I'm happy to take "or referring to" out. But, Mr Larish, perhaps you can tell me.

MR LARISH: Yes. Your Honour, the starting point, as your Honour knows, is that it's not in dispute that Dr Kolodziejczyk employment ended on about 5 November 2021.

HER HONOUR: Yes.

MR LARISH: And that Dr Winther-Jensen's employment ended on about 12 November 2021. Now, our friends contend that it's relevant to any authorisation given to Dr Kolodziejczyk to access the confidential information. However, they do not plead a positive case in that respect. So if your Honour goes to paragraph 21 of our pleading, which is behind tab 10, we say there that the conduct was not authorised.

HER HONOUR: Yes.

MR LARISH: And then if your Honour goes behind tab 11, our friends – your Honour will see that that is met with bare denial - - -

HER HONOUR: Denial. Yes.

MR LARISH: And your Honour would know that the authorities indicate that a plea of a bare denial and putting the applicant to proof does not generally justify discovery. And can I give your Honour a case in that respect. Your Honour, if your Honour goes to paragraph 35, just to introduce the issue. There, Yates J was dealing with particular documents in particular categories that remained in contention, and his Honour records that:

> *the categories were directed to the discovery of documents which might show a change in business of the first applicant* –

And then paragraph 36, in the second sentence, records that:

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The respondents supported the necessity for discovery on the basis that the documents related to questions of damages –

And there's a – if your Honour goes over the page, under page 9, there's a fairly detailed theory about how they're relevant, which I don't need to get into, and then, the respondent said that they proposed to adduce particular evidence.

HER HONOUR: Mr Larish, can you move closer to one of microphones? I'm told - - -

MR LARISH: I'm sorry, your Honour.

HER HONOUR: - - - you're not being picked up.

MR LARISH: And then, without getting into all of the detail of it, at the last sentence of paragraph 37, his Honour records that the existence of provisions of the kind that his Honour sets out in a particular agreement does assist the respondents in laying a foundation for the discovery they seek. So his Honour accepts that there was a foundation for the submission, in effect. But then, says in paragraph 38 that:

the difficulty which faces the respondents, however, is the fact that, beyond their bare denial of damage having been suffered as alleged, their joint amended defence does not articulate any such case –

And then, go over to paragraph 40, if your Honour pleases. There, his Honour records that:

in the absence of an appropriate articulation of the respondent's proposed case in their defence, the issue they raised in submissions is essentially speculative or hypothetical –

And then, importantly, the final sentence:

The fact that the respondents have traversed the applicant's allegations by simple denial that the second applicant has suffered loss or damage does not, of itself, justify the ordering of the particular discovery that they now seek in that regard –

And so, we say – that's why I took your Honour to the pleading about the bare denial of authorisation. In effect, what that means is we – we're being put forward – we're being put to proof that there was no authorisation, but there is no positive case that there was authorisation. If – I'm not – I don't want to be bidding against myself, but if your Honour was against me, and was otherwise minded to allow the category, then there would be – what we submitted that it would be appropriate for there to be two modifications. First, the words "referring to" would be removed, and I've addressed your Honour on that. And, secondly, we submit that subparagraph (a) is unnecessary. It's not in dispute that resignation occurred, and the deed of separation

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– the preparation of the deed of separation – our friends have the deed of separation. That was in Mr Huber's evidence. One doesn't normally go behind the preparation of a deed, and – otherwise, if subparagraph (a) was deleted, then it doesn't look like, to our mind, like it would actually fit within the chapeau.

There's no allegation that the deed of separation, for example, isn't valid. It just doesn't arise as an issue, but that would only be our fallback position, your Honour.

MR HENNESSY: Sorry, just quickly, your Honour. In terms of differentiating this case from 42 International. 42 International is concerned with lost counterfactuals and so, the reference in paragraph 38 by his Honour to "no articulation of the case" was a failure to identify what the counterfactual was for the purpose of a loss calculation. Here – and I'm told the High Court has told us that you have – one has to do that, you know, in order to support a counterfactual. Here, you're dealing with a denial in respect of alleged authorisation. No more needs to be said in this sense. Test it this way. What would one do? Deny, and then plead there was no authorisation. I mean, it would just be a tautology. So we've done sufficient to justify taking the issue. No reply was filed. So there's a – the parties have joined issue on this.

HER HONOUR: What do you say about the removal of subparagraph (a)?

MR HENNESSY: No. So no problem, of course, with the first modification. As to (a), two things: (1) it wouldn't come out because we're entitled to see documents that go to the surrounding circumstances in relation to the deed itself in terms of construction of it. But more importantly, for present purposes, you may or may not recall, there are issues around what Dr Kolodziejczyk was told at the time he resigned about what he could and could not do to see out his notice period. And that related to, amongst other things, working on the projects he was presently engaged in, including from home.

HER HONOUR: But that's subparagraph (c), is it not?

MR HENNESSY: (b) and (c). I take that, but not confined to that because of the reference in (a) to his resignation.

HER HONOUR: Well, if – there is no issue about the deed, is there? The deed is the deed, it will be construed on its face.

MR HENNESSY: Not at present, but - - -

HER HONOUR: I'm concerned that material going to its preparation will be privileged, at least in the hands of Fortescue.

MR HENNESSY: But as your Honour has ruled, I've noticed in other discovery disputes, that in and of itself doesn't justify - - -

HER HONOUR: No. I accept that.

MR HENNESSY: So - - -

HER HONOUR: We will just have that fight at another day.

MR HENNESSY: We may not, but it's up to them to just record it.

HER HONOUR: We may not, but we may. We seem to argue about a lot in this matter. So you say that subparagraph (a) is relevant to what?

MR HENNESSY: To the terms - - -

HER HONOUR: The terms.

MR HENNESSY: To the terms.

HER HONOUR: The deed is already in evidence, I'm told. As I recall, it's annexed.

MR HENNESSY: Yes. No, that's correct.

HER HONOUR: All right. Well, I'm going to allow the category in, including subcategory (a) but not including the words "or referring to".

MR HENNESSY: May it please the court.

HER HONOUR: We will need to stop there, I'm afraid. I'm very sorry.

MR HENNESSY: Your Honour, are we able to get the revised form of categories 1 through to 3 to your associate as the applicant is in respect of its categories?

HER HONOUR: You can do – or should we do perhaps put it – I mean, I'm happy for you to do that, but it might be better to make the order all at once. It's really a question of when.

MR HENNESSY: We're just concerned about the timing and getting going with this and - - -

HER HONOUR: Yes. Well, you can provide those to me and I will make orders. And to the extent that the categories 1 to 3 might be caught up in your application, perhaps there can be some discussion about whether I can make any of the orders on your application. And you can have that discussion with Mr Larish and Mr Cooke.

MS ST JOHN: Yes. Thank you, your Honour. I'm happy to take that up with my friends.

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HER HONOUR: That is the third respondent. Now, when are we going to return, and how long do we need?

MR HENNESSY: Sorry. I beg your pardon, your Honour?

HER HONOUR: When are we returning? I think – so as well as the schedule from your side, Mr Cooke, I need a draft confidentiality order dealing with exhibit PAD-B. Because, you might all recall, we have a public file in this matter. And so it's important that all those orders are in place.

MR COOKE: Yes.

HER HONOUR: Otherwise, material will be uploaded. How long do we need? Do we need a half day?

MR COOKE: Half a day would be my estimate, your Honour.

MR HENNESSY: Yes, your Honour - - -

HER HONOUR: Do the parties wish to provide my associate with dates or do you have them there?

MR HENNESSY: For our part, if we could provide your associate with the dates.

HER HONOUR: Yes. So I will give you an idea of when I can come back.

MR COOKE: Yes.

HER HONOUR: Unfortunately, I can't come back tomorrow. Next week I can do Monday, Thursday or Friday, if the parties are keen to knock this over, or I can do Wednesday afternoon only. So starting at 2 and going through to 4.15, if that's enough time.

MR COOKE: Thank you, your Honour.

MR .....: Thank you, your Honour.

HER HONOUR: I don't know if that – if next week doesn't work, I can – the following week, I could do Wednesday, Thursday or Friday. I can only do Friday morning, and it would – so I could only do – yes – Friday from 10.15 to 1 o'clock, but we only need half a day. So if the parties can find some mutually convenient dates – let my associate know as soon as you're able – we can deal with the balance. Then, there's about 10 categories to go, is there? There's about nine categories to go in your application, and three or four - - -

MR HENNESSY: Yes - - -

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HER HONOUR: - - - in Ms St John's.

MR HENNESSY: - - - given some of your Honour's rulings today - - -

HER HONOUR: Some of them may fall away.

MR HENNESSY: - - - I'm wanting to try and see if I can reduce that.

HER HONOUR: All right. Well, there may be – some arrangements can be – there can be agreement between the parties, then obviously – and if there are only one or two or three categories, and the parties wish to avoid another half day in front of me, and you're happy for me to make a ruling, that is, to send you a ruling without hearing – without oral submissions, relying only on the written material, that is another alternative way to proceed. My preference is usually to hear from the parties - - -

MR COOKE: Yes.

HER HONOUR: So unless it's – yes – simply trying to be efficient, save some costs. All right. If there's nothing further, can I thank you all for your assistance so. Could the court be adjourned.

MATTER ADJOURNED at 3.05 pm INDEFINITELY

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TRANSCRIPT OF PROCEEDINGS

O/N H-1998361

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

MARKOVIC J

No. NSD 527 of 2024

FORTESCUE LIMITED and OTHERS

and

ELEMENT ZERO PTY LIMITED and OTHERS

SYDNEY

10.16 AM, THURSDAY, 20 FEBRUARY 2025

MR J.S. COOKE SC appears with MR D.B. LARISH and MS S.K. YATES for the applicants
MR C.D. McMENIMAN appears for the 1st, 2nd and 4th respondents
MS F. ST JOHN appears for the 3rd respondent

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MR J.S. COOKE SC: May it please the court, I appear with my learned juniors MR LARISH and MS YATES for the applicants.

MR C.D. McMENIMAN: May it please the court, McMeniman, for the first, second and fourth respondents.

HER HONOUR: Thank you, Mr McMeniman.

MS F. ST JOHN: May I place the court, St John for the third respondent.

HER HONOUR: Thank you, Ms St John.

MR McMENIMAN: Your Honour, on the last occasion we were somewhat through my client's application for discovery and I've spoken to my learned friend, Mr Cooke, and we would propose that we continue with that application, complete it and then Ms St John's application and then return to the further application that Mr Cooke is making in respect of two categories, if that's convenient to your Honour.

HER HONOUR: That's convenient to me. Ms St John I think your application will follow the revised one I've seen.

MS ST JOHN: Yes, your Honour. So as I understand it - - -

HER HONOUR: It must necessarily follow from what happens with Mr McMeniman's client's application.

MS ST JOHN: Yes, your Honour, that's right. Category 5 in the orders that went up to your Honour this morning is the same category 5 that - - -

HER HONOUR: Yes.

MS ST JOHN: - - - the other respondents are proposing.

HER HONOUR: Yes.

MS ST JOHN: And, as I understand it, categories 1 and 2 in my application won't be opposed by Fortescue.

HER HONOUR: Yes, well, that's simply – well, 2 reflects what I've already done - - -

MS ST JOHN: Yes, your Honour.

HER HONOUR: - - - in connection with, I think, 3 of the first, second and fourth respondents.

MS ST JOHN: Yes, your Honour.

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HER HONOUR: Correct.

MR McMENIMAN: Your Honour, might I hand up a copy, if you don't have it already, of the schedule that we sent up this morning identifying the categories that have been ruled on in respect of my application and then some revisions to the remaining categories that we will be proposing.

HER HONOUR: I have that document and I don't think – no, I think I have that document. Hang on. I think I have that – yes, I have that document. I don't - - -

MR McMENIMAN: Thank you. So, obviously, we will be addressing the "to be argued" categories. Before addressing category 4, which is the first one, might I just identify as a way of overview what amendments we have made to the categories because some of them are common and taking into account matters that arose on the last occasion. Your Honour will see in category 4 the removal of the words for "or referring to".

HER HONOUR: Yes.

MR McMENIMAN: That has been, hopefully, done - - -

HER HONOUR: It has happened everywhere, yes.

MR McMENIMAN: - - - in each successive category. I will address you on category 4. Category 5, Ms St John will take the lead on making submissions in respect of that because it picks up our original category 5 and then also seeks to address some issues that arise from using "referring to" and some wording that was in her categories 3 and 4. Category 6, there's that small amendment there, "referring to". 7 is the same. 8 is the same and if I can just pass over 9. Category 10 has been reduced down to a two line category that's tied back to the pleading which is something that I will address you on which was a criticism that was raised with respect to the category. With respect to categories 9, 11, 12 and 13 I think my instructing solicitor has informed your Honour through your associate in an email this morning that they're not pressed. It seems to us, having regard to some of the submissions that have been made by Fortescue, that it better wait their evidence before revisiting those categories, if they're to be revisited at all.

Some of them proceeded on an assumption that the evidence that was relied on at the search order application would be relied on at the final hearing and was directed, therefore, at that. Whether that's the case or not it has not been made clear to us and so we will park those and we may or may not revisit them in due course. So dealing with category 4, your Honour. It seeks documents recording the Fortescue information in relation to what's defined as the "Green Iron plant" in the further amended statement of claim, paragraph 19. If your Honour might, please, pick that up. It should be behind tab 10 of the bundle that you received on – for the 6 February hearing. The paragraph defines "Green Iron pilot plant" quite broadly but

then the particulars identify certain documents that are relied on as containing the information and one of them is a catch-all that makes it clear that particulars 1 to 4, which identify some of the information that they say falls within paragraph 19, is not exhaustive and you will see that in particular 4 where it says it can be reasonably inferred, etcetera:

> *Information in addition to that in 1 to 4 above relating to design engineering, etcetera, of a Green Iron plant.*

So what - - -

HER HONOUR: The term – sorry to interrupt you. The term "Fortescue information" is not a defined term, is it?

MR McMENIMAN: No.

HER HONOUR: No.

MR McMENIMAN: So how this structure works, your Honour, is you start at 19. They define the information. Then you go to 23 and they allege that that information was confidential. Then you go to 26 and they redefined that information as the "Fortescue plant CI".

HER HONOUR: Yes. All right.

MR McMENIMAN: Then you go to 30 and they say that the respondents have created their own plant which they call the "EZ plant". Then you go to 31(b)(2) and there they say that:

> *The second and third respondents have used the process and the plant CI in designing, engineering, constructing, operating and/or determining the feasibility of the EZ plant or causing those things to be done.*

And then they later plead by reference to causes of action, obviously, and breach of confidence section 183 and then, later, copyright with respect to the same documents, that that ground's a breach. So what category 4 seeks is the information which they say concerns the Green Iron plant and it can't be limited to just the documents that have been put into evidence in the search order application which are particularised in paragraph 9(i) through to (iv).

HER HONOUR: Paragraph 19?

MR McMENIMAN: 19, sorry. One – particulars 1 through to 4. It's necessary for documents to be produced that shows the work that was undertaken in relation to that subject matter because that will show what they say has been copied or used in creating what they define as the pilot plant for the EZ pilot plant. And so the evidence will be directed at those documents to determine the extent, if at all, that

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there's any commonality that might be attributed to the same or similar information. And in order to make the allegation in paragraph 19, must have found that body of documents.

HER HONOUR: They have the documents in (i) to (iv), presumably.

MR McMENIMAN: They say in (v) that it's not exhaustive.

HER HONOUR: There's an inference drawn that there was something additional taken. So you say it's because of that, that order for material relating to – Fortescue information relating to the green iron plant should be discovered.

MR McMENIMAN: Yes. And that's consistent with the order that your Honour made with respect to our category 1 and 2. And you're going to hear some evidence at the end of today being led from Mr Cooke that they propose to do significant searches of 89 new custodians to try and find everything that will fall within our category 1 and 2. And so it must be inferred from that that their position now is the searches that they conducted to prepare their pleading a search order application. Consistent with particular (v) to paragraph 19, it's not exhaustive of the information that they rely on these proceedings to ground their claims that there was pre-plant information and that it has been used in creating the EZ plant. And the only way we can defend that claim is by having that information and comparing it to the plant that has been created by the respondents and having evidence put on as to the extent that there's any commonality or not or that information having been used.

MR COOKE: Your Honour, Mr Larish is going to address the main categories sought by the respondent.

HER HONOUR: Thank you.

MR D.B. LARISH: May it please the court. If your Honour still has the pleading up – if your Honour goes to paragraph 19 – a very important aspect of the allegation in paragraph 19 – yes, it does concern, of course, information relating to the green iron pilot plant. But it's – the allegation is as to what – that Dr Kolodziejczyk obtained particular information relating to the green iron pilot plant. It's not a general allegation about all information relating to the green pilot plant. And as as your Honour observed, the information that's presently the subject of the pleaded case that we know of is in (i) to (iv), and our friends have that. (V) is where we infer that there is more, and that's part of the reason that we're seeking discovery. And, of course, if there is more, which we obtained from our friend's discovery, then we would have to particularise it so that our friends are on notice of whatever else we say was obtained.

But what it seems to us that our friends are doing is seeking Fortescue information, if any, that falls outside what is particularised as having been obtained. The category is not limited to what was obtained. It's all information. So immediately, one asks why are our friends looking for something that's outside of the presently pleaded

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case. Our friends say that the category will show what has been copied or used and is relied upon. But what has been copied or used that's relied upon on the pleading is what's in (i) to (iv), which may be supplemented following discovery.

And with respect – as a matter of logic, and indeed as a matter of how the pleading works, the way the case will run is that we will compare the pleaded information, for which there is an allegation of misuse which is particulars (i) to (iv) against whatever our friends did and that is made good by the paragraphs that Mr McMeniman took you through, that is, starting with 19. That's the allegation as – of obtained and then if you go to paragraph 26 that's the Fortescue plant CI. It's not freestanding. It will be limited by the particulars. And then the allegation of misuse – bearing in mind in 27 that the Fortescue plant CI is then, together with another species of CI, defined as the "Fortescue CI" – the allegation of misuse is then made in paragraph 31 which is that – disclosed – the disclosure and use of the Fortescue CI which, tracking back to paragraph 19, is that which was obtained being that which is presently particularised. So we say that asking us to provide all Green Iron information – first of all, it's not relevant because if we don't rely upon it then it's – then that's that, but it's also involving fishing that's straying very far from the issues in dispute and for that reason – for those reasons, your Honour would reject the category.

MR McMENIMAN: Your Honour, might I hand up a copy of the paragraph – the category 11 that has been ordered.

HER HONOUR: Category 11 that has been ordered against your - - -

MR McMENIMAN: Of the Fortescue application that has been - - -

HER HONOUR: - - - client?

MR McMENIMAN: Yes. So my client has been ordered to produce all documents concerning the Element Zero plant. That's one side of the coin. The other side of the coin is the Fortescue plant and the only way one can properly compare the two is by having all of the information that they say comprises their plant compared to what they're getting from our paragraph 11 which is all of the information concerning the EZ plant.

HER HONOUR: I'm not sure that's right, is it? If the allegation is that your client took information that it wasn't entitled to and has now created a plant based on that information and that information is said to be the material in subparagraphs (1) to (4) of paragraph 19 then – and there is an inference that – to be drawn that there may be additional material and whether or not that's the case will be determined once your client gives discovery – how is it necessary for your client to have all of the material that has gone into developing the Fortescue plant? It seems to me that's – there's a bit of a chicken and egg happening here. This case is not about your client comparing what it has developed against what Fortescue has developed. It's the other way around and you will ultimately, I assume, get an expert report from Fortescue that says, "Here's what we think. It has definitely been developed using

our information or not" – that you will have to respond to but – I assume that's what will happen. I might be wrong. But I don't understand how getting all of this material, which may be thousands and thousands of documents, is going to help anybody. The case that's - - -

MR McMENIMAN: For starters, your Honour - - -

HER HONOUR: - - - to be proved by Fortescue is that your client took the information and misused it. That's their case.

MR McMENIMAN: And what the relevant comparison will be – and this was submitted – I think it was by my learned friend, Mr Cooke, last time we were before you – was in order to do the relevant comparison between what is said to be confidential, which is the information concerning the whole of a plant, and what was taken and used you will need to compare, for example, if there is any similarity between piping, which was one of the topics that was discussed. If there is similarity, the extent to which that is comprised in the whole and the only way one can compare the two is understanding the whole of the design of their plant and comparing it to the whole of the design of our plant and the relevant components of the two and that was what was put to your Honour by Mr Cooke - - -

HER HONOUR: But – but - - -

MR McMENIMAN: - - - with respect to one of the confidentiality categories.

HER HONOUR: But the applicants bear the onus on all of this. It seems to me that what you're trying to do is take on some sort of onus yourself and - - -

MR McMENIMAN: No, your Honour, it's us seeking to - - -

HER HONOUR: And isn't is your role to sit back and wait and see what they produce? And it may be that there is no other material that they're going to particularise. And so, the case is quite a narrow one. It's based on the first four documents. I'm struggling to see how this broad category helps anybody.

MR McMENIMAN: It will relevantly, we submit, come down to comparing the information concerning the design of their plant, which is not the subset that they say they're going to rely on, to the information that concerns the design of the EZ plant.

HER HONOUR: Paragraph 19 is about a subset of material. It's the subset of material that they say your clients took and misused. And if the subset remains as narrow as it is, that's it. That's their case. If, through discovery, they find three other documents, then, their case will expand to the additional three documents. But I don't see how getting all of the Fortescue material about green iron plant, particularly at this stage, is going to take the case anywhere.

MR McMENIMAN: Well, your Honour, I can't do anything other than just repeat that our evidence will be – and it arises from our defence, where we say we didn't use any green plant information in the creation of our plant. That ultimately the evidence in the defendant's side will be putting forward a comparison of the two plants and identifying why they are fundamentally different in various ways. And no doubt, they will point to there being similarities here and there and saying, "Well, it must be inferred that you've taken some piping here or there."

HER HONOUR: Having all that green iron information, I don't think, will help you with that.

MR McMENIMAN: It's not all the green iron information, your Honour. It's the green iron information in relation to their plant, which is a discrete set of information concerning the design of their plant.

HER HONOUR: Well, it might – it may not be that discreet. That's the problem.

MR McMENIMAN: No evidence about that, your Honour. It was a project on Mr McFaull's evidence that we will come to, which was done in a period of three or four months in 2021.

HER HONOUR: Well, I don't think the category is relevant on the currently pleaded case.

MR McMENIMAN: Thank you, your Honour.

HER HONOUR: So 4 is out.

MR McMENIMAN: Category 5, Ms St John is going to address your Honour.

HER HONOUR: So, all right. They're identical, Ms St John, your version of category 5. Both versions are identical, yes?

MS ST JOHN: I'm sorry, your Honour. I missed that.

HER HONOUR: Category 5 in your client's application - - -

MS ST JOHN: Yes. And category 5 in the EZ.

HER HONOUR: - - - and in Mr McMeniman's application are identical. Yes.

MS ST JOHN: Your Honour, we notified our friends yesterday that we would seek this amended category. And that's in place of three categories which have now fallen away, your Honour, or subsumed in this new category. One is the EZ Respondents Existing Category 5, which your Honour sees as an amendment in the EZ application. And it also discloses of my previous categories 3 and 4, which I no longer press.

HER HONOUR: So it's the native copies of the documents particularised at 19(i) and 20(i), correct?

MS ST JOHN: Yes, your Honour. And pausing there, we understand that's not resisted by Fortescue.

HER HONOUR: That's not resisted. All right. So it's the "and any documents that" that's resisted.

MS ST JOHN: That's as we I understand it, your Honour I'm hearing no demure.

HER HONOUR: Is that correct, Mr Larish?

MR LARISH: Yes. Yes, your Honour.

MS ST JOHN: So, your Honour, if I could take your Honour back to the further amended statement of claim to paragraph 19. So, this category is, I submit, quite narrow. If your Honour sees 19, this is the information that Dr Kolodziejczyk is said to have taken. It's particular 1, documents 1 to 4. So it's only those four documents, your Honour, that are the documents we're talking about. And then, information in those that shows up in other documents. So I submit, your Honour, this is where the category starts. In 20, these are the documents Dr Winther-Jensen is said to have taken. Your Honour sees particular 1, documents 1 to 7. As Mr McMeniman said a moment ago, your Honour sees 19 and 20, this information set out. And then, if your Honour turns to page 10 in paragraph 23, it's a pleading that that information was confidential information. That's often referred to in the cases as your Honour will know as having the necessary quality of confidence. Your Honour turns to the EZ respondents defence. Your Honour doesn't need to turn to it. I can tell your Honour that the EZ respondents deny that paragraph.

HER HONOUR: Deny 23.

MS ST JOHN: Yes, your Honour. Dr Winther-Jensen has said he doesn't know and cannot admit that paragraph and, your Honour, that's because he has no access to any documents showing how Fortescue was used and treated and disclosed or protected this information and so the pleading reflects that Dr Winther-Jensen just can't know whether it is confidential information in the sense required in the authorities and that's what's thought to be remedied by this category.

Your Honour will no doubt be aware that the authorities make clear that a plaintiff in a beach of confidence suit must establish that the information has the necessary quality of confidence and that's what this pleading in paragraph 23 goes to. In determining whether information has that quality a lot of the authorities refer to a list of 12 factors. That's not as a checklist, your Honour, but as a guide to help courts determine whether information does have that quality. Could I hand up a case, your Honour. Del Cazalas. That's a case of the New South Wales Court of Appeal.

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HER HONOUR: Yes, of course.

MS ST JOHN: And, your Honour, the list which is cited in very many other authorities your Honour will see at paragraph 40. This is the judgment of Hodgson J. His Honour refers to some factors listed by President Kirby in Wright v Gasweld in determining whether information may be considered confidential and then expanded in some commentary, and your Honour sees this list and I can tell you Honour this list has been taken up in very many other cases including, recently, by the Full Court of the Federal Court. I can give your Honour that authority if your Honour would like. Your Honour sees in factor 1:

> *The extent to which the information is known outside the business.*

In 2:

> *The extent to which the trade secret was known by employees and others involved in the plaintiffs business.*

3:

> *The extent of measures taken to guard the secrecy of the information.*

And skipping down to 6:

> *The ease or difficulty with which the information could be properly applied or duplicated by others.*

And your Honour sees over the page in 41 his Honour says:

> *In my opinion, the stronger these factors are in any particular case the more likely it is that it will be treated as a trade secret that an ex-employee is not entitled to use or divulge.*

Turning back to the pleading, your Honour, and to the particulars to paragraph 23 of the further amended statement of claim. Your Honour can see in 1 the nature of the information. In 2:

> *The IT systems are protected by access control.*

In 3:

> *The information was not publicly available. The circulation of that information was limited to Fortescue staff.*

And so that picks up some of those factors on that list of 12 factors. So, your Honour, our friends say this was not made publicly available. Circulation was

limited to Fortescue staff. Now, the respondents have got no way of testing that, your Honour. They don't have access to documents showing how Fortescue has used this information if it has, in fact, always treated it as confidential, always protected it and kept it close or if it has been disseminating it to third parties, for example, putting some of this information in a tender without a confidentiality restriction. For all we know some of this information might have found its way into a presentation given at a conference by a Fortescue employee and that would be – those would be matters that the respondents would wish to rely on in defending the claim that this information does have the necessary quality of confidence. Your Honour will see that the category - - -

HER HONOUR: Can I just ask this? I'm a bit confused by the words "that is said to be confidential" right at the end. That's a reference back to the material that's particularised, is it?

MS ST JOHN: Yes, your Honour. So your Honour heard from Mr Larish a moment ago that there was a complaint that category 4 in the EZ application went beyond what our friends relied on. This is intended to say, "Whatever information it is in these documents that you rely on that's the information that we want to test the quality of."

HER HONOUR: I see. So if there's information in, say, the file named "Green Iron update" that isn't confidential - - -

MS ST JOHN: That's right.

HER HONOUR: - - - you don't care about its - - -

MS ST JOHN: That's right, your Honour.

HER HONOUR: - - - re-publication.

MS ST JOHN: Yes, your Honour.

HER HONOUR: You only care about the aspects that are confidential. I thought they were all said to be confidential, myself, but - - -

MS ST JOHN: Well, your Honour, they're – we've told our friends that there is a difficulty with the way the confidential information is pleaded, because whole documents are pleaded against us. The case is made clear, that's not an adequate pleading of a breach of confidence case. The first element of such a case is to properly identify the information that's said to be confidential. But we're not taking a pleading point. We're saying, "We don't know what it is, but we're sure you know, because it's your case. So whatever is the information in these very few documents that you rely on, that you say confidential, please give us other documents where you've used or disclosed that information, in some other way, so that we can test your claim that has been kept confidential to Fortescue." That's the basis of the

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category. If your Honour excuse me a moment. And your Honour, of course, those documents aren't in the respondent's hands. There's no way for us to know how Fortescue has used or disclosed this information, except by seeing these documents, and discovering from Fortescue.

And I submit, your Honour, it's certainly no more onerous than what your Honour has ordered the respondents to discover. Your Honour will recall that orders were made in terms of Fortescue's categories 7 and 8. Those are all documents constituting, or referring to, the second specified documents. All documents recording or evidencing any use or disclosure of any more of the first and, or second specified documents, by any one, or more, of the respondents, or their agents. So your Honour, to summarise, your Honour ordered that the respondents give discovery of all documents referring to these documents, in paragraph 19 or 20. And all documents referring to any modified forms of those documents. Your Honour, it was also determined that the respondents should give discovery of all documents evidencing any use or disclosure by them, of those documents, or any modified forms. So that's what has been ordered against the respondents. And I submit a category – category 5 is, certainly, no more onerous than one of those categories.

Indeed, the categories have a very similar effect. We say our friends want to see how we have used this information. And we submit, sauce for the goose is sauce for the gander. We want to see how our friends have used it, so that we can meet that pleading in paragraph 23. Thank you, your Honour.

MR LARISH: Your Honour, just at the outset, this is actually a broadening of the previous category that appeared, because previously, what our friends were seeking were other documents that referred to these documents. But now it's other documents that might have bits of information from these documents in them. But that's by the by. I will address it as it is. It's not clear to us why there should be discovery of the documents sought. Our friend's primary position, as we understand it, is that this will indicate whether the documents relied upon are confidential. Now, of course, that is our onus, and we have to show that they are confidential. Including by reference to some of the matters in the particulars in paragraph 23. Importantly, there is no positive allegation, in paragraph 23 of our friend's defences, that it responds to our paragraph 23, about any particular disclosure that makes these documents not confidential. Your Honour will have seen, in other confidential - - -

HER HONOUR: But why can't they just test the proposition that you put, which is what they seek to do? They could do it by way of a notice to produce. Closer to the trial, perhaps.

MR LARISH: Perhaps, but it – the notice to produce - - -

HER HONOUR: Why not do it by way of discovery, now?

MR LARISH: Well, can I then - - -

HER HONOUR: Any document that records any of the material. A notice to produce that says they want any document that records any of the substance of the – those 11 documents.

MR LARISH: Well, it might be one thing for our friends to be seeking any – a document that says "any public disclosure", for example. Which is really, in effect, what? The - - -

HER HONOUR: Yes, but that requires your client to make a – more of a value judgment - - -

MR LARISH: Yes, or perhaps even - - -

HER HONOUR: - - - than this category - - -

MR LARISH: - - - any external publication, or something along those lines. But here, what the category – it would pick up, is all internal documents that incorporate all – a part of the information. And that's - - -

HER HONOUR: That might work in your favour, or not in your favour.

MR LARISH: Perhaps. But in terms of what the category is said to go to, which is the disclosure or dissemination of the information where the information is internal – that's neither here nor there to what our friends are saying – the speculation that this might have been published in a presentation at a conference, for example. Now, our friends are entitled to put us to proof, and I accept that they are – might be to a lesser extent when they haven't put a positive allegation, as is sometimes seen, in confidential information cases where you say actually, no, that's not confidential. It's published on the internet on X date. But that doesn't entitle them to a sort of free-standing fishing expedition for - - -

HER HONOUR: I'm not sure this is free-standing and fishing, Mr Larish. I think it's fairly narrow, myself.

MR LARISH: And - - -

HER HONOUR: And I think they're entitled to test – they could sit back and let you just try and prove your case - - -

MR LARISH: Yes.

HER HONOUR: - - - and then deal with this sort of category later. But they're choosing to be proactive now. It's a matter for how parties want to run their cases.

MR LARISH: Yes.

HER HONOUR: I can't see that as a fishing expedition.

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MR LARISH: Can I then just deal with another two matters, then, as to the – well, one matter as to the form of the category, which is the references to documents that – we understand documents that incorporate all of the information. But there would appear to be an issue in terms of documents that incorporate part of the information in the sense how does one search for whether something incorporates part of the information in something else.

HER HONOUR: Don't know. There seem to be lots of clever ways of searching, according to the affidavit that you're going to read later.

MR LARISH: Yes. But your Honour will recall that - - -

HER HONOUR: This is a case – and I will raise it later when it comes to the timing issue – where the parties should be sensibly sitting down and agreeing some search terms on all these categories. That could be done in relation to this category, it seems to me. This day and age where there's electronic discovery, but no doubt there are more and more electronic documents being produced every day than when I was in practice – this is a sort of case where that protocol ought to be adopted sensibly by the parties to minimise the time and the cost. And I don't see that happening, and it needs to happen.

MR LARISH: Yes, your Honour.

HER HONOUR: It's not my role to sit down and – with you and agrees list of search terms. That must be capable of being done by the parties themselves who understand the material that they are really – that really needs to be looked at. And the search terms should be common in many of the categories. So I really am struggling here with this sort of war of – that's going on about volume and time.

MR LARISH: Yes. We hear what your Honour says.

HER HONOUR: 10 years ago in practice, that's what I did. So it must have only developed since then. We were still in the dark ages 10 years ago, electronically speaking.

MR LARISH: Your Honour, just pardon me. My – thank you, your Honour. We would embrace the proposal that – our friend's proposed search terms in respect of this category to assist on the searches that would be done. Of course - - -

HER HONOUR: Well ..... that your client will struggle with the notion of part.

MR LARISH: Yes. Or really to understand what our friends are after by - - -

HER HONOUR: Well, if there's – a document has been reproduced in a presentation given internally or externally, then they want that document.

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MR LARISH: Yes. And that's feasible, your Honour.

HER HONOUR: If page 2 of the document has been reproduced, then they want that document.

MR LARISH: Yes. But this is not just referable to cut and paste.

HER HONOUR: They only want it if it's confidential, by the way. Part of the document's not confidential, they don't want that.

MR LARISH: I understand.

HER HONOUR: Correct.

MR LARISH: Yes.

HER HONOUR: That's how I read that category.

MS ST JOHN: With respect, exactly as your Honour has said. The – although I quibble with your Honour's statements generally about search terms, it would be very difficult, your Honour, for us to formulate search terms or even to consider search terms proposed by the applicants in respect of this category, because all we have is the documents. We don't actually know which parts our friends say are confidential. So it would be very difficult for us to formulate search terms to search for information when we don't know what that information is. And that's why the category is formulated in the way that it is.

HER HONOUR: Well, couldn't there maybe be is sensible discussion about whether the whole or only a part of the document's confidential? This matter is going to go to trial. And if I have to force the parties' hands and get you to come up and see me tomorrow with your diaries, I will. And we can work backwards from there. But there has to be some sense imposed on this battle between the parties to get it to trial. And the playing field has to be levelled, and the parties have to provide the discovery. And we have to move forward. So whatever needs to be done to facilitate that so that parties aren't spending months and months combing through material that they ought not have to, those things have to be adopted, whatever needs to be done. And they need to be done sensibly and cooperatively between the parties, or this matter will go to trial after I've retired from the bench.

MS ST JOHN: Thank you, your Honour. We've heard that. If our friends can tell us what information in those documents they say is confidential, that would then facilitate a discussion about which search terms could capture that information. But without doing that, your Honour, we couldn't propose terms.

HER HONOUR: Yes. I understand that. So I'm going to allow the category. And then, perhaps there can be some discussion about whether - - -

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MR COOKE: May it please the court.

HER HONOUR: All right. Six.

MR McMENIMAN: Category 6, your Honour, seeks all documents' recording obligations. And I don't press the word, "said to be." That was criticised.

HER HONOUR: Okay. So it's all documents' recording obligations imposed.

MR McMENIMAN: Yes.

HER HONOUR: So these are essentially terms of employment.

MR McMENIMAN: And as identified in the writer from including. So it's agreements. Some of the agreements are pleaded, the original employment contract or the documents that were signed at the commencement of employment and a separation deed. But it also seeks documents or agreements that might also exist that go beyond that and any directions made to the second and third respondent. Well, it's just the second respondent for us. And your Honour knows that's relevant because there's a heated debate in these proceedings as to what happened at the end of their employment when it came to directions as to working at home, what documents they could take, what they could do with them. And from recollection, your Honour had found that that wasn't an issue that could be resolved at that stage of the proceedings, and it's something for trial. So this would capture those sorts of documents as well. And any internal policies, as your Honour knows, they're picked up as a part of the contract as well to the extent they're incorporated. So it's a confined category, we would say, and it's directly relevant to the breach of competence claim and the breach of contract claim. Because that case your Honour was taken to makes it clear that you have to consider both corners of action when determining what the scope of employment is.

HER HONOUR: Is this opposed?

MR LARISH: Yes, it is, your Honour.

HER HONOUR: Why? It's fairly narrow.

MR LARISH: Doesn't arise on the pleadings. And I will take your Honour to the pleadings in this respect. If your Honour goes to tab 10 – I'm sorry, to tab 11. This is our friend's – the Element Zero respondent's defence. If your Honour then has paragraph 28A. Does your Honour have that?

HER HONOUR: Yes.

MR LARISH: There's an admission that the Dr Kolodziejczyk and Dr Winther-Jensen were under equitable obligations to Fortescue to treat confidential information belonging to Fortescue confidentially, and not to use it for any other purpose. And

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then, in relation to paragraphs – and the same admission, incidentally, is made by Dr Winther-Jensen. And then, in relation to paragraphs 53 to 54, your Honour will see admissions there.

HER HONOUR: Is that the defence?

MR LARISH: In the defence. But just to take you back to - - -

HER HONOUR: I will just see what you plead at 53 to 54.

MR LARISH: Yes. In tab 10. That is - - -

HER HONOUR: They entered into an employment agreement.

MR LARISH: Yes, and then paragraph 54 - - -

HER HONOUR: Term of each of them that they must not use or disclose confidential information.

MR LARISH: Yes. And so, we say that the question of the obligations imposed – it's admitted that there is a contractual obligation. It's admitted that there is an equitable obligation. The question doesn't arise on the pleadings, including, for example, if there were other agreements signed by them. If hypothetically that's the case, it's neither here nor there, because it's accepted that they're subject to obligations of confidence. Insofar as Mr McMeniman referred to directions after the end of the employment of – that's – was covered by your Honour's ruling on category 3, on the last occasion, which sought communications from Fortescue to Dr Kolodziejczyk, in the period between his resignation and his departure. And so, that – the reference to trying to find out that kind of thing is not really what this category what was directed to. That's category 3, and our friends will get any communications that there were in that period. If your Honour has the orders – or the draft orders, from last - - -

HER HONOUR: I've got the orders on - - -

MR LARISH: Yes.

HER HONOUR: - - - the document that Mr McMeniman has provided.

MR LARISH: Yes. So your Honour will see - - -

HER HONOUR: Any instructions?

MR LARISH: 3B and C.

HER HONOUR: Yes. All right.

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MR LARISH: And an equivalent – I've accepted with Ms St John, that an equivalent applies to Dr Winther-Jensen.

HER HONOUR: All right.

MR McMENIMAN: Your Honour, it arises this way - - -

HER HONOUR: How does it go? How does it help you, if you've admitted it?

MR McMENIMAN: It arises this way, on the pleadings. In paragraph 21, it's pleaded that the use of what's said to be the confidential information, was done without authority. And that's denied. And whilst it is accepted – admitted – that there was a term of that employment contract, and a term of - - -

HER HONOUR: That denial is that they didn't use, or take, the confidential information.

MR McMENIMAN: Yes, and it goes to - - -

HER HONOUR: So that's a completely different sort of denial, it seems to me.

MR McMENIMAN: No.

HER HONOUR: They admit, they have an obligation of confidence. That's not in issue in the proceeding.

MR McMENIMAN: Yes.

HER HONOUR: So why do they need to – why do – why does Fortescue have to trawl its records to find any direction given to your clients to not disclose material – confidential material?

MR McMENIMAN: It has to do with, specifically, the policies and directions, with respect to the access and use of information by employees, because this goes to the allegations that were made that the employees were inappropriately using laptops and USB devices, and so forth, in the course of their employment. And then, also at the end of their employment - - -

HER HONOUR: That allegation is that they had copied material - - -

MR McMENIMAN: - - - by having access to documents.

HER HONOUR: - - - and took it out of the organisation, and used it to develop a plant.

MR McMENIMAN: Yes.

HER HONOUR: That's - - -

MR McMENIMAN: The first part of that is an integral part of their claim. And it was taken.

HER HONOUR: You – you're suggesting that there might be a direction that says you can take the confidential information?

MR McMENIMAN: Well, that it's - - -

HER HONOUR: And use it?

MR McMENIMAN: There's policies and directions that were made to the employees that they could – consistent with IT policies, for example, and what they were told they could do at the – towards the end of their employment – use devices at home that weren't Fortescue devices, and access material that was Fortescue material, for the purposes of performing their roles as employees.

HER HONOUR: But I don't think that there's any criticism of your client, to the extent that that material was used. And correct me if I'm wrong, to perform what I call "Fortescue duties". Like any employee, if you're sent home on gardening leave, and you're told to finish – take a lawyer, finish that advice – you can usually use – you – I assume, your firm laptop to do that. If you're a – employed by a firm. But the case is not about that sort of taking of material. The case is about taking the material and using it in your new job.

MR McMENIMAN: I will - - -

HER HONOUR: So - - -

MR McMENIMAN: This category focuses on the first part, which is - - -

HER HONOUR: Yes, use of the laptop.

MR McMENIMAN: - - - the access to the material.

HER HONOUR: But I don't think it's in dispute that they could – is it? Access the material while they were Fortescue employees.

MR McMENIMAN: They - - -

HER HONOUR: Are they in dispute?

MR McMENIMAN: It has just been drawn to my attention, at paragraph 31, particular 2, that there are inferences available from the second and third respondents' exfiltration of the information inferred from paragraphs 19 and 20 above.

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HER HONOUR: Sorry, 31(ii) of the statement of claim:

Each of Dr Kolodziejczyk and Winther-Jensen use the Fortescue information in designing, engineering, constructing, operating and/or determining.

Is that the one I should be looking at?

MR McMENIMAN: Yes.

HER HONOUR: Or the particular?

MR McMENIMAN: The particular.

HER HONOUR: Inferences available. Well - - -

MR McMENIMAN: It's relevant - - -

HER HONOUR: I don't understand. If you took a copy and then you used it for a purpose other than a Fortescue purpose that's the case and if you're – if you're looking for a policy that says you can take a copy it must be inferred while you're a Fortescue employee, but they're not criticised for taking the copy. They're criticised for using it outside of their Fortescue employment and, surely, that's – you know, there's a barrier up between the two.

MR McMENIMAN: It goes to - - -

HER HONOUR: And no direction, I assume, is going to exist that says you can use it once you leave Fortescue. Is that what you're looking for? You can take it and you can keep it and you can use it whenever you like.

MR McMENIMAN: It does go to the scope of the permitted use within the scope of the duty of confidence in both contractor and in equity and then - - -

HER HONOUR: Well, I don't understand that if you admit you've got a duty of confidence.

MR McMENIMAN: But that is – part of the boundaries of that is what are the limits of the permitted use?

HER HONOUR: So you will be looking for a finding from the court that says, "You had a duty of confidence but it didn't extend to your use of material you took from your employer and used it for your new employer."

MR McMENIMAN: It is part of the - - -

HER HONOUR: Is that your case?

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MR McMENIMAN: - - - the second and third respondents' defence that the extent to which they had access to material that was Fortescue material on their personal devices and to the extent that it was retained on those devices post their employment – that's explicable by reference to the directions and policies that were in place at Fortescue which they relied on and informed the scope of their duties of competence to their former employer.

HER HONOUR: But not to use it in their subsequent employment. That's the case against your clients.

MR McMENIMAN: And it's – and they're inferring use from access.

HER HONOUR: Sorry, your clients infer that they were able to use – they had carte blanche to use the information because they were able to access it.

MR McMENIMAN: No.

HER HONOUR: No.

MR McMENIMAN: No. Fortescue's case is it's to be inferred from the fact that there were documents that existed on external devices of the second and third respondents that not only did they have it - - -

HER HONOUR: That they took copies and used it, yes.

MR McMENIMAN: - - - but they used it.

HER HONOUR: Yes.

MR McMENIMAN: It's our defence - - -

HER HONOUR: But what is this material going to?

MR McMENIMAN: Part of our defence that there were directions that were made to them as to why they could have such documents on those devices.

HER HONOUR: Yes. Yes, and that would be caught by the category 3.

MR McMENIMAN: Not necessarily because it's only directed – category 3 is only directed to the end of employment. These scientists were - - -

HER HONOUR: How hard can it be to find these policies if they exist. There's an HR department, presumably, or people and culture or whatever it's called now in – at Fortescue. It's a big organisation. We know that from Mr Dewar's most recent affidavit. It just seems it will be quicker to find them than for us to have this debate.

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MR McMENIMAN: I think it's part of the affidavit of Mr Dewar that's yet to be read that they're going to be uploading all the human resources in boxes and searching them.

HER HONOUR: Does someone have a file called "policies"?

MR LARISH: I suspect if the category is limited to policies regarding use of confidential information.

HER HONOUR: Yes. Why wouldn't – I mean, agreements you're going to have. Presumably, the employment agreements are already available. Why wouldn't it be limited to internal policies?

MR McMENIMAN: Your Honour, respectfully, directions are also important because - - -

HER HONOUR: I don't know what that means.

MR McMENIMAN: Well, they are directions that have been made to the third – the second respondent, sorry.

HER HONOUR: Oral, written - - -

MR McMENIMAN: Well, they're only going to be in documents, and so they're going to be in writing and emails, presumably, or some form of communication. And it's been the subject, at least insofar as it concerns the latter period of his employment of evidence by Fortescue on the search order. And it just seeks to ensure that we have all documents - - -

HER HONOUR: That's category 3 – the directions were made at the time when it was terminated. That will be picked up by category 3.

MR McMENIMAN: Yes.

HER HONOUR: So - - -

MR McMENIMAN: But that's the end of his employment as opposed to throughout his employment, when - - -

HER HONOUR: Well, does he say that directions were made to him throughout his employment? There's nothing in the defence that says that.

MR McMENIMAN: Well, it arises from the denial on paragraph 21 with respect to authority to access that material.

HER HONOUR: Well - - -

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MR McMENIMAN: And there was evidence before your Honour in the search order application that employees were travelling a great deal. They were using laptops and USBs and the like throughout their employment.

HER HONOUR: I think that makes the category very broad, particularly as you want directions on it in respect of intellectual property. It must be in respect of use of intellectual property.

MR McMENIMAN: Yes.

HER HONOUR: You want it including but not limited to – I think agreements must be out. You're going to get – must have those already or will get them. I don't understand directions and only direct it to the second respondent. But internal policies – I'm prepared to order.

MR McMENIMAN: May it please the court. That comes to - - -

HER HONOUR: So I think the category should read all documents, reporting obligations imposed on Dr Kolodziejczyk in respect of the use of intellectual property and confidential information during his employment with Fortescue, including but not limited to - - -

MR McMENIMAN: Fortescue internal policies.

HER HONOUR: - - - Fortescue internal policies in effect at the time and any time during his employment.

MR McMENIMAN: Thank you. That leads to category 7, your Honour. Just - - -

HER HONOUR: Sorry. Mr Larish, you aren't happy with that – don't like including but not limited to.

MR LARISH: No.

HER HONOUR: Nor do I.

MR LARISH: Well, if it was about the policies, then may I respectfully suggest that all – really just all, rather than - - -

HER HONOUR: All internal policies in effect.

MR LARISH: All internal policies that record that. Because otherwise - - -

HER HONOUR: Yes. I think that's right. All internal policies – reporting obligations imposed on Dr Kolodziejczyk in respect of the use, intellectual property and confidential information during his employment with Fortescue, which were, in effect ..... in effect at any time during his employment there. All right.

MS ST JOHN: Would your Honour indulge me for a moment. My client is not mentioned in that category, but I understood Mr Larish to say a moment ago that - - -

HER HONOUR: Imposed on Dr Kolodziejczyk and/or Dr Winther-Jensen.

MS ST JOHN: Please the court. Thank you.

HER HONOUR: All right. Seven.

MR McMENIMAN: This seeks documents that record creation and ownership of the copyright works that are completed. The main response from the applicants is to say that that's a matter for them to prove, even though they haven't pleaded who the author's works are and et cetera. And they say that creation and ownership can be seen from the metadata within the native versions of these documents that are said to be copyright works.

HER HONOUR: Which you've been provided with now.

MR McMENIMAN: We have. And I'm instructed that some of them will contain such metadata and some of them don't.

HER HONOUR: Well, perhaps you need to get the documents first, and then if there's a problem, you can raise it.

MR McMENIMAN: Yes, your Honour.

HER HONOUR: Is that the way to proceed.

MR McMENIMAN: Yes. We can do that. Category 8 - - -

HER HONOUR: Seven is out.

MR McMENIMAN: I'm told by Mr Larish that category 8 is agreed - - -

HER HONOUR: Right.

MR McMENIMAN: - - - with the amendment to take out or referring to.

HER HONOUR: All right.

MR McMENIMAN: And that - - -

HER HONOUR: Nine is gone. That leaves 10.

MR McMENIMAN: That leaves the amended 10. We've sped up.

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HER HONOUR: Sorry, it looks better?

MR McMENIMAN: We've sped up.

HER HONOUR: We have. I don't know that I understand 10.

MR McMENIMAN: Fortescue's – well, the claim, your Honour – I will need to take you to 12 to 14 - - -

HER HONOUR: Yes.

MR McMENIMAN: - - - and 19 to 20 - - -

HER HONOUR: 19 to - - -

MR McMENIMAN: - - - of the further amended statement of claim. 12 – you've been addressed on to death.

HER HONOUR: So that's the work that was undertaken.

MR McMENIMAN: Yes.

HER HONOUR: So let's call – that's the work paragraphs.

MR McMENIMAN: And then 14 makes - - -

HER HONOUR: And then 14 says, "Well, we can't find any of these documents."

MR McMENIMAN: And then it particularises, in (i), that there have been searches that have been conducted for it, that are detailed in that affidavit. And so, what category 10 seeks is the documents that record, or set out, the results of any such investigations, or searches.

HER HONOUR: Don't the affidavits do that, though? Isn't that what Ms Hantos says? I can't recall it in detail.

MR McMENIMAN: Well - - -

HER HONOUR: Isn't that what she does in her evidence?

MR McMENIMAN: Well, ultimately, the only way that that can be tested, and this allegation - - -

HER HONOUR: Is to cross-examine her.

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MR McMENIMAN: By reference to documents. So if there are documents that fall within category 10 that weren't included in Ms Hantos's affidavit, they ought to be discovered.

HER HONOUR: But what would those documents look like? I'm a bit – that's – I'm a bit puzzled.

MR McMENIMAN: They may not assist Fortescue. They may be documents that assist the respondent's case, for example.

HER HONOUR: They may be. But I'm just - - -

MR McMENIMAN: It directly arises from the pleaded allegation, in paragraph 14. Using the words:

> *...took, or otherwise caused to be made unavailable.*

Which is a fairly nice way of saying that they've destroyed them, or destroyed any trace of them. And they say that that arises because they've conducted what can only be assumed to be exhaustive searches – investigations of their records. And they rely on Ms Hantos to support that allegation. And the only way that that can sensibly be tested, we respectfully submit, is for the production of all the documents that record – and that's all we're seeking – record, or set out, the results of those investigations and searches into the conduct. And the documents that are pleaded in paragraphs 12 and 13, and 19 and 20. Paragraph 14 is a key component of their case, because they say that information must have existed. They can't find it, therefore their case rests on your Honour finding, at trial, that they conducted exhaustive investigations to and find these documents, and they don't exist. And therefore, some sort of fairly nice way of saying that there has been some sort of fraud committed, in terms of destroying documents. And the only way that that could be tested is by reference to the documents they have in the investigations - - -

HER HONOUR: You say - - -

MR McMENIMAN: - - - that they undertook.

HER HONOUR: - - - so that you can prove the inadequacy of the search. Is that the point?

MR McMENIMAN: Well, it rests on the acceptance of Ms Hantos's affidavit evidence – his paragraph does – that they conducted such investigations, and you should accept that, A, there were documents that existed, and B - - -

HER HONOUR: Well, they have to get - - -

MR McMENIMAN: - - - they can't find them.

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HER HONOUR: - - - over the first hurdle, first - - -

MR McMENIMAN: Yes.

HER HONOUR: - - - don't they?

MR McMENIMAN: Yes. And part of that has to do with them piecing together, from her evidence, traces as to things that they say you would infer from that, that other things existed, or didn't exist, and therefore they've been taken. And the only way that can be tested, sensibly, by the respondents - - -

HER HONOUR: I understand all that, but I'm not sure what these documents look like. Perhaps I need to hear from Mr Larish what – I can't recall what's in – I've only got Ms Hantos's – I've only got the annexure. I don't actually have the affidavit.

MR McMENIMAN: I can hand up a copy of her affidavit, if that would assist?

HER HONOUR: I can see if I can find one. Save a tree.

MR McMENIMAN: Your Honour, I've got a folder with a few of the affidavits that Fortescue relied on at the - - -

HER HONOUR: All right.

MR McMENIMAN: - - - ..... and the second tab is - - -

HER HONOUR: Have the folder back at the end.

MR McMENIMAN: - - - Ms Hantos. I

HER HONOUR: So, for example, patent applications.

MR McMENIMAN: It kicks off at part G and it's red. So, I assume, there has been an order made.

HER HONOUR: There may or may not have been. I don't know what – how up-to-date this one is. So she undertook a – someone stop me if I breach a confidentiality order. She undertook a search. So you would say, for example, in relation to these searches and then she locates some emails and – I think it's only the material in boxes but I might be wrong – and she says - - -

MR McMENIMAN: I'm informed by my learned friends that this version of the affidavit does not reflect the orders you've made.

HER HONOUR: No, it doesn't. No.

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MR McMENIMAN: And I apologise for that.

HER HONOUR: So – that's all right. I won't – I will try not to say anything but what would – what do you say - - -

MR McMENIMAN: Take, for example, paragraph 55.

HER HONOUR: Yes.

MR McMENIMAN: There's a selection of things that have been extracted there. There may be, in the course of Ms Hantos' searches – or Dr Bhatt because he gives evidence about doing some reviews as well of various documents and investigations into the SharePoint drive and other documents at Fortescue – that they identify a document or email that cuts across what has been put in this affidavit as supporting the case that's propounded by Fortescue or the outcome in a draft investigation report that indicates that there are other documents beyond those that have been put in this final affidavit that actually go to the same issue and may provide context or, actually, not assist the conclusion that is being pressed by this evidence in paragraph 14 of the further amended statement of claim. One can only test that evidence as to these investigations and the outcomes of them by having the documents that record what was done and the outcome.

HER HONOUR: So what you're looking for is, really, I think, any working papers or emails or other documents that, say, Ms Hantos created in coming to her conclusions in this affidavit?

MR McMENIMAN: Yes.

HER HONOUR: In relation to her searches.

MR McMENIMAN: Yes. We sought to be more directed in setting out the results of but, yes, your Honour, that would cover draft working papers and the like or - - -

HER HONOUR: I understand. They're not privileged. Mr Larish, what do you say about this category?

MR LARISH: Yes, there's a couple of problems with it, your Honour. The first is, yes, paragraph 14 is there because we furnished the court with the pleading for the purposes of the search order application and, indeed, for the purposes of discovery but once we obtain discovery, at that point, we will - - -

HER HONOUR: Will 14 come out?

MR LARISH: Exactly. It's unclear to us sitting here now whether we will press 14. It will depend – I can't say 100 per cent we won't but we would advise our friends at the time of our evidence-in-chief because, by then, it has been overtaken by events. We have our discovery, we have the documents and those are the documents that we

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would run with and the question of whether we couldn't locate them just doesn't arise because we would have them through discovery, and so we could, at the time of our evidence-in-chief, advise our friends whether we press paragraph 14. It's, clearly, not an element that needs to be made out for us to establish our causes of action. Ultimately, our causes of action, one would think, would generally be established based on identified material and, of course, if we don't press paragraph 14, then we wouldn't be reading Ms Hantos' affidavit. And we would advise our friends at the time of our evidence in chief which, if any, of the interlocutory material that we are relying upon. So that's the first point.

The second point is that this plainly overlaps with the material that was the subject of the search orders. And there's a concern that our friends are seeking to go behind the – or not re-ventilate, but seeking to re-enliven material that they say somehow relevant to the search order decision, because, well, they would say here now we have records of searches and that may affect the decision that your Honour came to. The result the investigations and the searches, in effect, were relied upon to establish the prima facie case for the purposes of the search orders.

And then the third issue is that Fortescue's views as to the investigations or results is likely privileged. Ms Hantos is a patent attorney, and there's patent attorney privilege. And she was doing what she was doing for the purposes of an anticipated proceeding. I accept that privilege is not a complete answer, but it's a relevant consideration. And so for those reasons, at the very least, it should be deferred until after our evidence in chief. And our friends could – if we're relying upon it – re-enliven the category or perhaps tailor it to whatever it is that we're relying upon, if anything, about the investigations or searches.

HER HONOUR: Can it be deferred?

MR McMENIMAN: Respectfully, your Honour, we're here to address the pleaded case and discovery on the pleaded case. This is – as the exchange between you transpires – it's a fairly narrow category of documents. And any privilege in these is for another day. All have been waived by reason of the evidence that she put on.

HER HONOUR: Might have been waived.

MR McMENIMAN: There will be a real – might have been waived. And it is a key part of their case that they can't find the information. It must have existed. They've conducted these exhaustive investigations, and therefore it must have been destroyed or taken – taken and the traces of it destroyed. The only way that that can be tested is by reference to the evidence they've put on, which they say are the investigations that provide the foundation for that allegation. And it is a very serious allegation that they've made. No matter what words they've used, they are essentially accusing the second and third respondents of destroying documents purposefully to cover their tracks.

HER HONOUR: Or taking them.

MR McMENIMAN: Taking and made unavailable. That can only be tested by reference to the evidence that they've relied on in support of that allegation, which is setting out either a fulsome recitation of the investigation in the outcomes or a selection of it. And if it's a fulsome recollection and setting out of the investigations and the results, then there may not be anything to produce. If it's been selective, then we should be entitled to those documents which would allow us to test the evidence of Ms Hantos and Dr Bhatt as to the investigations that they took over a three month period and grounded not just the search order - - -

HER HONOUR: So you really only want the results of the investigations or searches to the extent they're not included in Ms Hantos' affidavit.

MR McMENIMAN: Yes, your Honour.

HER HONOUR: Well, that's - - -

MR McMENIMAN: Recording the results of the investigations and searches.

HER HONOUR: That's not how the category reads.

MR McMENIMAN: Recording or setting out the results.

HER HONOUR: Of any investigation or searches, but only to the sent Ms Hantos doesn't give evidence about them.

MR McMENIMAN: Particularised there, but then your Honour might recall that Ms Hantos' affidavit is also picked up by Dr Bhatt, because both of them were working in conjunction with each other. And his evidence is tied in with hers with respect to the investigations that both of them were taking with respect to emails in SharePoint. So - - -

HER HONOUR: The outcome of the investigations is in evidence.

MR McMENIMAN: Yes. We don't need that.

HER HONOUR: You don't need that.

MR McMENIMAN: No.

HER HONOUR: You only need – what you want is – you want what is not in evidence - - -

MR McMENIMAN: Yes.

HER HONOUR: - - - if there is anything.

MR McMENIMAN: Yes, and that's the note that St John just drew to my attention.

HER HONOUR: So you want a narrower category than you've actually described at paragraph 10 of this document.

MR McMENIMAN: It would be paragraph 10, but noting that no documents need to be produced that have already been put in evidence by Fortescue.

HER HONOUR: Well, I'm not sure that any documents have been put into evidence, because Ms Hantos describes what she did, and what the outcome of that work is. And so does Mr – Dr Bhatt, to the extent he did the same.

MR McMENIMAN: Yes.

HER HONOUR: So really, what you want are documents recording, or setting out the results of, any investigations or searches for those – for the documents, or conduct identified in those paragraphs, to the extent they are – that those results are not already – are not the subject of evidence, or otherwise described by Ms Hantos, or Dr Bhatt, in their relevant affidavits.

MR McMENIMAN: Your Honour, can I have a moment, please? Just to - - -

HER HONOUR: Yes, of course. Your suggestion, it seems to me, as you stand there, is that we don't know what the universe of searching was. And there might have been some searches undertaken where material was found, but Ms Hantos has decided not to tell us that. Or not to tell the court. That's quite a serious allegation in itself.

MR McMENIMAN: Potentially, or it could be contextual.

HER HONOUR: Well, I don't understand that. But anyway.

MR McMENIMAN: As in, it's not – we're not necessarily having to say that there was some sort of intentional conduct to exclude things, because there may be things, as a matter of context, that came out of – or in the course of those investigations – that, for whatever reason, wasn't included In her evidence. But maybe something that, on instructions, we're told is relevant to the broader context. And we may want to say something about it.

HER HONOUR: Okay.

MR McMENIMAN: And so, there's not – I'm just making clear that there's nothing nefarious, in terms of us seeking to – standing here, impugning Ms Hantos, or Dr Bhatt. But more being able to test their evidence, and also the outcomes of these investigations and searches.

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HER HONOUR: All right. It's a fairly narrow category. Ms Hantos should be able to tell you what - - -

MR LARISH: Yes.

HER HONOUR: - - - the universe of material is.

MR LARISH: But our friends talk about testing evidence, but we haven't said that we are going to.

HER HONOUR: Yes, but you might.

MR LARISH: Yes, and I – that's - - -

HER HONOUR: And we should be dealing with the discovery now, on the cases pleaded. I – Mr McMeniman has made that - - -

MR LARISH: Well - - -

HER HONOUR: - - - point. That this is the case that they have to answer.

MR LARISH: Yes. Well – and - - -

HER HONOUR: And if you don't, then, yes, it will all have been for naught. And all that material can be put to one side, and Ms Hantos won't be called, and we will move on. But it can't be a very big universe of material, really. These searches were undertaken over a relatively narrow period, from memory.

MR LARISH: Yes.

HER HONOUR: 15 to 24 April, according to paragraph 50. That's only two weeks. If information, I assume, is all in one spot.

MR LARISH: Yes.

HER HONOUR: It was only a year ago.

MR LARISH: But - - -

HER HONOUR: Less than a year ago.

MR LARISH: - - - one queries to what end this would be being done, if Ms Hantos has not been called, and if we're not relying - - -

HER HONOUR: Well – but we don't know that at the moment.

MR LARISH: No, well - - -

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HER HONOUR: And the discovery is not ordered. We're dealing with this application now. We may be up to the sixth further amended statement of claim – I hope we're not – by the time of the trial.

MR LARISH: Yes.

HER HONOUR: It might look like a different case.

MR LARISH: Yes.

HER HONOUR: But there's not much we can do about that.

MR LARISH: May I suggest this, to avoid us rolling applications, that if, to the extent that Fortescue is relying on that material, come its evidence in chief, then it provides that discovery. And if it's not – so – the – an order can be made, so we don't have to come back and debate it. And if it's not, then it doesn't need to be. It's just unclear to us why our friends would need that material any earlier. And it seems to be in support of a serious allegation, as your Honour observed, of the things being excluded for the purposes of the search or - - -

HER HONOUR: Although, perhaps, not intentionally.

MR LARISH: Yes.

HER HONOUR: Well, we would have to – that would have to extend to Dr Bhatt's affidavit as well.

MR LARISH: Yes.

HER HONOUR: Mr McMeniman, can we do it that way?

MR McMENIMAN: Yes, your Honour, and in terms of – the only issue with the reformulation might be using the word "described" in their evidence might require reviewers to turn their mind to and evaluate whether it has been described in the evidence as opposed to just if it's a document that hasn't been included in their evidence.

HER HONOUR: Well, I'm happy to go with not included but it's – the caveat is in the event that the plaintiffs notify or applicants notify that they intend to rely on that evidence. So, in other words, if they're not going to rely on Ms Hantos or the relevant part of Dr Bhatt's affidavit that discovery is not provided. That's what's proposed at the moment.

MR McMENIMAN: Sorry, I might be a bit daft in following the logic – sorry, the sequence of events but - - -

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HER HONOUR: So this discovery wouldn't happen now. It will only happen – I'm just seeing – have I made orders for evidence yet?

MR McMENIMAN: No.

HER HONOUR: No. It would only happen once Fortescue nailed its colours to the mast and said, "These are the affidavits we're relying on" and if it doesn't – if that world doesn't include, for example, Ms Hantos' affidavit this discovery won't be provided. If it does, then this discovery will be provided and very quickly.

MR McMENIMAN: Well, your Honour, it can only be linked to paragraph 14 of - - -

HER HONOUR: Yes.

MR McMENIMAN: Because - - -

HER HONOUR: Because they're not – if they're going to amend they would have to amend to take away 14 or, at least, take away reliance on Ms Hantos.

MR McMENIMAN: But when? Your Honour, these documents will identify potentially relevant contextual matters that our clients might want to rely on.

HER HONOUR: On the cases currently pleaded.

MR McMENIMAN: Yes, and it's one in which - - -

HER HONOUR: Being told that the case - - -

MR McMENIMAN: - - - the applicants want to push off into the ether and, respectfully, your Honour, we embrace what you said in terms of dealing with the application today and a narrow category of documents to be produced and then if, down the track, when the applicants – if they choose to amend their claim to be something entirely different – and it would be entirely different without paragraph 14 – then that material may not be relevant to be tendered at trial but it ought not result in some complicated regime over a period of a year or two as to the production of documents, in our respectful submission.

HER HONOUR: We're here now.

MR LARISH: Yes, but the order could be made - - -

HER HONOUR: It could be.

MR LARISH: - - - made now but - - -

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HER HONOUR: But I don't think it – I'm – it's not attractive. If the current – the way this proceeding is running the parties are all going to be focused on discovery over the next three, four, five whatever months – should all be done. I don't think it will add to the quick – the efficient disposal of this proceeding to do things piecemeal - - -

MR LARISH: May it please the court.

HER HONOUR: - - - and I don't wish to encourage amendment. If – I think we need to deal with matters as they arise. So I think the category needs, though, some amendment. Mr McMeniman, you said it should be documents recording the results - - -

MR McMENIMAN: Yes.

HER HONOUR: - - - of any investigations or searches for the documents or into the conduct identified in the further a statement of claim and – but don't – the rider is to the extent those results are not included in – included in or described - - -

MR McMENIMAN: Your Honour, might - - -

HER HONOUR: - - - in the affidavit of Ms Hantos.

MR McMENIMAN: Might I respectfully suggest the word "recorded".

HER HONOUR: Yes.

MR McMENIMAN: Not "recorded in".

HER HONOUR: Recorded in the affidavit of Ms Susanne Monica Hantos – I think it's sworn – affirmed 1 May 2024 or the affidavit of Dr Anand Indravadan Bhatt. Now, is that the first – Dr Bhatt had a series of affidavits.

MR McMENIMAN: It's his first one, your Honour, which is in the 6 February court book.

HER HONOUR: The affidavit – it's that one.

MR McMENIMAN: 1 May 2024.

HER HONOUR: So I don't know if that's been affirmed or sworn – affirmed on 1 May 2024. All right.

MR McMENIMAN: Thank you, your Honour. That's - - -

HER HONOUR: It's a fairly narrow - - -

MR LARISH: Yes. There's just – there was – your Honour will recall there was one other species of investigation, which were the – Mr McKemmish's reports - - -

HER HONOUR: That they particularise - - -

MR LARISH: - - - that the same would apply to, because otherwise - - -

HER HONOUR: Where – is Mr McKemmish referred to in Dr Bhatt?

MR LARISH: I think his report is annexed to Mr Huber's affidavit. We can get your Honour the reference.

HER HONOUR: Right. And we also include Mr McKemmish's report. Mr McMeniman - - -

MR McMENIMAN: No.

HER HONOUR: We will also include – you don't want another copy of Mr McKemmish's - - -

MR McMENIMAN: No. I don't want a copy of that report, but drafts and the like.

HER HONOUR: Well, whoever's the scribe needs to add and Mr McKemmish's report, which is annexure whatever, to the affidavit of Mr – I think it's Adrian Huber and the date.

MR LARISH: And, your Honour, the final matter – the draft thing is just – my friend has relied on 12 to 14 - - -

HER HONOUR: 19 to 20 - - -

MR LARISH: Yes. Allegations in relation to 14 – concerns 12 and 13. He hasn't relied on 19 to 20 in this justification of relevance.

MR McMENIMAN: Well, okay then. Back to particular 5 at paragraph 19, which they say that it's to be inferred that we've taken other - - -

HER HONOUR: Except that no searching is referred to there, is there? Your proposition was we want to investigate or be able to challenge the ambit of the search, so I think it is limited to 12 to 14.

MR McMENIMAN: Thank you, your Honour.

HER HONOUR: So does that then deal with - - -

MR McMENIMAN: If it please the court, may swap seats.

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HER HONOUR: And I think that whatever we've determined flows into your client's application, Ms St John - - -

MS ST JOHN: Thank you, your Honour.

HER HONOUR: I was provided with – it follows, does it not, that I would make orders as proposed in your proposed short minutes of order, unless I've made any amendment to paragraph – what appears as paragraph 5 in that schedule.

MS ST JOHN: Yes, your Honour. Yes, your Honour.

HER HONOUR: All right. All right. So we've moved – that's moved us on, I think. But Mr Cooke, you're still not happy.

MR COOKE: Sorry. Just in relation to that last - - -

HER HONOUR: You wish to press, yes.

MR COOKE: Sorry. Just in relation to the last matter, I'm just reminded by my learned junior Ms Yates that there was another investigation in evidence, which was the - - -

HER HONOUR: Which was that?

MR COOKE: The Deloitte investigation, which is in the Huber affidavit.

HER HONOUR: Right.

MR COOKE: In other words, wouldn't want to be producing that again because it's already been included in the evidence.

HER HONOUR: I'm sure Mr McMeniman and Ms St John don't want to look at that again.

MS ST JOHN: No.

MR McMENIMAN: Not the report that was put in evidence.

HER HONOUR: Not the actual – yes. Yes. Well, that can be added as well.

MR COOKE: Thank you, your Honour. Your Honour, now turn to - - -

HER HONOUR: Want to have another go at category 2 and category 6(a).

MR COOKE: Well, it would be my first go, your Honour.

HER HONOUR: Would it?

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MR COOKE: I think so, your Honour.

HER HONOUR: I thought you failed on your first go, Mr - - -

MR COOKE: Your Honour kindly - - -

HER HONOUR: My memory is getting worse and worse, so - - -

MR COOKE: Your Honour kindly indicate that could renew my application I have in – if I had – if we discussed the search terms in relation to category 2, which we have.

HER HONOUR: I take it they're not agreed.

MR COOKE: Apparently not. And then in relation to category 6(a), I think your Honour had had enough by that point but said I can make that application.

HER HONOUR: I was exhausted. Right.

MR COOKE: You were exhausted. So was I, your Honour. But – could I just hand up – we've proposed some short minutes of order.

HER HONOUR: I think I've got them. Have they changed since this morning?

MR COOKE: Slightly.

HER HONOUR: Slightly? All right. Well, I will put a line through what I've got.

MR COOKE: Yes. It's just to make it clear what was intended, that's all – in the first page. I think that's how everyone interpreted it, but – so in relation to category 2, if I could deal with that first. We did take – category 2 – we did take up the suggestion of proposing search orders. So category 2, as set out in annexure A, that's exactly the same as category 2 before. But the documents would not only have to fall within category 2, but they have to be picked up by the search order. So the universe of documents that would have to be searched, your Honour, would be those that are responsive to the search order – search terms. And then, a subset of them that are responsive to category 2, would then need to be discovered. In the usual way that search terms work, your Honour.

HER HONOUR: Yes.

MR COOKE: And so, what we did – you remember there was a discussion about junior solicitors, and – with your Honour and I lamenting about how long ago it was that we were. This would assist - - -

HER HONOUR: This would make their lives easier, would it?

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MR COOKE: It would make their life a lot easier. They could get out on the weekend, and enjoy themselves. Unlike the bad old days when - - -

HER HONOUR: Yes.

MR COOKE: - - - we were all locked in the cupboard.

HER HONOUR: When we – that's right.

MR COOKE: Yes. Now – so that – that's - - -

HER HONOUR: With hard copy documents.

MR COOKE: - - - the idea. And so, what we've done is we've proposed some search terms. We think, very fairly, in our annexure B, to make life easy. We've got the late – the date limitations, your Honour – that are reflective – there, as well. And – but we understand that nonetheless, notwithstanding that we follow the indication that that's opposed by the respondents – notwithstanding it's a narrower universe as contemplated at the last case management hearing. Now, we can – Ms Yates is in a position to justify the search orders, if your Honour wanted to - - -

HER HONOUR: The search terms.

MR COOKE: The search terms. The search terms. So your Honour, Ms Yates is here. She's available to do that. Or your Honour could simply order the junior counsel from the parties to agree the search terms. And then they would have to reach an agreement as to what they are. But we're in your Honour's hands as to how you want to deal with that.

HER HONOUR: Well, perhaps I need to hear about what the objection is if there are now search terms which would, I imagine, narrow, at least – at least, would provide a world of documents, which could then be - - -

MR COOKE: And also, just to remind your Honour, category 2 - - -

HER HONOUR: - - - searched against these categories - - -

MR COOKE: Yes.

HER HONOUR: - - - A through X.

MR COOKE: Exactly. And A to X, just to remind your Honour. These - - -

HER HONOUR: A to X is a lot, though.

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MR COOKE: - - - are – they're authored. They're authored by the second and third respondents. They're the documents. They're their statements. So the idea is, you identify a universe of documents using the search terms. And then, there's a search made of that body about what is in the various documents – the work referred to by the respondents. Now, your Honour, that's very probative evidence. I will be cross-examining them, no doubt, at trial about what on earth these state – what on earth they meant by these startling statements. And if we don't have this body of evidence, then your Honour, unfortunately, is going to be missing out, we fear.

HER HONOUR: Just remind me. Take subparagraph P, for example. The development and testing work, as referred to in Dr Bhatt's affidavit in particular pages – these are extracted from emails - - -

MR COOKE: Emails. Yes.

HER HONOUR: - - - that emanate from the second and third respondents.

MR COOKE: That's right.

HER HONOUR: And so the proposal is that the second and third respondents – so the search having been undertaken of the – their respective documents – held by them, at the moment, against these search terms – which might then produce X number of documents, would then be reviewed. And to the extent they were relevant to any work of the nature described at A to X - - -

MR COOKE: Yes.

HER HONOUR: - - - they would be discovered.

MR COOKE: Yes.

HER HONOUR: But these are, essentially, documents held on their current laptops and - - -

MR COOKE: Yes, exactly.

HER HONOUR: - - - Element Zero's - - -

MR COOKE: Yes.

HER HONOUR: - - - electronic documents.

MR COOKE: Yes, that's right.

HER HONOUR: Yes. Okay.

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MR COOKE: I mean – so these – presumably, these aren't fictitious things that the second and third respondents are referring to. I mean - - -

HER HONOUR: No, but it's work that they did while at Fortescue.

MR COOKE: Yes.

HER HONOUR: Yes. All right.

MR COOKE: It's highly probative.

HER HONOUR: Mr McMeniman, or who wants to go first?

MR McMENIMAN: Ms St John's going to go first.

MS ST JOHN: Thank you, your Honour. Could I ask your Honour to turn to the transcript on the last occasion, that's 6 February. Does your Honour have a copy of that? I can hand one up.

HER HONOUR: I should. I should, yes. I do, I'm told. I will just have to find it. Transcripts. Right. Yes, when was the last occasion?

MS ST JOHN: 6 February, your Honour.

HER HONOUR: Yes.

MS ST JOHN: And if your Honour turns to page 29, line 4, this follows a description from Mr Cooke about category 2 – what it was relevant to. Your Honour says – I'm going to try to shortcut the transcript about this.

HER HONOUR: I will see what I've got. Yes. What am I meant to be looking for?

MS ST JOHN: Yes, your Honour. So your Honour says beginning at line 4 on page 29 - - -

HER HONOUR: Yes.

MS ST JOHN:

> *I'm trying to understand. I'm the solicitor just come out of university trying to work out what I'm looking for.*

And your Honour goes on:

> *I have to look for a document, irrespective of that document's date, that might evidence work that was undertaken by the second respondent in relation to no temperature oxide reduction technology. Is that correct?*

And then your Honour says:

It seems to me to be a very difficult task.

Mr Cooke says:

No, because only reasonable searches are required.

But, your Honour, pausing there. Searching is not the whole of the problem. In fact, that, I respectfully suggest, is not what your Honour had in mind in those comments. What your Honour, I submit, was talking about there is not the business of finding the documents to review. It's the exercise of taking the pool of documents produced and comparing them against this very long category. I will go on, if I may, your Honour. Over the page – this is page 30 beginning at line 17 – your Honour has submissions from Mr Cooke and at the end of those submissions at line 35 Mr Cooke says:

If there's a document that's no longer in the respondent's hands, of course, they can't produce it but it still has to go into the discovery list. That's all part of the record.

And he says:

If they never had it, they never had it so there's no oppression.

That, your Honour, also is not the oppression. The oppression is not the searching and it's not the production. It's the intermediate step which is taking the pool of documents and comparing them against the categories and that's the difficulty your Honour was talking about and nothing has been done, your Honour, to reduce that work. Over the page on page 31 your Honour says:

One way of skinning a cat was to agree search terms.

Your Honour says:

It's a very extensive category.

Your Honour says:

It has got 24 subcategories. It's an enormous task.

You say:

It's only a matter of getting instructions. It seems it's a bit more than that.

And your Honour says:

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In the form it's drafted it crosses the threshold of what's possible.

Then the discussion issues. Your Honour will see if I – these were submissions of Mr Hennessy's that I adopted on the last occasion. If your Honour drops down to line 43:

What is the evidence of work undertaken in relation to each of those 24 documents or categories?

Mr Hennessy refers to:

Work for getting our manufacturing and R and D facilities set up.

Over the page:

The work over Christmas to establish our Perth manufacturing.

Mr Hennessy says:

That's why we say it's oppressive.

He refers there to search terms but, of course, that's only the first step in the process. Over the page your Honour says at line 10:

This is an impossible category. I cannot order it as presently drafted.

Your Honour does invite Mr Cooke to propose some search terms but your Honour sees beginning at line 43:

Agreeing some search terms then that attempt can be made.

Your Honour invites Mr Cooke to come back if there's an issue. Then over the page:

Category 2 in its present form is rejected.

Now, your Honour, what has been done by our friends is they're re-agitating category 2 exactly as formally agitated except that now there are search terms which our friends want us to use for the first step of the process. Now, putting aside the relevance and the breadth of those search terms, which is something I understand Mr McMeniman wants to say something about, that leaves the second step, the most onerous, the most difficult step, completely untouched. Mr Cooke said on the last occasion that category 2 isn't duplicative because it excludes documents already discovered under category 1. But the duplication that is a problem is not handing over the same documents twice. That's the last step that's production. The work that is going to be duplicated is the work required to comply with the categories, that's the step of comparing the results of the search against the 24 categories, and I might

say the 24 very broad and in some cases very difficult to understand categories which was the issue on the last occasion.

Your Honour, I submit category 1 already gives our friends all documents showing work we did while in Fortescue's employ in relation to an electrochemical reduction process involving ionic liquid. And what category 2 does is it just pulls out 24 bits from the evidence that are slightly different ways to describe the same thing. Nevertheless, if your Honour composes, I withdraw that, if your Honour orders discovery in both category 1 and category 2 it's the checking of the documents against the categories that will be duplicative. And that's not helped at all, I submit, by saying category 2 excludes production of documents already discovered under category 1. Finally, your Honour said something about the timing that the respondents would need.

For our part that estimate of timing, which was 7 April, that was on the discovery your Honour had already ordered: given the breadth of the tasks that would be required to comply with category 1, that is comparing this pool of documents, which Mr McMeniman will say something about, against these 24 categories, we would seek to say something further to your Honour, which we need some instructions and possibly some evidence about, about the effect that would have on timing. All I can say today, your Honour, is that it might have a very substantial effect on timing. But I'm saying that without proper instructions, your Honour, because we've had these search terms only for a couple of days. Please the court.

MR McMENIMAN: I won't repeat anything that Miss St John says, but we adopt the same position with respect to the scope of the category as drafted. As we understood, and we might be mistaken your Honour, we understood that there would be a narrowing or a way of recasting the category that would be proposed that would not be oppressive. Instead, what was presented was search terms on Monday, a request for consent to them. And if that was not forthcoming, that this application would be pressed. Which is, respectfully your Honour, not how we understood what you had suggested the approach should be in terms of trying to reach some sort of agreement prior to running this sort of application. It appears to us on the scope of the search orders if you pick them up, I understand Ms Yates is ready to spend the next couple of hours going through them with your Honour and we wouldn't embrace that.

HER HONOUR: Don't propose to do that.

MR McMENIMAN: Our review of them is that, on the face of it, they will sweep up an inordinate amount of documents because of the broad nature of the terms: the connections with ORS, the uses of words such as iron, processing, Perth, Fortescue. As standalone terms they essentially capture anything that's a document that concerns Fortescue. So, your Honour respectfully, even if you've got to the point of considering search terms and wanted the parties to do is what we understood you apprehended us what to do, that ought not to be the subject of hearing and determining that today. That should go away. And if it's up to me and Miss Yates

and Mr Wu and Mr Larish and Miss St John to talk about the casting of category 2 and satisfying it by reference to search terms and if we're wholly unreasonable with each other and we can't reach agreement and we have to bother you again, then we will face your wrath at that point. But that's not the approach that's been followed, respectfully.

MR COOKE: Your Honour, just dealing with the scope.

HER HONOUR: It does still suffer from - - -

MR COOKE: That's not true.

HER HONOUR: Well, it is true.

MR COOKE: Well, it isn't, with respect, because if one turns to category 2 – I mean, just focussing on the words of the second and third respondents who are there to give instructions about what discovery they give. There's not – they're not divorced – the solicitors aren't divorced from the - - -

HER HONOUR: No, of course - - -

MR COOKE: - - - second and third respondents.

HER HONOUR: Of course, they're not, but we're talking, here, about someone has got to get the ball rolling and if someone is sitting down with a bundle of documents and trying to work out if a document records work undertaken by either the second or third respondent or Fortescue in relation to low temperature electrochemical ores reduction work and they don't have the necessary qualifications – which is, probably, an engineering degree of some kind – I don't know how you do that if you're not the second and third respondent. Your suggestion must be that the only way – or it follows, it seems to me, the only way to deal with this category is to have the second and third respondents sit there and sift through the material.

MR COOKE: Well, what would happen, in my respectful submission, is there would be a – the search would be conducted by the solicitors in accordance with the search terms ordered by your Honour – and they are narrow for the reasons Ms Yates can explain. That would produce a volume of documents and then the solicitors of the second and third respondents would then get instructions in relation to that body of material to see, for example, if one turns to K – remember the damming patent assessment document – the patent assessment document in which the second respondent referred to low temperature and electrochemical ores reduction work having been done – well, where is it? I mean, your Honour, these are very important statements being made. A very important document.

HER HONOUR: Well, I understand that but I think you have to find an easier way through. I still think it's a difficult, if not, impossible task and you will either end up

with a whole lot of material that's irrelevant or you will end up with, you know, little material because there are people who have to do this job and work out what's what.

MR COOKE: We respectfully submit, your Honour, that for the reasons that Ms Yates explained that these search terms will – we understand, will produce a narrow - - -

HER HONOUR: Well, we don't know that because we don't – until the search terms are applied we don't know how much material will be spat out at the other end, do we?

MR COOKE: No, we don't, but the way that they've been constructed is by reference to the particular categories. So if one looks at the search terms it has picked up particular relevant search terms which are tied to the categories themselves. So if you look you can see the first lot of search terms, categories 2A, B and C and D. So thought – a lot of thought has been given on our side as to the relevant search terms which pick up particular categories. It's not just – it's not all of them. It's not just - - -

HER HONOUR: I do not dispute that that has happened. There's a lot of search – they're quite extensive and, as I said, I do not profess to be an expert in search terms - - -

MR COOKE: But - - -

HER HONOUR: - - - so I don't know what gets spat out at the other end, for example.

MR COOKE: That's true, your Honour, but, I mean – this was, with respect, on the last occasion we – I think – it was all contemplated this might be the best way forward in relation to this – these category of documents. On their face the material referred to by the second and third respondents would appear to be not only relevant but, potentially, highly probative. Now, this is the way through in respect of getting the discovery – make sure we get the discovery of the material. Now, there's no other way that has been proposed by the respondents. So this is the only proposal before your Honour and – it's the only proposal before your Honour and there's nothing wrong in litigation in this court that the client, ie, the party in the proceedings would review the discovery. Often, you get representatives from clients swearing the affidavit for discovery. Well, one would expect the second and third respondents to do the same in this proceeding.

HER HONOUR: Well, I don't know how these – because if I look at some of these search terms, for example, "solvent" and it's meant to be 2A, B and C I don't see the word "solvent" in A, B or C.

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MR COOKE: I think if I could ask Ms Yates to address you on the actual search terms that will give us – give your Honour a better idea about what thought has gone into them.

HER HONOUR: Ms Yates.

MR COOKE: And how narrow they are.

MS S.K. YATES: Yes, correct.

HER HONOUR: Just take me through – and as an example I pick up the word "solvent" in connection with A, B, C and D – and it's D as well – but if I look at categories A, B, C and D I don't see the word "solvent" used at all

MS YATES: No, that is so, your Honour, but the word "solvent" appears in the same documents from which those categories are extracted. So the categories are formed around a description provided by the second or third respondent and in the same document there are ways of describing the particular solvent or electrolyte that is used, and so it occurs to us that it's an appropriate term to include because it's a permutation on the concepts that they describe. So, for example, "ionic solvent".

HER HONOUR: I understand. So you say the actual email, for example, may use the words "ionic solvent" - - -

MS YATES: That's so.

HER HONOUR: - - - even though the description – the category doesn't.

MS YATES: So, for example, in a later document in the patent assessment form the word – or the phrase "ionic solvent" is used to describe the invention and your Honour may recall that the patent assessment form – well, it appears to the applicants – contains concepts that were being developed at around the time that they were being discussed by the respondents. So this first collection of categories, 2A, B, C and D, which we propose to be located, in part, by the search terms here – they're grouped together and I do have to be careful, your Honour, because it relates to an entity over which there's a suppression order but these relate to emails between the second respondent and, if I could call it, the M-entity - - -

HER HONOUR: And that particular entity, yes.

MS YATES: - - - about work that they will collaborate on and also work that he has described has already been undertaken and that he will endeavour to provide a summary of under the auspices of that collaboration. So, looking to search terms, the third string, which I won't read aloud - - -

HER HONOUR: Yes. No, I see that.

MS YATES: It appears to us that any documents in the control of the second and third respondents referring to that entity would be a sensible place to start in the sense that the documents or the work was shared with. It occurs to us that - - -

HER HONOUR: Because that's the work that is the subject of A, B, C and/or D.

MS YATES: Quite. But in the event that work wasn't shared or the summary or outline of the work wasn't sent to that entity then we turn to the other search terms which, we say, are necessary to pick up the work.

HER HONOUR: So can I just understand this about – perhaps, you're not the right person to ask about the actual categories. Are A, B, C and D related?

MS YATES: Yes. Yes, your Honour.

HER HONOUR: Yes.

MS YATES: They come from the series of emails between the second respondent and M-entity.

HER HONOUR: Which concerned – and concerned M-entity. So why can't A, B, C and D be collapsed into one subcategory? So the real concern here is that – perhaps, I'm over to Mr Cooke now. Thank you. I understand what you've done, Ms Yates. The concern, I think, on the other side of the bar table but also for me is A to X – it's an awful lot, Mr Cooke. If A, B, C and D all concern the work that was undertaken in collaboration with M-entity or to be undertaken why isn't that – can't that be collapsed into one category and the same may be the same for E, F, G and H. I don't know.

MR COOKE: We can - - -

HER HONOUR: But the patent - - -

MR COOKE: Yes.

HER HONOUR: - - - assessment form seems to stand on its own. I'm not sure. That may be related work to that, although, there is an intended patent application, again.

MR COOKE: We can collapse the category.

HER HONOUR: It seems to me that this is still too big. If you want to come back with some collapsed categories. And for there – there should also be perhaps some discussion. I can understand the logic of the preparation of the search terms, but maybe there needs to be some discussion with your opponents about them.

MR COOKE: Yes.

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HER HONOUR: So - - -

MR COOKE: Well, we can – we, by all means, we can collapse the subcategories in category 2. We just thought we were being more helpful by pinpointing them, but we can collapse them, for example, (a) through to (d), into one.

HER HONOUR: Well, if they can be collapsed, I think that's the next stage of this.

MR COOKE: Yes.

HER HONOUR: I'm – I won't not order it because the second and third respondents need to have input, including significant input. That's not a reason not to order the category. But at the moment, there are too many – there is – it is too wide.

MR COOKE: All right.

HER HONOUR: It's too broad. It cannot be ordered in its current form.

MR COOKE: Yes. At least on the face of the document, it looks too broad.

HER HONOUR: Yes.

MR COOKE: But we will collapse it and establish that it's perhaps not as broad as what it seems.

HER HONOUR: Yes. All right.

MR COOKE: So we can do that.

HER HONOUR: Well, can I suggest that happen?

MS YATES: Would your Honour indulge me to say one more thing about that so that our friends don't go away without understanding the difficulties?

HER HONOUR: Yes. Of course.

MS YATES: Your Honour, the problem is not only that there are too many subcategories, it's that the categories, I submit, look narrower on their face than they in fact are. If your Honour takes into account the chapeau, all documents recording or evidencing work undertaken in relation to – and then, for example, (k). So your Honour has heard a lot about the patent assessment form. But this category isn't seeking the patent assessment form. It's seeking all documents recording work - - -

HER HONOUR: The work that went into it.

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MS YATES: Yes. Well, not only that, your Honour, but work in relation to this type of work, being the work referred to in the patent assessment form. So there's three layers of work in relation to work in relation to work in relation to.

HER HONOUR: Well, that's why I'm sending Mr Cooke back to redraft.

MS YATES: Yes, your Honour. My concern was that a collapsing might just result in fewer words essentially doing the same thing, which it – the problem, your Honour - - -

HER HONOUR: Well, it might. But I think until we see it, Mr Cooke has heard the issues.

MS YATES: Thank you, your Honour. And if I might say one more thing, particularly on my client's behalf, the problem is not only the difficulty for graduate solicitors in understanding how to do this, it's the cost of that number of documents needing to be compared against such broad and vague categories.

HER HONOUR: Well, we don't know the number until the search terms are applied. So it is a part of – a part of all of this is to agree the search terms. If you come back and tell me it's two million documents, of course those search terms are not appropriate. And I assume that Mr Cooke would agree that they were too broad, if that's what happened.

MR McMENIMAN: There is a world in which a re-casted category might alleviate the need for search terms.

HER HONOUR: Sorry, may alleviate – yes. There is a world.

MR McMENIMAN: An appropriately directed category may alleviate the need for any search terms at all.

HER HONOUR: Yes. That is true. All right. 6.

MR COOKE: Thank you, your Honour.

HER HONOUR: 6(a), I'm sorry.

MR COOKE: 6(a). Now 6(a) is all documents concerning the design, engineering, construction, operation and/or feasibility of a green iron pilot plant that were taken or copied by the second or third respondents from Fortescue during the period that they were respectively employed at Fortescue. Now, this category addresses the plant CI. And does your Honour have category 6, which was previously agreed between the parties?

HER HONOUR: Yes.

MR COOKE: And that is all documents constituting or referring to the defined term "first specified documents". And then:

> *The first specified documents means –*

and there's a list of documents. And they're the particular documents referred to in paragraphs 19 and 20 of the further amended statement of claim. Now, when one goes to paragraph 19, for example, of the further amended statement of claim – your Honour might recall this already, because your Honour has been there today – that particular documents are referred to, for example, in Roman numerals (i) to (v), and they have been picked up in the definition of first specified documents for category 6, no problem. But not particular 5 in category – in paragraph 19. In other words, there's an inference that we've been able to locate certain of the documents – the inference that they did – have taken other documents.

And category 6(a) addresses that. And the same logic applies with paragraph 20 of the further amended statement of claim, namely, particulars 1 to 6, are included in the definition of first specified documents, which is not a problem there. But not particular 7, in category 20. 6A – category 6A addresses that. So in other words, if we don't get category 6A, we're concerned – well, we won't – we will be missing some of the plant CI, as presently pleaded, because we're not going to get what we infer are the other documents that were taken – copied by the second and third respondents, whilst they're employed at Fortescue. And it's for those reasons, your Honour, that we fear that there will be an evidentiary gap, if this category is not ordered. It's a – it's narrowed, because it's confined, in its terms, by those documents that were taken or copied by the second or third respondent, from us during the period they were employed. I.e. that's the date period your Honour ordered, in the previous categories. Notwithstanding the reasonableness of this category, we understand it's opposed.

MR McMENIMAN: Your Honour was not addressed on what you've picked up, Mr Cooke, on the last occasion, which was this being duplicative with paragraph 2A – category 2A. And if your Honour can look at category 2A, as ordered, please:

> *All documents and all documents recording information copied, taken, or otherwise obtained by the second and third respondent, in the period from September '21 to November '21.*

Your Honour might recall that - - -

HER HONOUR: That's a narrower period than their employment.

MR McMENIMAN: That's right. And Fortescue, on the last occasion, sought to expand that out to cover the whole of their employment. And you weren't with them on that. And as Mr Cooke – and I will need to take you to the transcript – made clear, the word:

Including

And then, you have a list of things. The word:

Including

Is not limiting, and so, as he specifically submitted – and I will take you to it – that includes the plant CI, which is the subject of this new category. If your Honour could please go to page 34 of the transcript, from the last occasion, 6 February. And it starts on line 6, 2A. And you see, Mr Cooke addresses you, and says that it needs to be amended to go back to March 2019, which is the start of second respondent's employment. And then, down the bottom of the page, he submits that the words:

> *...including in category 2A is not limiting. It's not exhaustive. Would include not only the listed documents, but all documents, for example. Just concentrating on the plant CI.*

Now, your Honour, if you pick up the new category 6A, that's what it's directed at. And down at line 17:

> *Secondly, the documents are not limited to documents that are in the applicant's possession, custody, or control, because of the use of the words including. And we don't know whether, in fact, we have all the documents that fall within the category.*

He then makes submissions to your Honour, down at line 34 or 37:

As to the relevance

Is directed to paragraph 19, relevantly, which is what the new category 6A is directed at. And then, at 36 – page 36, line 9 through to 11 - - -

HER HONOUR: 36, not 35? 36?

MR McMENIMAN: Yes, over on page 36 now, sorry. It's important, because it's going to pick up, as I've said, not only these documents, but also those – the remaining plant CI, which is the category 6A that he's now pressing. Mr Hennessy then addresses your Honour on the oppression, in terms of the date, going back a number of years. And skipping over to page 38, your Honour, you have an exchange that spans a couple of pages, with Mr Cooke, that commences at line 32, on page 38. You say you don't accept the amendment, which is the amendment to the date to try and take it back to March 2019. Over on page 39 you indicate at line 31 that you're not with Mr Cooke and that's – and you're also not with him with the words "evidence" in category 2A, and over the page on line – page 40 your Honour makes the ruling that you delete the words "or evidencing" and you reject the March 2019 date. So the period is confined to the pleaded case arising on paragraph 19 in the further amended statement of claim, September 2021 to November 2021.

Mr Cooke then raises the new category that he's pressing. It's a relatively humorous exchange by standards and then over on page 47 we get to category 6 which is what your Honour has been addressed on today by Mr Cooke. It's an indication that that's agreed and then your Honour observes at line 18 what I started by submitting which is this new category is, really, a way of saying that you should have allowed the broader category 2A that they pressed because it covers the same territory. So category 2A, which was ordered, was tied to paragraph 19. It's not limited by subject matter. It covers the Green Iron plant information that is now sought by this new category and we respectfully say that seeking to broaden category 2A now by a new category to cover the whole of employment is just not the pleaded claim and your Honour made it clear on your ruling on 2A and this would be wholly inconsistent with that. It is duplicative and just extends the period in the way that your Honour didn't order it.

MS ST JOHN: Your Honour, I adopt what Mr McMeniman has said and I would just add that these documents, I submit, don't fall within – don't properly fall within the cases being put to your Honour as your Honour said on the last occasion. I submit your Honour was right to say – and I'm paraphrasing – that the real allegation here when your Honour looks at the pleading is that this material was taken by the respondent shortly before they left Fortescue and our friends rely on inclusive language in their pleading from, at least, this date. Your Honour, there's no real case pleaded from before that date. I submit a party can't give itself carte blanche on discovery by including inclusive language in its proceeding – in its pleading without enunciating any real – even any concept of any allegation of what they say might have happened during that early period. This period that's now proposed in a new category, your Honour, would extend the previously rejected – the previously ordered category – another two and a half years into the past for Dr Kolodziejczyk and another eight months into the past for my client and, I submit, that balanced against the narrower way the case is pleaded that's unreasonable and oppressive.

MR COOKE: Your Honour, in relation to what happened at the last case management hearing – just to summarise but it's, really, page 47, 48 and 71 – is – after, you know, of course, accepting that your Honour is right and always right – at page 47, lines 20 to 30 in relation to your Honour did previously in relation to category 2A – I made it clear I was making a new – I had to make a new application and I indicated what that category was at transcript 48, line 40 to 44. Then, I think, your Honour, fairly, had had enough by the time we got to transcript 71 and to deal with category 6A and there was an indication that we will deal with it at a later time to the extent necessary which is what I'm doing now. Now, the reason why category 2A is, plainly, different – it relates to a narrow period of time and that period of time, I think, your Honour determined was reflective of the particular documents referred to in category 2A but if one goes to the pleading - - -

HER HONOUR: Well, 2A is based on – that category is the pleaded category. I understand that your pleading is from, "at least", but there's no evidence of anything

earlier then September 2021. And if, by this category, what you're seeking to do is really to look for that evidence - - -

MR COOKE: Your Honour, looking at paragraph 19. The paragraph starts, "In an unknown period before the date pleaded in paragraph 17 above." Now, the date pleaded in paragraph 17 above - - -

HER HONOUR: Is 5 November.

MR COOKE: - - - is when the second respondent ceased employment. And then what we did is in, "but from at least", and we then gave some particulars of the documents that we knew about and specifically pleaded that it can reasonably be inferred that other information and documents were taken based upon the specific documents that we pleaded. And, so, to shut us out you would be effectively omitting the pleaded inference in paragraph 5 and ignoring the words, "In an unknown period before the date pleaded" only because - - -

HER HONOUR: What's the answer to my question? You don't know, and you're fishing.

MR COOKE: Well, it's really the reasonable inference. So the reasonable – I mean, we've managed to find some documents. And so the inference pleaded at V is not limited by time. And if they've taken the documents at some point in time, then why wouldn't they have taken the documents earlier? But on it's pleading it's not limited.

HER HONOUR: They may or may not have, but - - -

SPEAKER: That's a serious allegation.

MR COOKE: It is absolutely a serious allegation. It's actually based upon a reasonable inference as pleaded, drawn from the fact that we managed to discover that they took some other documents. But the problem is, your Honour, if your Honour - - -

HER HONOUR: Is particular five not bound by the date period specified in the chapeau?

MR COOKE: No. Well, the date period – it would be.

HER HONOUR: It's unspecified and is including but not limited to.

MR COOKE: "In an unknown period before the date pleaded in paragraph 17", when the date when he resigns – relieves – but, your Honour, your Honour would not, with respect, read the entirety of paragraph 19 and say that a fair reading of paragraph 19 would that be limited to September 2021 to October 2021. Now, in respect to the particular documents that have been identified in I to IV - - -

HER HONOUR: That's the period.

MR COOKE: That's in that particular period. But your Honour is aware from your Honour's previous experience in these proceedings that those documents were found then, but the pleading in terms is not limited to that. It says, "In a period unknown", and then it says, "But from at least." And so the danger is going to be, your Honour, that we're going to be missing some of the Plant CI.

HER HONOUR: This is limited only to the Plant CI because that's paragraph sub V is limited to the Plant CI.

MR COOKE: 19 and 20 are limited to the Plant CI. That's what it's limited to. And so what the danger – what the respondents would have your Honour do, is to miss a body of the Plant CI, so it's actually the dispute between us in relation to that part of the Plant CI, is not going to be resolved. Now, your Honour with respect, wouldn't be - - -

HER HONOUR: Obviously if the documents were already produced in answer to 2 or 2a, I can't remember which one, then they're to be excluded from this category. So you're really looking for material up to before the period in 2a, aren't you?

MR COOKE: Yes.

HER HONOUR: So it's commencement of employment, respective employment, until whatever that date is, September 20-whatever - - -

MR COOKE: 21.

HER HONOUR: - - - 1. And that's the gap you seek to fill.

MR COOKE: That's the gap. There is a gap. And I've mentioned that last time.

HER HONOUR: And then it's not duplicative.

MR COOKE: Not duplicative. No. Not at all.

HER HONOUR: Why can't I order that? It's pretty narrow. Short period for each.

MR McMENIMAN: I'm not going to repeat our submissions but in terms of the - - -

HER HONOUR: I don't want you to repeat, because I - - -

MR McMENIMAN: No. No. In terms of the date range - - -

HER HONOUR: The pleading is not precise in terms of its date.

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MR McMENIMAN: I'm not going to repeat myself. The evidence of Mr McFaull, in paragraph 62 is that the project, which is this plant, commenced on 11 February 2021. Well, the process of purification of the iron, etcetera, which resulted in the pilot plant, which he says ultimately was commissioned on 16 February 2023. And he says that the relevant period, which is 11 February 2021 onwards, covers both initial research and design of electrochemical reduction processes, and the design and construction of the first pilot plant.

HER HONOUR: So 1 January 2021 would be a date?

MR McMENIMAN: 11 February 2021.

HER HONOUR: 11 February. 1 January. I mean, Mr Cooke, difficult to argue with that. 1 February, perhaps, to make it - - -

MR COOKE: I'm told that the evidence is that work began on it in December 2020.

HER HONOUR: Well, where's that evidence?

MR COOKE: I don't know, your Honour. I'm about to find out.

MR McMENIMAN: That – that is – that is not Mr McFaull's evidence. And this is the evidence about the time - - -

MR COOKE: But your Honour, we've got to look - - -

MR McMENIMAN: This is the - - -

MR COOKE: With respect, we've got to look at the pleading. And the pleading is not limited - - -

HER HONOUR: Well, I think we can also look at the evidence.

MR COOKE: All right. Well - - -

HER HONOUR: There's no evidence that any work was done. But if the evidence is it was done - - -

MR COOKE: Yes.

HER HONOUR: - - - from that time, I'm not going to order a - - -

MR COOKE: Okay. Well, your Honour - - -

HER HONOUR: - - - a longer time. I'm just looking through Mr McFaull's affidavit.

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MR COOKE: I've got some evidence here from Dr Bhatt, which is in annexure AIB10.

HER HONOUR: To which affidavit?

MR COOKE: It is the affidavit of 1 May 2024.

HER HONOUR: So in the court book. AIB10. Can I - - -

MR COOKE: Yes.

HER HONOUR: Is there a page on the top of that?

MR COOKE: Page number – of the top, do you have, your Honour – or - - -

HER HONOUR: Or any page.

MR COOKE: 85.

HER HONOUR: 85.

MR COOKE: Do you have that? I will be careful what I read out.

HER HONOUR: Yes. Well, just direct me.

MR COOKE: Yes. Look at the date at that email at the top of the page.

HER HONOUR: Yes.

MR COOKE: Well, that's not confidential.

HER HONOUR: December 2020.

MR COOKE: 15 December 2020.

HER HONOUR: Yes.

MR COOKE: And then, if you look at the contents:

> *We are getting our manufacturing and R and D facilities set up. This work will proceed shortly.*

HER HONOUR:

> *This is what will keep us busy in 2021.*

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So - - -

MR COOKE: Yes.

HER HONOUR: - - - hence I said 1 January 2021.

MR COOKE: Yes. So this – but this is dating back to at least - - -

HER HONOUR: December.

MR COOKE: - - - December - - -

HER HONOUR: All right.

MR COOKE: - - - 2020.

HER HONOUR: I'm happy to make it 15 December 2020.

MR COOKE: They're already working on it by that date.

HER HONOUR: Well, it's not clear, actually.

> *We are getting our manufacturing and R and D facilities set up. This work will proceed shortly.*

MR COOKE: Fair point, your Honour.

HER HONOUR: It's a little bit unclear.

MR COOKE: Unclear.

MR McMENIMAN: Well, as your Honour knows, Dr Winther-Jensen didn't come on board and there was a shift down the direction that resulted in this plant, which is what explains Mr McFaull's evidence about it not starting until February.

HER HONOUR: Yes. All right. Well, I'm going to order it from 1 January 2021.

MR McMENIMAN: May it please the court.

HER HONOUR: So not during the period they were respectively employed, but from 1 January 2021 until the date the second and third respondents respectively ceased employment – ceased their employment with Fortescue. I know it's not Fortescue, I can't remember the name of the company.

MR COOKE: I think we've just been - - -

HER HONOUR: The employer company.

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MR COOKE: Yes. I think we've just been using Fortescue - - -

HER HONOUR: It has been Fortescue.

MR COOKE: - - - in the category.

HER HONOUR: Okay.

MR COOKE: Yes.

HER HONOUR: All right.

MR COOKE: Thank you, your Honour.

HER HONOUR: I think that covers everything.

MR COOKE: Now, your Honour, that leaves two issues. The question of timing of when the discovery is to be provided. And there's another issue which is this, which is in the short minutes of order that the respondents sent up to your Honour's associate yesterday, in there in schedule 2 there's a notation that each document identified by the applicants – sorry, must be identified in relation to a particular discovery category. So, in other words, they are saying, "We want you to identify which document belongs to which discovery category." Does your Honour see that at page 7?

HER HONOUR: No, hang on. I've got multiple.

MR COOKE: Yes.

HER HONOUR: So I've got something called "proposed short minutes of order" which concerns the respondents - - -

MR COOKE: The - - -

HER HONOUR: Which has both. Sorry, it has got - - -

MR COOKE: Yes.

HER HONOUR: - - - both of you in it and some mark-up about the confidentiality. So where - - -

MR COOKE: Yes.

HER HONOUR: - - - should I go in that document? Paragraph 7, schedule 2?

MR COOKE: If you go to page 7.

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HER HONOUR: That's the discovery to be given by your clients, correct.

MR COOKE: I think so, yes. Does your Honour have schedule 2?

HER HONOUR: Yes.

MR COOKE: Yes, and see - - -

HER HONOUR: Yes.

MR COOKE: - - - there's a notation there – the second notation?

HER HONOUR: Yes.

MR COOKE: Each document must be identified in relation to the discovery.

HER HONOUR: Yes, that's a bit unusual. Why do you want that?

MR McMENIMAN: No, what falls within category 1 and 2.

HER HONOUR: Well, that's fairly unusual.

MR McMENIMAN: I want to know what – I want - - -

HER HONOUR: You can work that out yourself. You're all clever.

MR COOKE: We wouldn't object to that course - - -

HER HONOUR: Right.

MR COOKE: - - - so long as it's reciprocal.

HER HONOUR: Okay.

MR COOKE: So - - -

MR McMENIMAN: We will do it. Yes, we will agree. Absolutely.

HER HONOUR: All right.

MR COOKE: All right.

HER HONOUR: That needs to be added to schedule 1 – that note.

MR COOKE: It can be added to schedule - - -

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HER HONOUR: Perhaps, it can be added as a notation on the orders.

MR COOKE: Yes. If your Honour turns back to the proposed short minutes of order, page 1. I think it would be almost like a carve out to rule 20.17, I think, (1)(a) of the Federal Court Rules.

HER HONOUR: Would it?

MR COOKE: It would. And so, perhaps - - -

HER HONOUR: I believe you. It can be done. I can excuse compliance or whatever you want to do.

MR COOKE: Whatever we want to do, yes.

HER HONOUR: I can excuse compliance.

MR COOKE: So, perhaps, if we just put it in the introductory words in the order to make it clear, is my proposal, but, perhaps, I can agree to that with my learned friends and - - -

MR McMENIMAN: Yes, we can sort that out.

HER HONOUR: Yes. All right.

MR COOKE: And then we can send it up to your Honour's chambers.

HER HONOUR: All right. So when are we giving each other discovery by?

MR COOKE: Yes. Now, the respondents have indicated to us – I think they can do it by 7 April. Now, in relation to the applicants you would have received an affidavit from a Mr Ashley Robert Cameron.

HER HONOUR: I have.

MR COOKE: Sworn 19 February 2025 – yesterday.

HER HONOUR: Done with that.

MR COOKE: Now, for the reasons indicated in this affidavit which is on information and, I believe, from Mr Dewar who, for the reasons indicated by Mr Cameron, is unavailable to swear it – swear his affidavit - - -

HER HONOUR: Mr Dewar has given me - - -

MR COOKE: So this is - - -

HER HONOUR: - - - a lot of information about the complexity of the exercise including that there seemed to be 82 people's computers or inboxes that have to be reviewed.

MR COOKE: Yes. Well, the problem is this, in short. So where Mr Dewar gets to and explains why his understanding will be that it will take five months in order to – Fortescue to be able to provide the discovery in response to categories 1 and 2. Now, the reason is when one – and I can show you why – the reason is that if it's left – if it's not confined to any number of particular custodians – and there's 89 custodians – that's going to create the predicted one million documents which then need to be reviewed and searched and reviewed and so this is where we're at – up to. Now, if - - -

HER HONOUR: Why is it 89 custodians?

MR COOKE: 89 custodians.

HER HONOUR: Why is it 89 custodians?

MR COOKE: Well, he says at paragraph 28 it's a large organisation with over 3000 employees and so he's now informed by Mr Huber and Dr Bhatt and believe that further extensive searching has led to the identification of 89 custodians who may have authored or received documents potentially relevant to category 1 and those custodians are spread across the following teams. Now, then what's revealed is that those 89 custodians from their Outlook boxes will – this is paragraph 30, subparagraph (a). There will be at least a million documents, so that's the problem. Right.

HER HONOUR: Sorry, a million documents?

MR COOKE: Yes. 1 million - - -

HER HONOUR: That will be collected?

MR COOKE: Yes.

HER HONOUR: But then have to be – you're not suggesting it's a million documents to be searched.

MR COOKE: It will be a million documents in which the search terms will need to be run to produce the 100,000 documents in subparagraph 30(d), and he talks about the searches, your Honour, and to make what are good – what just submitted to your Honour to make good, that's at paragraph twenty one - - -

HER HONOUR: The search terms being terms that are to be agreed?

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MR COOKE: No. Well, the 21(d) is the search term. So the problem – my initial reaction perhaps was the same as what your Honour was thinking. I was thinking, why can't – if we did search terms, wouldn't that reduce the time? But the answer is no, because at paragraph 21(d) – this is in the timeline – search terms are already taken into account. So the only way to limit this category is to limit the number of custodians, which will then limit the number of documents. And so if a shorter period of time is imposed, then, well, why don't we limit the custodians just to the second and third respondents? That's two custodians, and that will limit the number of documents that are searched – that needs to be searched and answered to categories 1 and 2, and then that will reduce the number of documents that need to be reviewed, and we can go from that basis. But on evidence, your Honour – and this is detailed evidence and enquiries made by Mr Dewar - - -

HER HONOUR: Perhaps it would help if your opponents could see who the 89 people are. There may be people who are so far down the food chain that they don't need to be searched. There must be ways – this harks back to what I said at the beginning. There must be ways for the parties to agree a sensible way forward to achieve the discovery in the categories that have now been ordered will not take the rest of the year, that will not involve 3333 hours or whatever the prediction was, that will render a manageable volume of material to be sensibly reviewed by those who are – whose job it is to review and produce the discovery.

MR COOKE: Yes.

HER HONOUR: And it can also be done in tranches, I assume, so that it's - - -

MR COOKE: Well - - -

HER HONOUR: - - - an ongoing - - -

MR COOKE: I'm not sure - - -

HER HONOUR: - - - process.

MR COOKE: I'm not sure if it can be, with respect, because - - -

HER HONOUR: Things can be de-duplicated. That's what we used to do. No one wants to see the same document five times, I assume.

MR COOKE: But that is one way of limiting categories 1 and 2 to make it manageable, is the number of custodians.

HER HONOUR: Well, that needs to – there needs to be some sort of, you know – who are these 89 people? No one knows the answer that.

MR COOKE: ..... well, apparently, we do obviously know the answer that we - - -

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HER HONOUR: Yes, on your side of the bar table.

MR COOKE: Yes.

HER HONOUR: But, you know, sensibly there must be some who must be so remote or so unimportant to what's in issue here.

MR COOKE: Yes. So we can disclose the 89 custodians to the respondents, but where I'm standing now, your Honour, if your Honour was to set a date for categories 1 and 2 in their present form, then, on evidence from my instructing solicitor, it would take five months. So perhaps the best way forward is your Honour would not determine a date for the provisional discovery just yet.

HER HONOUR: Yes, but that should - - -

MR COOKE: But we try - - -

HER HONOUR: I mean, work needs to start, obviously, to get on with the job, but someone needs to – I mean, you know, sales and – I don't know how many people are in sales and marketing. Well, sales and marketing people really have the sort of documents that are sought in category 1, for example, funding approvals, budgets, invoices for equipment. Sales and marketing sounds like the end piece of the equation. People actually sell the stuff, you know. I don't know. I don't know the answer to these things, but these are the sorts of inquiries, I think, that need to be made.

MR COOKE: We – absolutely. We're – we – the way forward, as we see it, is that the number of custodians get markedly reduced.

HER HONOUR: Yes.

MR COOKE: So we will propose – we will disclose to our learned friends the names of the custodians, and then we can see if we can reach an agreement, work out the timing, etcetera, and then perhaps come back to your Honour. I mean, this is just – this will be in a week or so, if your Honour is available for a case management hearing. And then we can work out a time. Now, in relation to the time, I must say it seemed sensible to us that whatever time your Honour ordered in relation to categories 1 and 2 that it be the same time given for the other categories that we need to deal with. Because otherwise, your Honour, you're getting sort of duplicative searches and so forth. So better to have one time for all our categories, and that be a reasonable time.

HER HONOUR: Sure.

MR COOKE: That seems to be the best way forward in relation to that. In contradistinction - - -

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HER HONOUR: Category 3 is, I assume, simple enough. I don't know about the categories that I ordered today.

MR COOKE: I don't have any evidence in relation to the timing of the other categories, your Honour. So categories 1 and 2 is our real problem at this stage.

HER HONOUR: All right. Can there be some discussion about that in the next couple of days.

MR McMENIMAN: Might I address you quickly on the practicalities?

HER HONOUR: Yes.

MR McMENIMAN: We will receive their custodians, and we will have a discussion about that. But, respectfully, we say the way forward in addition to that – so if your Honour could pick up paragraph 21 of Mr Dewar's affidavit. You might be more familiar with some of these terms than me. But essentially what he seems to be saying in paragraphs (a) through to (d) is that the steps of this, before anyone even looks at a document, you take the inboxes, you put them in a database. You cleanse the data. Hopefully, you do some deduplication, as well. You do something called ..... then you do some searches that reduces this pool of estimated 1 million documents – which has somehow expanded from the last occasion from a 100,000 to 1 million – are then reduced down to something that is said to be reviewed.

Now, on their estimate, that's going to take three weeks to upload and search all this data. And at that point, they should be in a position to identify, not by a form of affidavit that is impenetrable, respectfully, in terms of what it's saying. But what it is that having conducted the reasonable searches with respect to the categories that have been ordered, not going back and renegotiating them by saying, "We will only search the second and third respondents," they will be able to say to your Honour, on oath or affirmation, how many documents are left to review, and how long that will take, and what the resources are to undertake that review.

Because there are parts of this affidavit that, on the face of it, we will respectfully be saying can't be accepted, including that that initial review, as typically happens in discovery, is done by solicitors who were instructed, and then if they run into trouble, then they go and seek a technical expert to look at it. You don't take 10 technical experts off the job to go and review every single document. There's an element of a lack of proportionality to this affidavit that, respectfully, never seen anything like it in a discovery process, thrown up by one of the most well-resourced applicants to step inside this court. And saying that they need five months of discovery and in circumstances where, on their evidence before you in the search order, they undertook all of these searches.

They tried to find most of the documents that would exist, falling in many of the categories, and they put it before you in evidence. They're now turning around and saying that they need five months to go and look elsewhere. And we don't want to

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deter them from undertaking reasonable searches. But, respectfully, if it's not coming back before you in three weeks, then it can go to a registrar. And they can put an affidavit on, and they say, "This is the result of having uploaded those inboxes and conducting that enriching and searching process to reduce it down to" – whether it's 10 thousand documents, 30, 40, whatever it is, and how long it will actually take to review them.

HER HONOUR: All right.

MR COOKE: Your Honour, with respect, my learned friend's criticisms of the evidence are not justified on the face of it. The problem is, is that the number of custodians is 89. That produces 1 million documents. And then when the searches are done, that's going to produce 100,000 documents, and 100,000 documents is a problem because that's way too many documents.

MR McMENIMAN: .....

MR COOKE: And those documents have to be reviewed, and the - - -

HER HONOUR: Well, that assumes it produces 100,000. No one knows. That's the problem. There might be one person's inbox that produces nothing. There's also this suggestion that there's a pre-review by the internal legal team of documents in certain executives' inboxes - - -

MR COOKE: Well - - -

HER HONOUR: - - - to identify relevant documents for providing to this organisation TransPerfect. If there has been a pre-review, I don't understand what that would do. Then I don't – anyway.

MR COOKE: But - - -

HER HONOUR: It's a very process-intensive process.

MR COOKE: And so maybe, the way forward, your Honour, is we would, first, deal with a number of custodians and take up your Honour's invitation. We will provide the list of custodians – and to reduce them. That's the first step, logically.

HER HONOUR: Yes. That can be the first step, but then I think - - -

MR COOKE: And then we revisit what the next steps are after that.

HER HONOUR: Yes. I think someone needs to get on with this job to work out what is the world of documents that needs to be reviewed and then to tell me, as Mr McMeniman suggests, how long that's going to take. At the moment, it's speculative because - - -

MR COOKE: Yes.

HER HONOUR: - - - you say it's 89. Someone says it's going to take this long, but no one has actually started the job

MR COOKE: But I suppose, the headline – I understand what your Honour is saying, and we go down that path, but the first step is to see if we can sensibly reduce the 89 custodians, and then if the respondents want, you know, to get their discovery earlier and get this trial - - -

HER HONOUR: And then you've got this SharePoint - - -

MR COOKE: - - - on earlier, then they should be cooperative.

HER HONOUR: I don't understand the SharePoint system and how it interacts with the 89 Outlook boxes, and frankly, I don't want to have to understand it unless I really need to.

MR COOKE: Yes. But it's really - - -

HER HONOUR: But it is what it is.

MR COOKE: Yes. But it's reducing the number - - -

HER HONOUR: There's a sophisticated IT system, obviously, in place at your client. But your client is well-resourced and needs to get on with it. It's your client's proceeding.

MR COOKE: Yes, your Honour. But it's paragraph 30(d) – that's the time. That's the intensive – that's taking up the bulk of the five months. It's in paragraph 30(d). It's because of the 100,000 documents which is the – that needs to be reviewed, so the idea would be that's an unreasonable amount of documents.

MR McMENIMAN: That's an assumption.

MR COOKE: And we need to reduce that number of documents by taking certain reasonable means - - -

HER HONOUR: Well, you might have to, but we need to know how many documents there are first.

MR COOKE: Yes.

HER HONOUR: Might be 50,000, might be 10,000, might be a way of easily reducing it. I don't know the answer to these questions until we have a bit more data.

MR COOKE: Yes. So we're not really, in my respectful submission - - -

HER HONOUR: You might need 12 full-time people to review it.

MR COOKE: We might, and Mr Dewar may have underestimated it.

HER HONOUR: He may have.

MR COOKE: He may have.

MR McMENIMAN: May I suggest this, your Honour – is that you set a date, whether it's in a week's time, that we agree custodians - - -

HER HONOUR: Come and report to me, yes.

MR McMENIMAN: - - - and that you then – if the custodians are agreed, they commence and undertake those tasks that are in 21(a) through to (d), and they do that within – give the maximum three or four weeks, and we come back before you. If we haven't agreed custodians, then we will need to relist and have you determine that. And then they can go away and do (c) and (d), and then you will know, after that, how many documents we're talking about needing to be reviewed.

HER HONOUR: All right. Well, I'm happy to do that. Do you want to come back to me for case management? I need to make these orders, though, which is what concerns me. Do you want to come back next week for case management, or do you want to come back in three weeks with a bit more information?

MR COOKE: Three weeks, I think, your Honour. Thank you.

HER HONOUR: All right. What orders am I going to make in the meantime?

MR COOKE: Well, I think - - -

MR McMENIMAN: We can go away and formulate that along the lines that I said, and then if there's an issue with us not agreeing to the custodians, then we will be re-listing earlier than three weeks time.

HER HONOUR: You can come back early. You can re-list.

MR COOKE: But I forgot to mention one important point in terms of – and your Honour should make the respondents' – should fix the date for the respondents now, being 7 April, and the reason is this – is that there's more leeway with our date because by the time – we've got to put on our evidence-in-chief first, presumably. Your Honour's going to order that. So we will need the respondents' discovery before we do that and then we will need a period of time to prepare that evidence and then there will be an order that - - -

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HER HONOUR: Well, I'm happy to make that – to put a date on the respondents if you want a bit longer 7 April.

MR McMENIMAN: If we run into troubles then we will - - -

HER HONOUR: Yes, should - - -

MR McMENIMAN: - - - correspond with our friends - - -

HER HONOUR: Yes.

MR McMENIMAN: - - - but that's how – that's the date that we're willing to take.

HER HONOUR: Yes. Well, that - - -

MR McMENIMAN: We want to get on with it, anyway. The applicant - - -

HER HONOUR: Yes, that order can be made.

MR COOKE: Yes. Thank you.

HER HONOUR: That's not a problem I don't think. There's no push back from the other side of the bar table but someone's going to send me some revised orders because of the notation, correct.

MR COOKE: Yes.

HER HONOUR: Yes.

MR COOKE: And then our – the date – the time period for ours, your Honour, could be a date to be fixed.

HER HONOUR: Yes, I'm happy to do that.

MR COOKE: I think then that addresses everything.

HER HONOUR: But you're going to send me some orders, is what I understand, correct?

MR COOKE: Today, yes.

HER HONOUR: Is that right? Today?

MR McMENIMAN: Yes.

HER HONOUR: I will make them in chambers.

MR McMENIMAN: Yes, your Honour.

HER HONOUR: The next case management date then?

MS ST JOHN: I'm sorry, your Honour, before we go on I'm not sure I've understood what the applicants are going to be ordered to do. I - - -

HER HONOUR: The applicants are going to be ordered to get on with the discovery. The discovery orders will be made. There will be no date fixed – I think, on a date to be fixed. We're going to come back in three weeks by which time the applicants will have got to the point where, hopefully, you will have agreed a list of custodians and they will have undertaken steps A to D, I think it was, in paragraph 31 of Mr Dewar's sworn affidavit. 21, I think it is.

MS ST JOHN: I think your Honour might be talking about paragraph 30. D is the step that takes 14 weeks. So, your Honour, I had understood that it would be A to B or, potentially, A to C - - -

HER HONOUR: A to C.

MS ST JOHN: - - - that will be conducted.

HER HONOUR: No, it doesn't.

MS ST JOHN: And that will allow us - - -

HER HONOUR: At 21 - - -

MS ST JOHN: I'm sorry, your Honour, I was looking at paragraph 30.

HER HONOUR: At 21, once you've got the custodians then you've got some legal review for some reason. Then you upload the data, export the inbox and that takes – that will take two to three weeks for 89 custodians. So if there are fewer custodians it will take a bit less time and I'm not sure what processing and enriching the data is but one assumes that by the end of step C or step D, whatever the parties think is more sensible, you've got the potentially relevant documents. At the moment that's estimated to be a million. We hope that it's less.

MS ST JOHN: Thank you, your Honour. Your Honour, paragraph E of 21 would be uploading into relativity. I don't know whether the million or other figure would be known until step E is done. Presumably, that's a matter for our friends how far they want to go through this process before they get to the magic number but it might be that E should be done as well.

HER HONOUR: Well, he has – yes. Well, I think E sounds like the easiest of the five steps because it's just taking the data from one platform to another.

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MR McMENIMAN: And to make clear, D is taking – let's assume it's a million. D is taking a million and reducing it down to their estimated 100,000.

HER HONOUR: Right. Okay.

MR McMENIMAN: Because these searches are being conducted - - -

HER HONOUR: 10 per cent.

MR McMENIMAN: - - - based on - - -

HER HONOUR: Yes, I see. Yes, correct.

MR McMENIMAN: So that's why - - -

HER HONOUR: Yes, that's where we have to get to.

MR McMENIMAN: That's where we have to get to.

HER HONOUR: So we have to ge to – we have to get to what are the number of documents in relativity or just before they go into relativity.

MR McMENIMAN: That are going to be batched and reviewed.

HER HONOUR: All right. Is that understood?

MR COOKE: Well, yes, I think so, your Honour. Yes.

HER HONOUR: All right. Well, when are you going to come back and see me then? I can see you on 11 March at 9.30 which is a Tuesday or - - -

MR COOKE: I'm just, sort of, wondering whether three weeks is going to be enough time because we've got to agree to the custodians for the other – for the respondents and then we've got to do the process. So I'm just thinking – I'm thinking, perhaps, we should probably - - -

HER HONOUR: Can see me – come and see me on 18 March at 9.30.

MR COOKE: Yes, Mr Larish and I are before the Full Court - - -

HER HONOUR: Are you?

MR COOKE: - - - on the 18th and 19th.

HER HONOUR: Right.

MR COOKE: But what about, your Honour, the 21st? Does that - - -

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HER HONOUR: Friday, the 21st. That's fine with me at 9.30 because you can only have half an hour.

MR COOKE: Yes.

MR McMENIMAN: Yes, your Honour.

HER HONOUR: I've got a – day 3 of a Full Court. All right. So that should be the day reflected in the orders that come up to my chambers. Once the timing for discovery is known the parties should start thinking about what are the next steps. Might be that at some point I will ask you to bring your diaries with you and a tentative date should be fixed ..... to focus the minds. That should be done sooner rather than later, depending on when the parties really want to get to trial.

MR COOKE: May it please the court.

MR McMENIMAN: We're keen to do that as well, your Honour.

HER HONOUR: Yes. Others will get in before you, otherwise. If you want to secure some time, late this year is one possibility but I apprehend you won't be ready.

MR McMENIMAN: We would endeavour to be, your Honour, on our side of the table.

MR COOKE: It's hard. I mean, without seeing - - -

HER HONOUR: Without seeing the evidence.

MR COOKE: - - - the discovery. Discovery's needed in order to prepare the evidence. So it's difficult to determine whether the parties would be ready by the end of this year. It does sound a little ambitious, but I'm just not in a position to be able to - - -

HER HONOUR: You might want to aim for early next year then. Remembering that February is now an available period. I know no one likes February. Yes, I just saw your face - - -

MR McMENIMAN: Fortunately, they're getting our discovery in April.

HER HONOUR: - - - Mr McMeniman.

MR McMENIMAN: So, might be able to tell you in May.

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HER HONOUR: No one likes a long case in February I've discovered. All right. Is there anything further? If those proposed orders could be provided to my chambers. Today would be best.

MR McMENIMAN: Thank you, your Honour.

HER HONOUR: Thank you all. Could court be adjourned.

MATTER ADJOURNED at 1.01 pm ACCORDINGLY

Federal Court of Australia

District Registry: New South Wales Registry

Division: General No: NSD527/2024

FORTESCUE LIMITED ACN 002 594 872 and others named in the schedule
Applicant

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others named in the schedule
Respondent

ORDER

JUDGE: Justice Markovic

DATE OF ORDER: 26 February 2025

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. By 7 April 2025, each of the respondents give non-standard discovery pursuant to rr 20.15 to 20.17 of the *Federal Court **Rules** 2011* (Cth) of all documents within the categories set out in Schedule 1 to these Orders; except that compliance with r 20.17(2)(a) of the Rules is not required insofar as the documents are to be identified by reference to the relevant discovery category/categories, as noted in Schedule 1.
2. Documents produced by the respondents pursuant to category 11 of Schedule 1 may only be inspected by or disclosed to the external solicitors of record and counsel for the applicants, and independent experts retained by the applicants for the purpose of this proceeding, who have first provided an undertaking to the court substantially in the form of Schedule 2 to these Orders.
3. On a date to be determined, each of the applicants give non-standard discovery pursuant to rr 20.15 to 20.17 of the Rules of all documents within the categories set out in Schedule 3 and Schedule 4 to these Orders; except that compliance with r 20.17(2)(a) is not required insofar as the documents are to be identified by reference to the relevant discovery category/categories, as noted in Schedule 3 and Schedule 4.
4. The applicants are to undertake the steps set out in paragraphs 21(b)-(d) of the unsworn affidavit of Paul Alexander Dewar which appears at Annexure ARC-1 to the affidavit of Ashley Robert Cameron sworn 19 February 2025 (**Steps**) by 19 March 2025 in respect

of those custodians that the applicants consider would comply with their reasonable search obligations including having regard to:

(a) the 27 custodians identified by the First, second and fourth respondents' solicitors' letter dated 24 February 2025 in response to the applicants' solicitors' letter dated 21 February 2025; and

(b) the six custodians identified by the third respondent's solicitors email dated 26 February 2024,

(**Custodians**).

5. By 5.00 pm on 19 March 2025, the applicants are to notify the respondents of:

(a) the number of documents resulting from the Steps in respect of the Custodians; and

(b) an estimated time required to comply with Order 3.

6. The matter be listed for case management at 9.30 am on 21 March 2025.

Date orders authenticated: 26 February 2025

Registrar

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

SCHEDULE 1

Applicants' Categories of Documents to be Discovered by the Respondents

Notes

All documents are to be produced in native form.

Each Document must be identified in relation to a discovery category

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(ii)], see FASOC [20(iv)]

No.	Name	Ref
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024	see FASOC [19(iii)], see FASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH.R1.docx	see FASOC [20(i)(1)]
9	211014_FFI Green Steel_Ore Leach_ASH_XRF results.csv	see FASOC [20(i)(2)]
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)(6)]
13	Green Iron Update (01.11.2021).pdf	see FASOC [20(i)(7)]

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.

Categories

Ionic Liquid documents

1. All documents recording or evidencing work undertaken by the Second 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 an electrochemical reduction process involving Ionic Liquid.

2. [Not used]

2A. All documents, and all documents recording 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 evidencing the location and storage of any of the documents referred to in category 1 and 2A above during:

(a) the period 25 March 2019 to 12 November 2021;

(b) after 12 November 2021;

noting that compliance with this category does not require the "forensic investigation and analysis of the Element Zero Respondents' computer systems", in the sense described in the affidavit of Michael Williams sworn 29 December 2024 at paragraph [45].

4. [Not used]

5. All documents recording or evidencing any of the Respondents' reference to the confidentiality of any of the documents referred to in category 1 and 2A above.

Specified Documents

6. All documents constituting or referring to the First Specified Documents.

6A. All documents concerning the design, engineering, construction, operation and/or feasibility of a green iron pilot plant, that were taken or copied by the Second or Third Respondents from Fortescue during the period 1 January 2021, until they respectively ceased employment with Fortescue.

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.

9. [Not used]

Element Zero-related documents

10. [Not used]

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) piping 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.

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, 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:

(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;

except that the:

(I) Second Respondent is not required to give discovery in respect of patents, patent applications, and drafts thereof that he did not work on after 25 March 2019; and

(II) Third Respondent is not required to give discovery in respect of patents, patent applications, and drafts thereof that he did not work on after 15 February 2021.

14. All documents evidencing or recording the use of any of the documents in categories 1, 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.

SCHEDULE 2

Confidentiality Undertaking

No. NSD 527 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

FORTESCUE LIMITED ACN 002 594 872

and others named in the schedule

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081

and others named in the schedule

Respondents

I, _____

of _____,
being an Australian external legal practitioner or an Australian barrister acting for the Applicants, or an independent expert witness retained by the Applicants for the purposes of this Proceeding, undertake to the Court, effective from the date set out on the final page of this undertaking, that until and unless the Court otherwise orders or the Respondent(s) otherwise agrees in writing:

Confidentiality, disclosure and use

I will keep the Confidential Material confidential at all times.

To the extent I have access to Confidential Material:

I will use, handle, keep and store the Confidential Material in such a manner that will at all times preserve its confidentiality;

I will establish and maintain reasonable security measures to safeguard the Confidential Material from unauthorised access or use; and

I will not make any copies of Confidential Material except as reasonably necessary for the sole purpose of the conduct of the Proceeding.

I will not use the Confidential Material for any purpose other than for the sole purpose of the conduct of the Proceeding.

I will not use the Confidential Material for the purpose of:

drafting, amending or prosecuting any patent application or utility model in any jurisdiction; or

any other legal proceeding in any jurisdiction (existing or otherwise).

Subject to paragraph 0 below, I will not disclose the Confidential Material (either in whole or in part) either directly or indirectly to any person including the Applicants, their servants, agents and related companies without the prior written consent of the Respondent(s)' Lawyers, unless:

such disclosure is expressly authorised by the Court, including by way of a determination by the Court:

that I be released from this undertaking with respect to the relevant Confidential Material; or

that the relevant Confidential Material is not confidential;

the Confidential Material is in, or enters into, the public domain other than in contravention of a confidentiality undertaking or other obligation of confidence; or

such disclosure is required by law.

The Confidential Material may be disclosed by me:

to any Judge, employee or other personnel of the Court or any person associated with recording the transcript at any hearing in the Proceeding for the purpose of the Proceeding and provided the Confidential Material is:

in the case of oral disclosures in relation to the Confidential Material, stated to be subject to this confidentiality undertaking; and

otherwise, clearly identified and marked "Confidential" and is otherwise kept confidential in accordance with this undertaking;

to the Applicants' Lawyers and Australian barristers retained by or on behalf of the Applicants to act for the Applicants in the Proceeding who have signed and provided to the Court undertakings in the same terms as this undertaking before that person has access to the Confidential Material;

to support and administrative staff employed by (or, in the case of Australian barristers, employed or engaged by the barrister or by their chambers) persons referred to in sub-paragraph 0 above who reasonably require access to the Confidential Material for the purpose of the Proceeding;

in an affidavit filed in the Proceeding by or on behalf of the Applicants, provided the Confidential Material is in an annexure or exhibit to such an affidavit and any such annexure or exhibit is clearly identified and marked "Confidential" and otherwise kept confidential in accordance with this undertaking; and

to independent experts retained by the Applicants' Lawyers in relation to the Proceeding who have signed and provided to the Court undertakings in the same terms as this undertaking before that person has access to the Confidential Material.

If I propose to disclose or otherwise use Confidential Material in any interlocutory or final hearing in the Proceeding, then subject to paragraph 0 above, I will take all necessary steps to ensure that the disclosure is not made in open Court and that the transcript of that portion of the hearing is confidential, with access thereto limited to the persons who have liberty to view such material under this undertaking or any orders of the Court.

Within 30 days of the final determination of the Proceeding or on the expiry of any applicable appeal period (whichever is the later) I will:

destroy all hard copies (including, without limitation, computer disks and USB drives) of all Confidential Material in my possession, custody, control or power, and give (or cause to be given) notice in writing to the Respondent(s)' Lawyers certifying the destruction of all such hard copies of Confidential Material; and

take all reasonable action to permanently delete, so as not be retrievable by any means, all Confidential Material stored in any electronic storage facility owned or used by me and give (or cause to be given) notice in writing to the Respondent(s)' Lawyers certifying the permanent deletion of all such electronic copies of Confidential Material or that I have taken such action, as the case may be.

except that:

the Applicants' Lawyers may retain one copy of the Confidential Documents;

the Applicants' Lawyers and Australian barristers retained by or on behalf of the Applicants may retain: (i) any notes, memoranda, summaries, reports, analyses, records and opinions made or caused to be made by the Applicants' Lawyers or Australian barristers (including any briefs to experts and any expert reports) which may contain Confidential Information; (ii) any evidence in the Proceeding or transcript of the Proceeding which may contain Confidential Information, in each case for record-keeping purposes, provided that they are stored confidentially within the internal records of the Applicants' Lawyers or Australian barristers (as the case may be); and

copies of the Confidential Material may be contained in electronic files created pursuant to automatic archiving and back-up procedures in the ordinary course of business,

provided that any such copies are kept confidential, and not accessible by any person, other than in accordance with the terms of this undertaking.

I will notify the Court and Respondent(s)' Lawyers (or cause the Court and Respondent(s)' Lawyers to be notified) as soon as practicable if I become aware of any suspected or actual unauthorised access, use or disclosure of any Confidential Material, and will provide all reasonable assistance requested by the Court, Respondent(s) and/or the Respondent(s)' Lawyers in relation to any action that the Court and/or Respondent(s) may take against any person for unauthorised use or disclosure of any Confidential Material provided to me pursuant to this undertaking.

Definitions

The following definitions apply in this undertaking:

Applicants means Fortescue Limited, Fortescue Future Industries Pty Ltd and FMG Personnel Services Pty Ltd.

Applicants' Lawyers means Davies Collison Cave Law.

Confidential Document means all documents (in any form or media) produced by any of the Respondents in response to category 11 in Schedule 1 to the orders of Justice Markovic dated [date of orders] in the Proceeding, being:

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) *piping 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.

Confidential Information means the contents of, and all information in, any Confidential Document, all information derived therefrom or in notes taken or reports or other documents generated therefrom.

Confidential Material means Confidential Information and Confidential Documents.

Court means the Federal Court of Australia.

Proceeding means Federal Court of Australia proceeding number NSD 527 of 2024, any cross-claim filed in that proceeding, and any appeal(s) therefrom, any applications for special leave to appeal, and any costs recovery proceedings in relation to any such proceedings.

Respondent(s) means the Respondent(s) to the Proceeding.

Respondent(s)' Lawyers means the respective Respondent's legal representatives of record in this Proceeding.

This undertaking

I acknowledge that this undertaking continues in force after the conclusion of the Proceeding.

I irrevocably submit to the jurisdiction of the Court for the purposes of enforcing this undertaking.

Signature: _____ Date: _____

Signature of Witness: _____

Name of Witness: _____

SCHEDULE 3

EZ Respondents' Categories of Documents to be Discovered by the Applicants

Capitalised terms are defined in the Further Amended Statement of Claim dated 23 October 2024 (**FASOC**).

Document has the same meaning as in the Evidence Act 1995 (Cth) not including any Excluded Documents.

Excluded Documents means documents already produced by the Applicants in the Proceedings.

Proceedings means the claim commenced by Fortescue in the Federal Court of Australia numbered NSD527/2024.

Notes:
All documents are to be produced in native form.
Each Document must be identified in relation to a discovery category

Documents recording all research and development work undertaken by the Second Respondent or the Third Respondent during the period from 25 March 2019 to 12 November 2021 on Direct Electrochemical Reduction processes, including approvals of research, research instructions, work undertaken, target timescales for that work, funding approvals and budgets and invoices for equipment and products used in such processes.

Documents recording the Ionic Liquid R&D Information and any research or development work undertaken in relation to Ionic Liquid R&D by the Second Respondent, the Third Respondent and/or Fortescue during the period from 25 March 2019 to 12 November 2021, including approvals of research, research instructions, work undertaken, target timescales for that work, funding approvals and budgets and invoices for equipment and products used in such processes.

Documents recording the end of Dr Kolodziejczyk's employment with Fortescue, including documents concerning:

a. his resignation and terms on which his employment ended, including the preparation of a Deed of Separation;

b. any instructions given to him in respect of the period following him giving notice of his resignation; and

c. communications and records of any meetings between Dr Kolodziejczyk and Fortescue employees between 22 October 2021 and 5 November 2021.

[Not used].

A native copy of the documents identified at particular (i)1 – 4 to paragraph 19 and particular (i)1-7 to paragraph 20 of the FASOC and any documents that incorporate all or part of the information in those documents that is said to be confidential.

Fortescue internal policies in effect at any time during Dr Kolodziejczyk's and Dr Winther-Jensen's employment, insofar as those documents record obligations imposed on Dr Kolodziejczyk and Dr Winther-Jensen in respect of intellectual property and confidential information during each of their employment with Fortescue.

[Not used]

Documents recording Dr Kolodziejczyk and Dr Winther-Jensen obtaining the Fortescue information as referred to in paragraphs 19 and 20 of the FASOC.

[Not used]

Documents recording the results of any investigations or searches for the documents or into the conduct identified in FASOC [12]-[14], to the extent those results are not recorded in the affidavit of:

(a) Ms Susanne Monica Hantos affirmed 1 May 2024;

(b) Dr Anand Indravadan Bhatt affirmed 1 May 2024; or

(c) Mr Adrian Huber sworn 1 May 2024 at Annexures AH-21, AH-22, AH-26, AH-27.

SCHEDULE 4

Third Respondent's Categories of Documents to be Discovered by the Applicants

Definitions

Capitalised terms are defined in the Further Amended Statement of Claim dated 23 October 2024 (**FASOC**).

Document has the same meaning as in the *Federal Court Rules 2011* (Cth) not including any Excluded Documents.

Excluded Documents means documents already produced by the Applicants in the Proceedings.

Proceedings means the claim commenced by Fortescue in the Federal Court of Australia numbered NSD527/2024.

Notes

- All documents are to be produced in native form.
- Each document must be identified in relation to a discovery category.

1. Copies of all documents produced to the First, Second and Fourth Respondents by way of discovery.

2. Documents recording the end of Dr Winther-Jensen's employment with Fortescue, including documents concerning:

    (a) his resignation and terms on which his employment ended, including the preparation of a Deed of Separation;

    (b) any instructions given to him in respect of the period following him giving notice of his resignation; and

    (c) communications and records of any meetings between Dr Winther-Jensen and Fortescue employees between 3 November 2021 and 12 November 2021.

3. [Not used].

4. [Not used].

5. A native copy of the documents identified at particular (i)1.-4 to paragraph 19 and particular (i)1-7 to paragraph 20 of the FASOC and any documents that incorporate all or part of the information in those documents that is said to be confidential.

Schedule of parties

No: NSD527/2024

Federal Court of Australia

District Registry: New South Wales Registry

Division: General

Second Applicant	FORTESCUE FUTURE INDUSTRIES PTY LTD ACN 625 711 373
Third Applicant	FMG PERSONNEL SERVICES PTY LTD ACN 159 057 646
Second Respondent	BARTLOMIEJ PIOTR KOLODZIEJCZYK
Third Respondent	BJORN WINTHER-JENSEN
Fourth Respondent	MICHAEL GEORGE MASTERMAN

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BY EMAIL:
MWilliams@gtlaw.com.au;
RDunn@gtlaw.com.au
Mike.Hales@minterellison.com;
Daniella.Lambert@minterellison.com

Attention: Michael Williams
Rebecca Dunn
Mike Hales
Daniella Lambert

Our Ref: 2023413

Your Refs: MJW:RXD:1058625
1496352

Contact: Paul Dewar
PDewar@dcc.com

Grace O'Connor
GOConnor@dcc.com

8 April 2025

Mr Michael Williams / Ms Rebecca Dunn
Gilbert + Tobin
L35, Tower Two, International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000

and

Mr Mike Hales / Ms Daniella Lambert
MinterEllison
One The Esplanade, Level 9
1 The Esplanade
Perth WA 6000

Fortescue Limited & Ors v Element Zero Pty Limited & Ors,
Federal Court Proceeding No. NSD527 of 2024

Dear Colleagues

We refer to the hearing of the Applicant's discovery application on 6 and 20 February 2025.

On 6 February 2025, her Honour gave the Applicants an opportunity to propose search terms in respect of the form of discovery category 2 sought by the Applicants under its IA dated 20 November 2024.

On 20 February 2025, having proposed search terms to accompany an amended form of category 2, your clients raised further objections in light of what it considered to be the breadth of the category. Her Honour gave the Applicants the opportunity to "*come back with some collapsed categories*" (T48.42) in view of the possibility that certain sub-categories of amended category 2 could be grouped together.

We **enclose** short minutes of order providing for a further amended form of category 2, which our clients intend to raise before her Honour at the upcoming case management hearing. As you will see, they include orders for three limited subcategories of documents, confined by date ranges, and accompanied by proposed search terms intended to assist your clients. In light of the extremely narrow casting of these subcategories, and in circumstances where this discovery category seeks documents recording work as

described by the Second Respondent in contemporaneous documents annexed to Dr Bhatt's affidavit, we do not understand there to be any oppression attaching to these categories.

Yours faithfully



DAVIES COLLISON CAVE LAW

Form 1
Rule 2.13(2)

Proposed Short Minutes of Order
Regarding Fortescue Discovery Category 2

No. NSD 527 of 2024

Federal Court of Australia

District Registry: New South Wales

Division: General

FORTESCUE LIMITED ACN 002 594 872 and others named in the schedule

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others named in the schedule

Respondents

THE COURT ORDERS THAT:

1. By 9 June 2025, each of the Respondents give non-standard discovery pursuant to rules 20.15 to 20.17 of the *Federal Court Rules 2011* (Cth) of all documents within his/its control within **Annexure A** and responding to the searches set out in **Annexure B** to these orders.

Date: __ April 2025

ANNEXURE A

2. To the extent not covered by category 1 of Schedule 1 as set out in the orders of Markovic J dated 26 February 2025, all documents, which record any of:

   (a) the "*preliminary work that we have done in ionic liquids and low temperature iron ore reduction*" that Dr Kolodziejczyk referred to in an email to [suppressed name] on 21 October 2020 (see Bhatt AIB-7);

   Note: the Third Respondent is not required to give discovery in this category.

   (b) the *"patent application for our low-temperature electrochemical ores reduction in ionic liquid electrolytes*", being the patent application Dr Kolodziejczyk reported he was "*currently working on*" in the email to Andrew Forrest and Michael Masterman dated 22 December 2020 (see Bhatt AIB-12 p 93), and any drafts thereof;

   (c) the "*R&D roadmap*" that Dr Kolodziejczyk told Chris Mcmahen, John Paul Olivier and Michael Masterman that he was "*currently developing*" in the email dated 6 January 2021 (see Bhatt AIB-15 p 106), and any drafts thereof.

ANNEXURE B

Category	Search terms	Date
2(a)	**(1)** [(iron OR Fe OR ferric OR ferrous OR hematite* OR haematite* OR magnetite* OR goethite*) OR (“FeO” OR “Fe2O3” OR “Fe2O3” OR “Fe3O4” OR “Fe3O4”)] **AND** [electrolyte* OR solvent* OR solution* OR “ionic liquid” OR “ionic liquids” OR “ionic mixture” OR “ionic mixtures” OR eutectic* OR hydroxide* OR “KOH” OR “NaOH” OR “LiOH”]	For documents to be discovered by the First, Second and Fourth Respondents: 25 March 2019 to 21 October 2020 Note: the Third Respondent is not required to give discovery in this category.
	(2) [(iron OR Fe OR ferric OR ferrous OR hematite* OR haematite* OR magnetite* OR goethite*) OR (“FeO” OR “Fe2O3” OR “Fe2O3” OR “Fe3O4” OR “Fe3O4”)] **AND** [reduc* OR electroreduc* OR electrowin* OR electrodeposit* OR “Direct Electrochemical Reduction” OR “low temperature” OR “low-temperature” OR “low temp” OR “low-temp” OR “LTE”]	

Category	Search terms	Date
2(b)	**(3)** [“patent” OR specification* OR “invention disclosure”] **AND** [(green w/1 (“iron” OR “steel”)) OR ((“iron” OR “Fe” OR “ferric” OR “ferrous” OR “copper” OR “Cu” OR “nickel” OR “Ni” OR metal*) w/5 (oxide* OR ore* OR complex*)) OR (hematite* OR haematite* OR magnetite* OR goethite*) OR (“FeO” OR “Fe2O3” OR “Fe2O3” OR “Fe3O4” OR “Fe3O4”)] **AND** [electrolyte* OR solvent* OR solution* OR “ionic liquid” OR “ionic liquids” OR “ionic mixture” OR “ionic mixtures” OR eutectic* OR hydroxide* OR “KOH” OR “NaOH” OR “LiOH”]	For documents to be discovered by the First, Second and Fourth Respondents: 1 December 2020 to 12 November 2021 For documents to be discovered by the Third Respondent: 15 February 2021 to 12 November 2021
	(4) [“patent” OR specification* OR “invention disclosure”] **AND** [(green w/1 (“iron” OR “steel”)) OR ((“iron” OR “Fe” OR “ferric” OR “ferrous” OR “copper” OR “Cu” OR “nickel” OR “Ni” OR metal*) w/5 (oxide* OR ore* OR complex*)) OR (hematite* OR haematite* OR magnetite* OR goethite*) OR (“FeO” OR “Fe2O3” OR “Fe2O3” OR “Fe3O4” OR “Fe3O4”)] **AND** [reduc* OR electroreduc* OR electrowin* OR electrodeposit* OR “Direct Electrochemical Reduction” OR “low temperature” OR “low-temperature” OR “low temp” OR “low-temp” OR “LTE”]	

Category	Search terms	Date
2(c)	**(5)** [(“research” OR develop* OR “R&D”) w/5 (“roadmap” OR “road map” OR “road-map” OR plan OR write-up* OR writeup* OR “write up”)] **AND** [(green w/1 “steel”) OR (“iron” OR “Fe” OR “ferric” OR “ferrous” OR hematite* OR haematite* OR magnetite* OR goethite*) OR (“FeO” OR “Fe2O3” OR “Fe2O3” OR “Fe3O4” OR “Fe3O4”)]	For documents to be discovered by the First, Second and Fourth Respondents: 6 January 2021 to 12 November 2021 For documents to be discovered by the Third Respondent: 15 February 2021 to 12 November 2021

Schedule

No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

Applicants

Second Applicant:	**FORTESCUE FUTURE INDUSTRIES PTY LTD**
	ACN 625 711 373
Third Applicant:	**FMG PERSONNEL SERVICES PTY LTD**
	ACN 159 057 646

Respondents

Second Respondent:	**BARTLOMIEJ PIOTR KOLODZIEJCZYK**
Third Respondent:	**BJORN WINTHER-JENSEN**
Fourth Respondent:	**MICHAEL GEORGE MASTERMAN**

Daisy Cullen

From: Caitlin Meade <CMeade@gtlaw.com.au>
Sent: Thursday, 17 April 2025 1:57 PM
To: Kevin Huang
Cc: Paul Dewar; Grace O'Connor; Ashley Cameron; Rohit Dighe; Jessica Sapountsis; Rebecca Dunn; Michael Williams; Daisy Cullen; Molly Allen; Mike Hales; Daniella Lambert; Oliver Hoare; Meaghan Philp
Subject: RE: NSD527/2024 - FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS [ITUSEONLY-LAW.FID86345]
Attachments: Letter to DCC (discovery) 17 April 2025.pdf

Categories: Filed to ND
FilingIndicator: -1

Dear Colleagues

Please see attached.

Regards
Rebecca Dunn / Caitlin Meade

Caitlin Meade (She/Her)
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From: Kevin Huang <KHuang@dcc.com>
Sent: Tuesday, 8 April 2025 3:35 PM
To: Rebecca Dunn <RDunn@gtlaw.com.au>; Michael Williams <MWilliams@gtlaw.com.au>; Caitlin Meade <CMeade@gtlaw.com.au>; Daisy Cullen <DCullen@gtlaw.com.au>; Molly Allen <MAllen@gtlaw.com.au>; Mike Hales <Mike.Hales@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Oliver Hoare <oliver.hoare@minterellison.com>; meaghan.philp@minterellison.com
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Subject: NSD527/2024 - FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS [ITUSEONLY-LAW.FID86345]

Dear Colleagues

Please find **attached** our letter of today's date, and accompanying further short minutes of order.

We intend to send copies of the correspondence and short minutes of order to her Honour's Associate under cover of the following email prior to the next case management hearing:

Dear Associate

We refer to the upcoming case management hearing in the above matter.

Please find attached:

1. *A copy of the Applicants' correspondence of 8 April 2025, and*
2. *Additional short minutes of order, which the Applicants propose to seek at the upcoming case management hearing.*

The Respondents' lawyers are copied on, and have consented to, this email.

Yours faithfully

Please let us know if you consent to the above correspondence being sent to her Honour's Associate.

Yours sincerely

Kevin Huang
Lawyer

Grace O'Connor
Managing Associate

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17 April 2025

By email: pdewar@dcc.com

Mr Paul Dewar
Partner
Davies Collison Cave
Level 4, 7 Macquarie Place
SYDNEY NSW 2000

Dear Colleagues

Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)

We refer to your letter dated 8 April 2025 and correspondence of the same date.

For the avoidance of doubt, our clients oppose the further amended form of category 2.

As set out in your letter, your clients have now had two opportunities to succeed on their category 2. It was rejected by her Honour on both occasions. It is inappropriate for you to now raise a third attempt at this category, over 6 weeks after the second rejection.

At the 20 February 2025 hearing (see T48.43-45), her Honour suggested that there should be some discussion between the parties regarding any collapsed categories or search terms. Your letter does not attempt to engage or discuss along the lines suggested by her Honour. In light of her Honour's comments, please provide an explanation of how you have addressed her Honour's suggestions in Annexure A and Annexure B of the proposed orders so that we can properly consider this amended category.

Our clients' rights are reserved.

Yours faithfully
Gilbert + Tobin

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TRANSCRIPT OF PROCEEDINGS

O/N H-2017318

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

MARKOVIC J

No. NSD 527 of 2024

FORTESCUE LIMITED and OTHERS

and

ELEMENT ZERO PTY LIMITED and OTHERS

SYDNEY

11.09 AM, WEDNESDAY, 30 APRIL 2025

MR J.S. COOKE SC appears with M.W.H. WU and S.K. YATES for the applicant
MR C.D. McMENIMAN for the 1st, 2nd and 4th respondents
MS F. ST JOHN appears for the 3rd respondent

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MR J.S. COOKE SC: May it please the court. I appear with MR WU and MS YATES for the applicants.

HER HONOUR: Thank you, Mr Cooke.

MR C.D. McMENIMAN: May it please the court. McMeniman for the first, second, and fourth respondents.

MS F. ST JOHN: May it please the court. St John for the third respondent.

HER HONOUR: Mr Cooke.

MR COOKE: Thank you.

HER HONOUR: There's a lot of material. Can you simplify it for me?

MR COOKE: Yes, your Honour. Your Honour, the applicants sent up a mark-up of the respondents' short minutes of order, which I think identifies - - -

HER HONOUR: That's the document I received most recently this morning?

MR COOKE: Yes.

HER HONOUR: Yes.

MR COOKE: Yes. And it's a mark-up of the documents your Honour received yesterday.

HER HONOUR: Yes.

MR COOKE: And I think that identifies the issues in dispute most clearly. The first two orders – proposed orders – concern an extension of time for the respondents to provide the discovery. Now, the EZ respondents – if I can call them that – have previously proposed, and we consented to, an order that their discovery be provided by 7 April. They sought an extension to 21 April, which we consented to, and your Honour granted. However, we only received the EZ respondents' discovery lists at 4 pm yesterday. Because of that, we've had barely any time to review them. But one thing is glaringly obvious to us on a quick review that they have failed to comply with rule 20.17 because they have not itemised each document that a claim is made for them in respect of privilege. Your Honour is well aware that that is a requirement.

And the most recent decision which refers to that and discusses that requirement is Jackson's J decision in Hastwell v Kott Gunning (No 3) [2019] FCA 1641. Now, your Honour, of course, there may be other deficiencies in respect of the EZ respondents' discovery list, but we have not had time to consider our position in that regard because we were only provided with the discovery list last night. Now, unless

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the EZ respondents accept the deficiencies that we notify them in due course and remedy them, then we will have no choice but to file an interlocutory application in due course. But we're not at that stage yet because we haven't had time to review, and the issues in dispute have not crystallised in that regard. Proposed order 2, your Honour, concerns an extension of time that Dr Winther-Jensen seeks to provide discovery, which the applicants do not oppose.

HER HONOUR: So, I can ..... 2.

MR COOKE: Yes. But similarly, the applicants need time to consider, when we actually get the discovery list, whether there are any deficiencies with Dr Winther-Jensen's discovery and to take the necessary actions to resolve those deficiencies. In respect of proposed order 3, your Honour, that concerns revised category 2. On the last occasion, your Honour, Ms Yates and I addressed you on a revised discovery category 2 that Fortescue sought from the respondents. We understood that your Honour saw the wisdom of the category from your Honour's comments but considered it was oppressive in the form sought by Fortescue because it had overlapping subcategories. And the transcript bears this out. And your Honour invited Fortescue to come back with some collapsed categories, which is what we've now done.

And you will see that we've reduced the category from 24 subcategories to 3 categories as indicated in annexure A, and we've also, to assist our friends, included some search terms in annexure B. Now, we provided this proposed category to the respondents on 8 April, but they oppose it. There's no basis to do so. They are narrow in compass, your Honour, as your Honour can see from the subcategories, and concern very important subject matter, namely, references to the ionic liquid work by Dr Kolodziejczyk in emails. So, he's referring to the work in emails. And as I indicated on the last occasion, your Honour, that material is ripe for cross-examination and ripe in terms of a discovery that ought to be given. But we have heeded what your Honour has said, and narrowed it in that fashion. Then, your Honour, the next proposed order - - -

HER HONOUR: Can I just understand these search terms, Mr Cooke? I understand the categories.

MR COOKE: Yes. Sorry, does your Honour need to be addressed on the search terms?

HER HONOUR: No. I just – how does it work? There's - - -

MR COOKE: How does it work?

HER HONOUR: So, for example, you've got category 2(a). So, I see. They're the search terms for category 2(a) under 1 and 2?

MR COOKE: Yes.

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HER HONOUR: And someone who understands how to do this would know what to do in putting in those search terms?

MR COOKE: Correct.

HER HONOUR: And then on page 5, you've got category 2(b).

MR COOKE: Yes.

HER HONOUR: So, that's two sets of the search terms. And category 2(c) - - -

MR COOKE: And the same logic follows.

HER HONOUR: - - - is the final set of – only one set of search terms.

MR COOKE: Yes.

HER HONOUR: I see.

MR COOKE: Now, your Honour, proposed order 4 is by a consent. It's a narrowment of one of the discovery categories that your Honour ordered against the applicant because it was throwing up - - -

HER HONOUR: Yes. Too many documents.

MR COOKE: - - - 200,000 additional documents from an already large pool of documents.

HER HONOUR: Yes.

MR COOKE: And so, the parties have been sensible in that regard. Proposed order 5 concerns the timing for the applicants to provide discovery. Now, there's no disagreement in respect of the timing for the applicants to provide discovery in respect of the majority of the categories being those referred to in proposed order 5(a).

HER HONOUR: Right.

MR COOKE: And the time that's agreed is 18 July. That's in relation to the first tranche of discovery. But there is a disagreement in relation to the second tranche of discovery which concerns categories 1 and 2. Now, category 2 is as shown in proposed order 4 above. Category 1 is similarly worded to category 2, but it relates to direct electrochemical reduction processes which includes, but is not limited to, ionic liquid R and D information, which you can see in the proposed category 2. So, there's overlap between the two categories. And for efficiency purposes, as we've

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indicated to our friends, we need to deal with them together in terms of discovery otherwise it would be a waste of resources.

Now, the work we have undertaken in accordance with your Honour's previous orders in relation to those two categories has identified that a very large number of documents are potentially relevant to categories 1 and 2, even as amended, that need to be reviewed. That is, 72,000 documents have been identified. Now, as we've explained in correspondence to the respondents, we need until 12 September to complete the second tranche of discovery for a number of reasons. First, because we need the time until July for the team to focus on the first tranche of discovery which comprises a similar number of potentially relevant documents, ie, 65,000. And then, once we've completed that, we can put more resources on the second tranche of discovery.

Now, it's not that we haven't started tranche 2, but it's just that less resources are available to focus on tranche 2 because we want to, and we're conscious, we've got to get out tranche 1 by the agreed date. And also, tranche 2 involves scientific documents, as the categories on the face suggest, which require more time for review than the other documents in tranche 1. Now, of course, your Honour, we understand our obligations to the court, and if we finish tranche 2 earlier, we of course will give it to the respondents as soon as that occurs. And, indeed, we can give an update to your Honour as to how we're going in respect of tranche 2 when we next see your Honour, which we propose at a case management hearing in late July.

HER HONOUR: You won't be seeing me in July or August, I'm afraid, Mr Cooke.

MR COOKE: All right.

HER HONOUR: I will be elsewhere.

MR COOKE: It's good to hear, though, your Honour .....

HER HONOUR: So, you can see me in June, or you can see me in September.

MR COOKE: All right. Well, maybe we will park that date for now. But we – but I would recommend – I would respectfully suggest September would be better because then we would have finished our first tranche of discovery. Now, your Honour, what has occurred last night that the EZ respondents served a solicitor's affidavit at 6 pm, and that – from Ms Dunn. And that appears to be directed to challenging the time that the applicants require for tranche 2 based upon personal views - - -

HER HONOUR: Yes. I'm not sure I'm – I've had a look at that affidavit.

MR COOKE: Yes.

HER HONOUR: Mr McMeniman, I'm not sure I'm terribly assisted by - - -

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MR COOKE: No.

HER HONOUR: - - - someone else's view of how long something will take. I think there needs to be an air of reality brought into this exercise. I must say, I am surprised that the parties cannot agree this sort of timing – sensibly sit down with each other and really nut it out, and that I have to resolve this dispute. But for someone else to give a view, it's very hypothetical as to how long it would take. I'm not sure it assists me at all. I can't possibly know. I am not the partner in charge of this exercise. And until you – unless you really understand the nature of the material, I can't decide based on what – I think Mr Sun says through Ms Dunn. Whether Mr Dewar has, you know, given us a pie in the sky estimate or a realistic estimate.

MR COOKE: We respectfully agree, your Honour. And of course, the applicants complied according to your Honour's orders on the last occasion to identify the correct dates of the estimated time for discovery. So, in accordance with an order of the court, we identified, for tranche 2, that date. And, of course, Mr Dewar is an officer of the court, and he has instructed me to indicate that date in compliance with the applicants – compliance with the order.

HER HONOUR: So, is the difficulty with the September date that until discovery is complete, nobody can go into evidence? Is that what I understand the difficulty to be?

MR COOKE: That's certainly a difficulty, but I want to address you on the evidence timetable. But - - -

HER HONOUR: Yes. Well, we will deal with that separately. But, Mr McMeniman, is that the real difficulty with whether it's August or September, ultimately? I can't remember how long Mr Sun actually said he thought it would take. What is the difficulty?

MR McMENIMAN: The difficulty is we suggested that the applicant should put on their evidence, and they've indicated that they can only provide a date by which they will provide their evidence once they've reviewed the respondents' discovery.

HER HONOUR: Right.

MR McMENIMAN: And so, dealing with it in order, the first, second and fourth respondents have complied with their discovery obligations. And they provided the applicant a verified list from each of the first, second and fourth respondents. And they provided a copy of the non-confidential documents in those lists. The confidential documents are waiting – the signed confidentiality undertakings. And when they've provided, the documents will be provided. So, there's no need for order 1. There has been an issue raised at the bar table about the identification of privilege issues. That can be sorted out if there's a real issue, but it has nothing to do with whether discovery has been complied with in terms of finalising the review,

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providing the list, providing the documents. That issue, your Honour, is tied to the renewed application – the third application – by the applicants for category 2, which is in order - - -

HER HONOUR: 3.

MR McMENIMAN: 3. Discovery having been completed by the first, second and fourth respondents, what they are now seeking – because they're renewing that application, they waited six weeks to propose something. They didn't go away and give me a call or give Ms St John a call and say, "Can we work through these search terms?" Or work through the various lists of things that they put before you twice. They waited six weeks till after the first date by which we were to provide discovery, and in the midst of which my solicitors were working diligently to complete discovery – and they did so working over the public holidays and the like. They waited until 8 April to propose a renewed category 2. Now, the problem is - - -

HER HONOUR: 8 April is when it was proposed?

MR McMENIMAN: 8 April. The last time we were before you was 20 February.

HER HONOUR: Yes.

MR McMENIMAN: And there was a discussion. Your Honour - - -

HER HONOUR: Well, there was a date vacated through no fault of the parties; through my own faults, I appreciate. And I think you were meant to come and see me earlier.

MR McMENIMAN: Nothing to do with the ability to pick up the phone and talk about a discovery category. So, if they want to renew this application for category 2 – which, on the face of it, it seeks duplication with category 1 but also categories 13 and 14 which concern patent applications – if they want to do that, they need to comply with the obligation to make an application for further and better discovery. And they need to satisfy by evidence that the documents that have been discovered to them do not include documents that they can prove there is a reasonable basis to believe they must exist.

And I can provide a citation if necessary for that proposition, your Honour. But that's the test. And the reason why that's the test that applies is not only has discovery completed, but it would be oppressive to go back and repeat discovery, which is essentially reviewing the same documents that fall within categories 1, 13 and 14 and see whether there's something missing that falls within this new category 2. And there's particular oppression by renewing an application that it be done also by reference to search terms which will throw up, potentially, documents - - -

HER HONOUR: Coming within their - - -

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MR McMENIMAN: - - - outside of the breadth of things that have been brought together and reviewed a first time. So, it just should not be entertained at this stage. They waited too long, and they waited until they're now at a point where they need to make a formal application for further and better discovery. So that just leaves the time for them to give their discovery. And, your Honour, I've taken on board what you say about Mr Sun's evidence through Ms Dunn. We embrace what you say for this reason: we've asked for an explanation as to how the applicant gets to their estimate that they need five months or so to review these documents, because both Gilbert + Tobin and Minter Ellison cannot see how it is possible, based on the way in which they review documents and the number of resources they will allocate, why it would take that long.

And their ability to have completed discovery – and our very, very real concern that the applicant is seeking to drag out these proceedings against two smaller respondents when they have not adequately resourced it, if they're to be believed on evidence that has been given by the bar table on instructions. They have not put evidence before you from an affidavit that actually identifies how they have come to the view that it's going to take them five and a half months, using the same tools that the respondents are using in terms of third-party providers, to assist them with the review. And there's some technology that enables to reduce the scope of review, as well, now, I'm told, that actually picks up how you're reviewing things and identifies what's going to be relevant and not based on reviews that are conducted and that actually makes it shorter in terms of time.

But that is why we have sought to at least do what we can. In the absence of anything, we've asked – and it's in Ms Dunn's affidavit – we've asked a number of times, "How do you get to this estimate of months and months and months to complete something that the respondents would be able to do in a far shorter period of time?" Silence. We just get presented with dates, and we get presented with orders to agree with. And if we don't agree, that's how we end up back here. And so, the real concern with that is that there's an additional two months in there, and your Honour is away. But the applicant needs to get on and deal with their evidence. And if they need to see the respondents' discovery first, then I respectfully ask that if they're not going to take a date today for their evidence, that we have a case management hearing in late May or early June before your Honour goes on leave, and they take a date for their evidence, and we take a trial date. And we're ready to take a trial date today if need be, and we've got an estimate.

But on the last occasion your Honour indicated that you thought this might be a matter that could be heard in the early new year, if possible. We agree. And I have dates for myself and Mr Hennessy and my team, and I will have dates again if we're back before you in May. But, respectfully, you have evidence before you from both the respondents, solicitors, doing the best they can in the absence of information from the applicants as to what is a reasonable estimate to complete discovery. And it's met by nothing on the other side other than submissions done on instructions.

HER HONOUR: Well, perhaps – or just before you get back up.

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MR COOKE: Yes.

HER HONOUR: Ms St John, do you have anything to add to any of that?

MS ST JOHN: Your Honour, I respectfully adopt what Mr McMeniman has said. Although the third respondent hasn't yet completed his discovery, it's not now very far off, that would be 12 May. And so, your Honour, the electronic searches have been run, the human review is underway. And so there would also, for us, be some backtracking if your Honour were now to order new discovery categories, even though the third respondent's discovery is not yet complete. Your Honour, if your Honour is against the respondents and is minded to order this new discovery, it's difficult for us to put on any evidence or make submissions to your Honour about whether that might be oppressive.

Because until we run those searches, we don't know how large the pool might be for review. So, if your Honour is against us on that, I would respectfully suggest that we have – submit that we should have the opportunity to at least get in touch with our friends if the pool, it turns out, is unmanageably large. We would then contact our friends about that, and potentially be able to agree some narrowing of the category. Hopefully, we wouldn't have to trouble your Honour with that.

HER HONOUR: Right. Thank you, Ms St John.

MR COOKE: Your Honour - - -

HER HONOUR: On the discovery date - - -

MR COOKE: Yes.

HER HONOUR: - - - doing the best you can – well, firstly, as I understand it, the imposition to you – your client putting on evidence is the need to review the respondents' discovery. Correct? If I wasn't to order the – or if I was against you on the additional category, then your client must be in a position to review that discovery now and on and from 12 May. Correct?

MR COOKE: Not necessarily, no. Because we can review the list at the moment, but as I've indicated to your Honour, we've identified one deficiency so far. There may be other deficiencies.

HER HONOUR: Well, there may be, but you won't know until you look at it.

MR COOKE: We won't, and we haven't been given the time, with all due respect to my learned friend.

HER HONOUR: No, no. No, well, no one's saying that you won't get time now.

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MR COOKE: To look at it. So, we do need – we need time to consider it. We need – and if necessary, we will write to our friends about deficiencies and the like, but if that can't be resolved between the parties, and unfortunately the parties haven't had great success to date in resolving issues between themselves, then we will have to come and trouble the court to resolve that. So that's one thing. The other thing is this: is your Honour right, that until we have reviewed the respondent's proper discovery in this proceeding, we are not in a position to assist the court in terms of the dates required that we need for the evidence-in-chief, nor indicate to your Honour – have any idea of how long the trial would be and that's very difficult without the evidence. That's another aspect, your Honour.

But also, between now and July, the applicant's legal team is busy, extraordinarily busy, reviewing the 62,000 documents that it needs to review in order to satisfy tranche one and then also needs to move into the 72,000 documents for tranche two. And so, we need to do all of those things, we respectfully submit it, before an evidence timetable can be ordered because we're simply not in a position, we say, to start on the evidence at least until we've finished tranche one, which is in July. By that stage, we will have reviewed the respondent's discovery, and also we would have dealt with any deficiencies. And so, if we start it then, then we will be in a – if we come back before, your Honour at some point, we will be in a better position to be able to - - -

HER HONOUR: So, assuming you were to start your evidence in July, when – how long do you think you need for it?

MR COOKE: Well, your Honour - - -

HER HONOUR: You must have an idea of what your evidence is going to comprise in addition to what's already – the numerous affidavits that have already been filed.

MR COOKE: Without knowing what the discovery is?

HER HONOUR: Yes. Well, let's assume, in the respondent's favour - - -

MR COOKE: Okay.

HER HONOUR: - - - that their discovery is adequate and the only thing that hasn't happened is there hasn't been an enumeration by item or an itemisation of the documents subject to a claim for privilege.

MR COOKE: Yes. All right. So, doing the best we can, we will require three months. So, three months commencing from the end of July, which will bring us to 28 October or thereabouts for our evidence-in-chief. Now, as previously foreshadowed to the court, we anticipate that our evidence-in-chief will involve detailed expert evidence and, your Honour, we haven't even got the documents from

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the respondent, not all the documents from the respondent, in terms of being able to work out what to provide to our experts. So, there's just - - -

HER HONOUR: Well, you've got - - -

MR COOKE: Well - - -

HER HONOUR: You have Mr McMeniman's client's discovery and Mr McMeniman's - - -

MR COOKE: A list.

HER HONOUR: Yes. Well, I think there's a question of signing some confidentiality undertaking and the material will be provided.

MR COOKE: I don't even think – I'm not even sure that that has been communicated to my client as yet, but in any event, I suppose a lot has happened since 6 pm last night, but be that as it may, be that as it may, there has to be a review of the documents, and then we have to instruct the experts.

HER HONOUR: I accept all of that.

MR COOKE: Yes. And in an ordinary – your Honour, from a typical patent proceeding, if I can use that, which deals with a scientific expert all the time, three months is considered to be a standard to short period of time for that kind of evidence. I don't think anyone at the bar table who's really – can indicate that that's wrong to your Honour. So, three months is a fair time. I don't think we could move any quicker. I will know more after I've viewed the discovery.

Now, then we go from there, but then your Honour then would – well, the respondents presumably would like three months as well? Or would they like a shorter period of time? But assuming three months, that brings us to 28 January. Then there will be four weeks for evidence and reply. That will bring us to the end of February. And then, your Honour, there will have to be a joint conferral, if your Honour directs that to be ..... there will be joint expert questions that have to be negotiated and ordered by your Honour. Then there will be a joint conclave, you know, which usually takes a couple of weeks, producing a joint report for your Honour. Then we move into pre-trial directions - - -

HER HONOUR: This case will take me to my retirement, Mr Cooke.

MR COOKE: Well, I don't think so, your Honour. But realistically - - -

HER HONOUR: My successor will be hearing it.

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MR COOKE: But realistically, your Honour – realistically – we are looking more like – we're looking at, like, sort of, May, I think. That would be the earliest, I would think, with all those steps.

HER HONOUR: May. I think you - - -

MR COOKE: But think about it - - -

HER HONOUR: You won't get any pushback on May, I don't think, from your opponents.

MR McMENIMAN: ..... take a date that's - - -

HER HONOUR: Yes.

MR McMENIMAN: - - - not in – that's sometime next year? Preferably in the first half.

MR COOKE: Well, there we go.

HER HONOUR: Well, where I'm going, Mr Cooke, is this: I'm happy to allocate a provisional date today if the parties wish to take one, having regard to some best estimate of how much time you need, or to do that in the next week or so, if you want to have a discussion about best estimates. Or you can come back and see me in a couple of weeks, and I can do that. At the moment, I'm pretty much subject to appeal periods, I think. Pretty much have your pick for the first half of next year.

MR COOKE: All right. Well, your Honour, what about – I mean, I – really, my estimate is going to be very, very rough.

HER HONOUR: Yes, of course.

MR COOKE: We may need more or less time.

HER HONOUR: I don't expect anyone to give me a proper estimate at the moment.

MR COOKE: Well, assuming - - -

HER HONOUR: And I would think I would have to mark out probably three to four weeks in my diary. And you – we can play with those three to four weeks in the months that follow. But - - -

MR COOKE: Twenty – yes, sorry.

HER HONOUR: - - - if you wish to do that, you can.

MR COOKE: Yes, your Honour.

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HER HONOUR: I've - - -

MR COOKE: Yes. We do, your Honour.

HER HONOUR: - - - now lost track of appeal periods because they've changed. But I think May is now a free month. Yes.

MR COOKE: Yes.

HER HONOUR: It is a free month because - - -

MR COOKE: I think so.

HER HONOUR: - - - we're about to hit May.

MR COOKE: 25 May, your Honour, to 12 June, that's three weeks, or extending it to 19 June, that's another four weeks.

HER HONOUR: We might need to check diaries and send my associate some chunks of time, or – unless you've got dates.

MR .....: I've got dates, yes.

HER HONOUR: So, if we work towards at least a notional date for hearing, then I think the parties need to realistically sit down with each other and work out times. That might mean that you have to aim for an August date to do your category 1 and 2 discovery.

MR COOKE: I just – your Honour, I'm instructed, no, it's not.

HER HONOUR: It's just not possible?

MR COOKE: So, I'm instructed – no, it's not. But if that changes, we will absolutely notify the court and ..... parties.

HER HONOUR: Right. Well - - -

MR COOKE: And if your Honour – look, if your Honour - - -

HER HONOUR: If I leave the September date, Mr McMeniman, and the material comes earlier, it comes earlier. If it doesn't, then you will have the three months - - -

MR COOKE: That's right.

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HER HONOUR: - - - while Mr Cooke's client is preparing its evidence to review the material, which will at least give you and Ms St John some significant period to consider that material.

MS ST JOHN: Might I say something briefly. I rise because Mr Cooke invited anyone who could say three months wasn't standard in a patent proceeding to say something. I don't make that submission, your Honour, but I do say that it's not the relevant measure. Our friend's evidence – our friend, as your Honour has noted, has put on very substantial evidence-in-chief already. There's no evidence before your Honour saying that our friends can't begin to prepare their evidence-in-chief now at the same time as they do their discovery.

HER HONOUR: Well, I think, to bring an air of reality to the preparation of the case, I understand that the applicant is a litigant with some resources. But even for the applicant, resources are limited. And if those running the case need to focus on issues at a time, there's only so much that one – you know, one team can do at a time, as – recalling from my own days in practice, now some years ago. So, I do think we need to bring a measure of, sort of, reality to preparation of this matter. I understand the parties want it dealt with. If – you're all experienced practitioners at the bar table, and all those instructing are experienced practitioners. And if – I would rather have a realistic assessment given to me – be that three months, two months, six weeks – than an unrealistic one. To come back here every six weeks and tell me you need extensions is not a good use of anyone's time.

MS ST JOHN: Your Honour, I accept all of that. I would submit, though, that ordinarily, the people who would be preparing expert evidence would not be the same people who are doing a first-level discovery review.

HER HONOUR: Well, no. I accept all of that, but one needs to understand the universe of material available before one can instruct an expert.

MS ST JOHN: Yes, your Honour, but that would be the material to be coming from the respondents which our friends will have by 12 May and yet they say they don't want to begin preparing their evidence-in-chief based on our material until they finish disclosing their material. The result, your Honour, is that now talking about a trial date 12 months away and our friends say they don't want to put on the evidence-in-chief for six months. So, our friends have six months from now to finish their discovery and prepare their evidence-in-chief and then the other steps are compressed within the final six months.

HER HONOUR: I'm not going to make dates for the provision of evidence today because I do want the parties to talk. I've seen the correspondence that has passed between the parties; I'm not sure it's helpful. I can arrange for the parties to sit with a registrar, if that's helpful, to try and nut out some dates, but I think it would not be much more helpful if the respective instructors could sit down or pick up the phone – I think Mr Dewar is in Perth – and actually talk to each other, and possibly cheaper, and come up with a realistic timetable. If everyone's objective is to get the matter

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dealt with in next May, then everybody has a date to work to and the time in between now and then has to be dealt with equitably as between the parties.

MS ST JOHN: Yes, your Honour.

HER HONOUR: And that is what I would like the parties to try to achieve by consent between each other.

MS ST JOHN: Thank you, your Honour. That was what that was what my submission was directed towards. So, if there's 12 months until trial and six months taken up with evidence-in-chief, I would submit that's not going to be an equitable division of the time remaining until trial.

HER HONOUR: All right. Well, perhaps that can be there can be a discussion about that.

MS ST JOHN: Please the court.

MR McMENIMAN: Your Honour, I don't wish to add anything other than this seems to be a case that benefits from case management of the applicant because we are concerned and the tenor of what I understand, in better words, Miss St John was saying is as to the under-resourcing or inadequate way in which the resources are allocated amongst the four counsel and many solicitors that exist in the applicants camp and there is also internal resources and you've seen evidence about that in the prior interlocutory applications.

But then when it comes to actually doing something, your Honour is lectured in detail about every possible step that could come along in preparing a case for hearing as if it wasn't the first time that you've seen expert evidence and it being prepared for a hearing and there being only six reviewers and that's all that can be allocated when you've heard from evidence that there's usually 11 to 12 first level reviewers and that it can't be the case that you would have all of those people dedicated to discovery and no one available to prepare evidence such as the three junior counsel who sit down the other end of the bar table.

And so, respectfully, I've heard what your Honour said about discovery dates. All I would submit is that we would benefit from coming back before you early June before you go on leave and hopefully then we can deal with this evidence date issue and if the conduct between the parties has maintained its course, as it has in the past, then you ought allocate – sorry, you should refer myself and the other juniors to a registrar and we will sit in a room, as often happens in other large cases, and have to agree how to prepare it for trial.

HER HONOUR: Yes. Well, that is what I propose to do if the parties can't come to an agreement. All right. Well, the orders – I think the orders to be made today, Mr McMeniman tells me I don't need to make the order in accordance with paragraph 1. If there are any issues with, as your side perceives it, with the EZ respondents'

discovery, I have no doubt that your side will let the EZ respondents know and if that matter has to be taken up with me, it can be.

MR COOKE: Thank you, your Honour.

HER HONOUR: I will make – paragraph 2 is agreed.

MR COOKE: Yes.

HER HONOUR: Now, I don't propose to make an order in accordance with paragraph 3 today. I am persuaded by what Mr McMeniman has told me.

MR COOKE: Can I be heard on that, your Honour, because I haven't had a chance to respond.

HER HONOUR: You can.

MR COOKE: Thank you. Look, we were before – last before your Honour at the end of February. Right. We did propose this category some four weeks later- four to five weeks later, beginning of April. Your Honour, we, of course, in between that, we're all busy seeing Stewart J in relation to the application for leave in March. So, the parties were very busy, and we did our best to narrow category 2 to a reasonable category. Now the – Mr McMeniman's clients were provided with category 2 weeks before they completed their discovery, which was only last night. And, your Honour, we do submit these are documents referred to in emails by Dr Kolodziejczyk and we do submit that it would be relevant for your Honour to be able to consider those documents in the course of this proceeding.

HER HONOUR: Well - - -

MR COOKE: And there seems to be plenty of time because the respondents – whilst we're busy trying to review the respondents' discovery categories, whilst we're busy trying to get our tranche one discovery categories out, the respondents may have some time up their sleeves to be able to address what is a narrow category.

HER HONOUR: Well, the real question is whether you need to put on – in the absence of agreement, you need to put on an application. It would be better, of course, if you didn't.

MR COOKE: Yes.

HER HONOUR: But – and I understand why you don't want to and I certainly, you know, would prefer if I didn't have to resolve it by way of application, but I think you do because it's opposed.

MR COOKE: All right.

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HER HONOUR: And I think the way forward is if you can't agree it with your friends at the on the other side of the bar, table then you will have to put on an application.

MR COOKE: May it please the court.

MR McMENIMAN: Your Honour, just so that I'm clear about what I meant about that, it wasn't just filing an application. They ought to review what has been discovered first, the thousands of documents.

HER HONOUR: Yes. No, I understand your point.

MR McMENIMAN: So, it's not – I'm not trying - - -

HER HONOUR: And - - -

MR COOKE: But there's no burden if Mr McMeniman can tell me that those discovery categories are caught by the discovery they're given, but we haven't had that indication from the respondents, but I hear what your Honour has to say and if we have to put on an interlocutory application, we will.

HER HONOUR: All right. Paragraph 4 of the orders is agreed, I understand.

MR COOKE: Yes.

HER HONOUR: That then leaves paragraph 5 which I will make, I propose to make in accordance with the dates provided.

MR McMENIMAN: Please the court.

HER HONOUR: Of course, if those dates – if in the course of undertaking the exercise, those dates are truncated in any way, then I think you should let your opponent's know.

MR COOKE: Yes, we will.

HER HONOUR: And you should let the court know, but it seems to me that your client, Mr Cook, really needs – does need to focus its resources on this case. The case was commenced last year – this year – last year.

MR COOKE: I think so, your Honour.

HER HONOUR: Yes.

MR COOKE: But your Honour is aware of the other interlocutory application.

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HER HONOUR: Yes. Some time has passed. It's obviously a case that should be dealt with or resolved in some fashion relatively expeditiously and so I think the necessary resources do need to be focused on it. I understand that one human can only do so much.

MR COOKE: Exactly, your Honour, and we say they are.

HER HONOUR: But it is your client's case.

MR COOKE: Yes.

HER HONOUR: And so, I think it is incumbent on your client to ensure that it is properly resourced.

MR COOKE: Yes. I mean, we hear what your Honour has to say. We are properly resourcing it, but we will continue to property resource it and we're very conscious that it's the applicant's case and – but we will adhere to what your Honour has just said.

HER HONOUR: All right. So, which three or four weeks should I pencil out in my diary next year.

MR COOKE: From 25 May.

HER HONOUR: Are those convenient?

MR COOKE: That's convenient.

HER HONOUR: That's the last week of May into June. Ms St John, are you available in that period?

MS ST JOHN: I'm sorry, I didn't hear that.

HER HONOUR: Are you available from 25 May for three weeks?

MS ST JOHN: Yes, your Honour.

HER HONOUR: Mr McMeniman, do you have yours and your leaders' - - -

MR McMENIMAN: Yes, your Honour.

HER HONOUR: Everyone is available?

MR McMENIMAN: Yes. We're available earlier, as well. But I'm not sure where the applicant is.

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MR COOKE: Unfortunately, got closing submissions in early May from the trial in April before Burley J. So - - -

MR McMENIMAN: So, mid-May?

MR COOKE: No. From the 25th, your Honour, of May, we're free, if that's convenient your Honour. I understand that the – it suits the parties' counsel – the other parties' counsel. So - - -

HER HONOUR: All right. Well, I can pencil in from 25 May for three weeks.

MR COOKE: Thank you.

HER HONOUR: I think there might be a long weekend somewhere in there.

MR COOKE: Okay.

HER HONOUR: We usually have the Queen's birthday – or King's birthday around the second weekend in June. But, in any event, that can be sorted out. What I will do is I will make an order today provisionally listing the proceeding for hearing for three weeks commencing on 25 May 2026. That will not appear as a listing.

MR COOKE: No.

HER HONOUR: No one will get a bill from the court. But that time will be kept free in my diary.

MR COOKE: Thank you, your Honour. Can I respectfully request – if my learned friends agree, if we could request another two days for submissions, but have a little – have a bit of a break between those three weeks and the closing submissions.

HER HONOUR: Yes.

MR COOKE: To give us – to give the parties time to prepare a better product for your Honour.

HER HONOUR: Yes. No. I'm supportive of that.

MR McMENIMAN: If that's convenient to your Honour.

HER HONOUR: At the moment, it is. I have not yet decided when I'm going on leave next year yet.

MR McMENIMAN: From a junior's perspective, it's sometimes better to rip off the Band-Aid.

HER HONOUR: Yes.

MR McMENIMAN: But if your Honour would be assisted in that way, we would - - -

HER HONOUR: Well, usually, it's helpful after there has been a lot of evidence to give the parties some time to digest the evidence and prepare some comprehensive written submissions. You can tell me what those days are. You can either tell me now or you can perhaps have a discussion and let my associate know.

MR COOKE: I think the parties are proposing, jointly, the 18th and 19th, if that's convenient to your Honour. Thursday and Friday.

HER HONOUR: So, the trial would end on the – assuming we take up the three weeks, the evidence would end by 12 June, and you would come back on the 18th and 19th. Is that right? So, you would have Monday, Tuesday, Wednesday to get your houses in order.

MR COOKE: Can I just confer with my learned friends.

HER HONOUR: That would – what about 23 and 24?

MR COOKE: Yes, your Honour.

HER HONOUR: 23 and 24. And when do you want to come back for case – I think you better come back for case management at the end of May, hadn't you? And tell me what is going to happen with evidence.

MR COOKE: Would – sorry, your Honour, I didn't - - -

HER HONOUR: You can come back early June if you like, but you – I would like you to come back and tell me what's proposed for a timetable for evidence.

MR COOKE: Could I inquire whether – I'm not sure whether your Honour is already away – but could I inquire - - -

HER HONOUR: I'm in chambers until 27 June.

MR COOKE: 27 June. I think – could we seek a date in June? Your Honour, the 19th or 20th?

HER HONOUR: 19th, I think, is better. Actually, if – I could do the 20th, but it would have to be at 11 o'clock.

MR COOKE: That would suit us.

HER HONOUR: Or the 19th at 9.30.

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MR COOKE: That would also suit us.

MR McMENIMAN: Either is fine. Thank you, your Honour.

HER HONOUR: So, the 19th at 9.30?

MR COOKE: Yes.

HER HONOUR: All right. Perhaps, I will have a go at these orders then if everyone's ready.

MR COOKE: Yes, please, your Honour.

HER HONOUR: I will have a go at the orders, and you can tell me if I've missed anything. In matter number NSD 527 of 2024, the Court makes the following orders:

(1) The date for compliance by the third respondent with order 1 of the orders made on 26 February 2025, as varied by order 3 of the orders made on 21 March 2025, be extended to 12 May 2025.

(2) Discovery category 2 of schedule 3 to the orders made on 26 February 2025 (EZ categories) – I don't know if I need that definition – be amended to delete the words, "and/or Fortescue" and add "or" after the word "second respondent", so the category reads as set out in the draft orders provided to me by the applicant's counsel today at paragraph 4.

(3) The dates on which the applicants are to give discovery pursuant to order 3 of the orders made on 26 February 2025 are:

    (a) 18 July 2025 for documents within categories 3, 5, 6, 8, and 10 of the EZ categories and category 2 of schedule 4 to the orders, the orders made on 26 February 2025

    (b) 12 September 2025 for documents within categories 1 and 2 of the EZ categories.

(4) The proceeding will be listed for case management hearing on 19 June 2025 at 9.30 am.

(5) The proceeding be provisionally listed for hearing for three weeks commencing on 25 May 2026 and 23 and 24 June 2026.

Is there anything I've missed?

MS ST JOHN: No, your Honour.

HER HONOUR: Mr Cooke, if your client wishes to put on an interlocutory application in relation to that additional of discovery if there can be no agreement in

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the meantime, I think that can just be filed in the ordinary way. So, I will leave that for the parties to - - -

MR COOKE: Yes. Thank you, your Honour.

HER HONOUR: - - - attempt to determine. So, on the next occasion, timetables – an update on the progress for discovery and any timetables for evidence, which no doubt will be assisted by some discussion between now and then.

MR COOKE: May it please the court.

HER HONOUR: All right. Thank you. Could court be adjourned.

MATTER ADJOURNED at 12.00 pm UNTIL THURSDAY, 19 JUNE 2025

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Daisy Cullen

From: Grace O'Connor <GOConnor@dcc.com>
Sent: Friday, 9 May 2025 10:09 AM
To: Kevin Huang; Michael Williams; Rebecca Dunn; Caitlin Meade; Daisy Cullen; Molly Allen; Mike Hales; Daniella Lambert; Meaghan Philp; Oliver Hoare
Cc: Paul Dewar; Jessica Sapountsis; Ashley Cameron; Rohit Dighe
Subject: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]
Attachments: 2025-05-09 - Letter to G+T (discovery) (2023413).pdf

External email >

Dear Colleagues,

Please refer to the ***attached** letter.

Yours faithfully

Grace O'Connor
Managing Associate

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We recognise their ongoing connection to land, sea and community.

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From: Kevin Huang <KHuang@dcc.com>
Sent: Thursday, 8 May 2025 12:56 PM
To: Michael Williams <mwilliams@gtlaw.com.au>; Rebecca Dunn <rdunn@gtlaw.com.au>; Caitlin Meade <cmeade@gtlaw.com.au>; Daisy Cullen <dcullen@gtlaw.com.au>; Molly Allen <mallen@gtlaw.com.au>; Mike Hales <mike.hales@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Meaghan Philp <Meaghan.Philp@minterellison.com>; Oliver Hoare <oliver.hoare@minterellison.com>
Cc: Paul Dewar <PDewar@dcc.com>; Grace O'Connor <GOConnor@dcc.com>; Jessica Sapountsis <JSapountsis@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Rohit Dighe <RDighe@dcc.com>
Subject: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]

Dear Colleagues

Please see the **attached** correspondence and enclosure.

Yours sincerely

Kevin Huang
Lawyer

Paul Dewar
Principal



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Attention: Michael Williams
Rebecca Dunn
Mike Hales
Daniella Lambert

Contact: Paul Dewar
PDewar@dcc.com

Grace O'Connor
GOConnor@dcc.com

Our Ref: 2023413

Your Refs: MJW:RXD:1058625
1496352

9 May 2025

Mr Michael Williams / Ms Rebecca Dunn
Gilbert + Tobin
L35, Tower Two, International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000

Fortescue Limited & Ors v Element Zero Pty Limited & Ors,
Federal Court Proceeding No. NSD527 of 2024

Dear Colleagues

We are continuing to review the extent to which your clients have failed to comply with their discovery obligations, however at this stage it is apparent that your clients have at least failed to comply with their obligations under rule 20.17(2)(b) and (c) and have not complied with the instruction in the Court's order that documents be discovered in native form.

Rule 20.17(2)(b) and (c)

Rule 20.17(2)(b) and (c) require a description of each document in the List of Documents to be discovered: *Hastwell v Kott Gunning No 3* [2019] FCA 1641 [21] – [31]. This obligation needs to be complied with in respect of every document referred to in the list of documents including:

(a) documents which have been but are no longer in your clients' control (rule 20.17(2)(b)); and

(b) documents in respect of which your clients make a claim for privilege (rule 20.17(2)(c)).

Yours clients have failed to meet this obligation in the Lists of Documents served on our client on 29 April 2025. We require you to remedy this defect by no later than 12 May 2025 (noting that you have been on notice of this defect since the last case management hearing on 30 April 2025).

Documents in native form

We refer to our email of 6 May 2025, and your response of the same date.

As noted in our email, it is a requirement of the Orders of Justice Markovic of 26 February 2025 that discovery of documents in Schedule 1 be provided in native form.

Your response to our email failed to engage with the reality that the provision of discovery in native form is a requirement of her Honour's orders. It is not a mere "request" by our clients.

In your email of 6 May 2025, you indicated that your clients would provide their discovery in native form, but it has not yet been provided.

It will be highly inefficient (and wholly unreasonable) for our client to be required to review your clients' discovery twice; once in PDF form, and then again in native form.

Please provide your clients' discovery in a native form by Monday 12 May 2025.

Our clients reserve all of their rights.

Yours faithfully



DAVIES COLLISON CAVE LAW

The Companies Officer
Australian Securities Exchange Ltd
Level 40, Central Park
152-158 St Georges Terrace
PERTH WA 6000

23 August 2019

Dear Madam or Sir

Fortescue Ore Reserves and Mineral Resources Update: Operating Properties

Fortescue Metals Group (ASX:FMG, Fortescue) presents the Ore Reserves and Mineral Resources statement for its Hematite and Magnetite operating properties at 30 June 2019.

Ore Reserves and Mineral Resources are reported in accordance with the Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves, December 2012 (the JORC Code) as required by the Australian Securities Exchange. The annual summary will be included in Fortescue's 2019 Annual Report and should be read in conjunction with the enclosed supporting technical information (Attachment 1 – Hematite Ore Reserves and Mineral Resources Report and Attachment 2 – Magnetite Ore Reserves and Mineral Resources Report).

Hematite Ore Reserves and Mineral Resources – Operating Properties

	Reporting	30 June 2019		30 June 2018	
	Basis	Million Tonnes	Fe %	Million Tonnes	Fe %
Ore Reserves	(Dry Product)	2,288	57.5	2,250	57.4
Mineral Resources	(Dry In-Situ)	6,175	56.3	6,122	56.4

Operating Properties include the Chichester and Solomon Hubs as well as the Eliwana deposit (part of the Western Hub). Ore deposit types include Bedded Iron (BID), Channel Iron (CID) and Detrital Iron (DID) mineralisation.

A Mineral Resource update for the Iron Bridge Magnetite project was completed by Snowden Mining Industry Consultants in 2019 and provided in an ASX release dated 2 April 2019.

Chief Executive Officer Elizabeth Gaines said, "We are pleased to report our Hematite Ore Reserves and Resources at our operating properties maintained at over six billion tonnes, supporting the sustainability of our core iron ore assets across our Solomon and Chichester Hubs, as well as our developing Western Hub."

"Our Eliwana Mine and Rail Project in the Western Hub is now underway, in addition to our Iron Bridge Magnetite Project which is developing Australia's largest JORC compliant magnetite resource."

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Yours sincerely
FORTESCUE METALS GROUP

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Background
The Iron Bridge Project is owned through an unincorporated joint venture (UJV) between FMG Magnetite Pty Ltd (69 per cent) and Formosa Steel IB Ltd (31 per cent). FMG Magnetite Pty Ltd is a subsidiary of FMG Iron Bridge Ltd, a Hong Kong registered company owned by Fortescue (88 per cent) and a subsidiary of Baosteel Resources International Company Limited (12 per cent). Formosa Steel IB Pty Ltd is a 100% wholly owned entity of Formosa Plastics Group.

Fortescue
The New Force in Iron Ore

Ore Reserves and Mineral Resources Update Operating Properties



Fortescue
The New Force in Iron Ore

Attachment 1
Hematite Ore Reserves and Mineral Resources Report

Fortescue Hematite Mineral Resource Reporting as at 30th June 2019

Chichester Deposits (Cloudbreak, Christmas Creek & Kutayi)

Geology

The Cloudbreak, Christmas Creek and Kutayi deposits lie within the Chichester Ranges, in northern Western Australia. Iron mineralisation is hosted by the Nammuldi Member which is the lowest member of the late Archaean aged Marra Mamba Iron Formation (MMIF). The Nammuldi Member is characterised by extensive, thick and podded iron rich bands, separated by equally extensive units of siliceous and carbonate rich chert and shale. The Nammuldi Member in the Chichester Range is interpreted to be up to 60 metres in true thickness. Underlying the Nammuldi Member rocks are black shales and volcanic rocks belonging to the Jeerinah Formation. Extended periods of tectonic activity have variably folded and faulted these rocks, together with weak metamorphism. Subsequent erosion and hardcapping or lateritic processes have altered these rocks, and present outcrop of Nammuldi Member represents a ridge of low-lying hills (relief up to 30 metres) throughout the prospect areas. These ridges are recognised as the Chichester Ranges.

Drilling within the prospects has proved that the Nammuldi target horizon extends below cover away from the hills. In these regions (recognised mineralisation has been intersected more than 6 kilometres from the outcrop) the target iron formation can be overlain by Tertiary age colluvium and alluvium (younger than 65 Million years). This colluvium can contain both cemented and un-cemented detrital products of iron enriched material, BIF, chert and shale within a matrix of finer grained sediments (including clays). Percolation of groundwater through the weathering profiles has resulted in precipitation of both calcrete and ferricrete creating resistant horizons within the extensive regolith. More proximal to the Fortescue Marsh to the south, the Tertiary sediments become finer grained and more clay dominant, with some recognised calcareous zones. A simplified geological cross section through the Chichester Ranges is shown in Figure 1. A typical stratigraphic section of the Chichester Ranges is shown in Figure 2.

Figure 1

Simplified Schematic geological section through Chichester Ranges

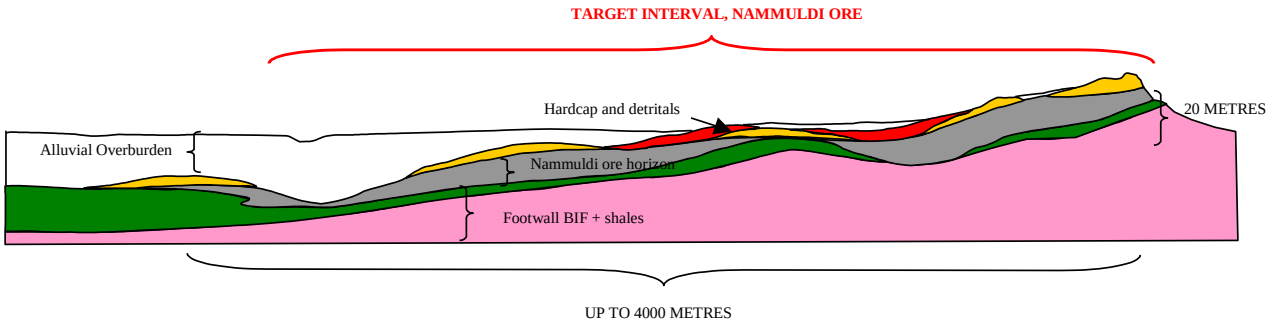
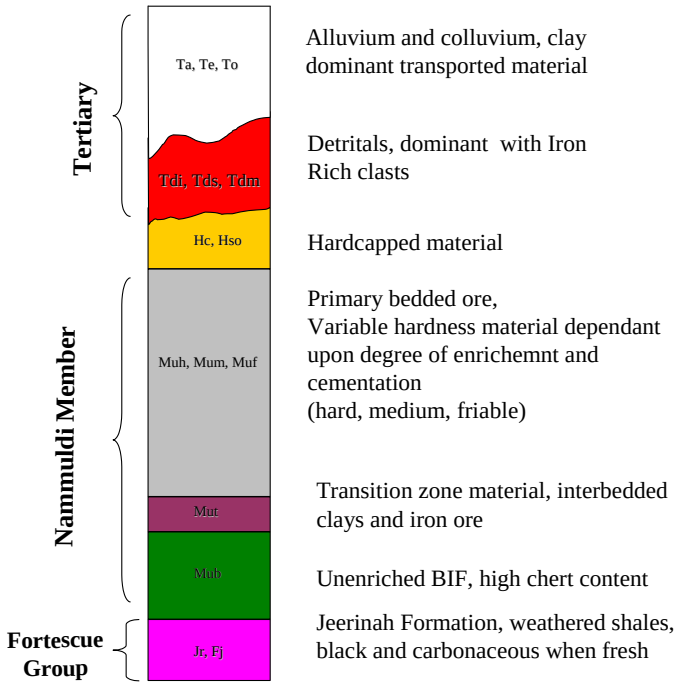


Figure 2

Typical stratigraphic section of Chichester Ranges ore intersection



Structure

The structural geology of the area is predominantly concealed with limited outcrop exposure. However, small scale faulting and folding (metre offsets) can be observed in some outcrops, and larger-scale faults are interpreted from aeromagnetics and regional mapping, plus drilling results. There is currently no evidence to suggest that the faulting or folding crosscuts the mineralisation. In places faults may be the conduit for the mineralisation (hypogene model).

Iron Mineralisation Styles

The mineralisation is characteristically hematite and goethite (with variable degrees of alteration between these minerals). Main gangue minerals are kaolinite, quartz and gibbsite, with minor gangue including carbonates, either calcite or dolomite.

Iron is enriched from the parent rock (Banded Iron Formation, BIF) by processes of supergene and, or hypogene enrichment. In both processes, the original iron is present as magnetite bands within the BIF (iron banded with cherts and lesser carbonates), and oxidation of the magnetite to hematite and goethite occurs. Contemporaneous with the iron enrichment, the original gangue minerals are partially to fully leached out or replaced by iron minerals, giving an overall increasing content of iron minerals depending upon the degree of enrichment. A volume loss of up to 35% can occur with enrichment due to loss of gangue minerals.

Microplaty hematite (MplH) is recognised in varying degrees throughout Fortescue's Chichester Range deposits. This is interpreted to occur due to hypogene enrichment of the MMIF in proximity to tectonic structures (faults or tight folds), which have allowed upward fluid flow, and low-grade metamorphism of the parent rock, resulting in extensive hematite mineralisation.

The majority of the iron mineralisation is martite-goethite resulting from supergene enrichment of a BIF substantially rich with magnetite (oxidised to martite) in the parent rock.

Hardcapping (ferricrete development) of portions of the mineralisation has been identified in mapping and drilling. This process, formed at latter stages of geological development (Tertiary), has changed the physical and geochemical properties of the upper portions of the mineralisation (up to 10 metres thickness). Hardcapped material has a higher density being pervasively cemented by goethite, commonly has vitreous goethite included in the matrix, and can be quite vuggy. An associated increase in gangue content may be seen in hardcap due to the near surface processes of ferricretisation.

Current Drainage

Ephemeral drainages dissect the Chichester Ranges, generally in a southerly draining direction and commonly display alluvial sediments characterised by silt and sand sized sediments. These shallow drainages become more meandering and braided on the shallower topography towards the Fortescue March. The Fortescue Marsh is a wide shallow basin (up to 13 kilometres wide) associated with a widening of the Fortescue River, which during flood events fills with water and can remain filled for extended periods. The surface of this feature is Quaternary clay rich sediments.

Data and Mineral Resource Estimation

The Mineral Resource estimate for each deposit is based solely on reverse circulation (RC) drilling (in addition, numerous diamond drill holes have been drilled, some of these were twinned with RC drill holes to check geological and grade continuity, the remainder were drilled to provide material for metallurgical test work or as downhole geophysical calibration holes). Drill hole spacing ranges from 800 x 200m to 50 x 50m depending on the stage of development ahead of mining. For Grade Control (GC) drilling, holes are drilled on a 25m x 25m pattern. Drill hole collar locations were surveyed using a base station differential GPS with collar accuracies to within 5cm (laterally and vertically).

Exploration RC samples and the majority of GC samples were collected over 1m intervals using cone splitters from which ~3kg of material was pulverised to produce a sub-sample for analysis. Field quality control procedures involved insertion of assay standards and collection of duplicate samples at the rig. Sample pulps were analysed for Fe, Al_2O_3, SiO_2, TiO_2, CaO, MgO, Na_2O, K_2O, Mn/MnO, P, S, As, Pb, Zn, Cu and Cl by XRF and 3-point LOI (at 370, 650 & 1,000°C) by thermogravimetric methods. This is considered to be close to “a total analysis”.

Geochemical and geological logging data were used to define geological domains within each deposit, 3-D wireframes were then used to code the drilling data and define samples within each geological domain. Model limits were controlled by drill hole data extents and Mining Lease boundaries. Statistics were determined for each analyte within each domain, this confirmed that each domain was statistically discrete and justified the use of hard boundaries in statistical analysis and modelling.

An indicator method was used to define high grade zones within each stratigraphic unit. For Cloudbreak and Christmas Creek the Resource Models were constructed using a 25mE x 25mN x 1mRL parent block size with sub-celling to 12.5mE x 12.5mN x 1mRL to aid in following the folded domains and to allow integration of Grade Control Models. Grade Control Models were constructed with a parent block size of 12.5mE x 12.5mN x 1mRL and no sub-celling. At Kutayi the Resource Model was constructed using 50mE x 100mN x 1mRL blocks. All estimation was undertaken using Ordinary Kriging (OK) at parent cell scale. Multiple estimation search passes were used for each domain. Hard boundaries were applied between all estimation domains. Validation of the block models (using visual, statistical and trend analysis methods) shows good correlation of the input data to the estimated grades.

The mineralised domains have demonstrated sufficient geological and grade continuity to support the definition of Mineral Resource and Ore Reserves and the classification applied under the JORC Code. Drill spacing and data integrity, geological complexity, estimation risk and mineralisation continuity based on the semi-variogram ranges of influence were used to determine Mineral Resource classifications.

For Mineral Resource reporting purposes the Cloudbreak and Christmas Creek Resource Models were regularised to a 12.5mE x 12.5mN x 1mRL block size prior to the GC Models being merged. The resulting combined Resource/GC Models were then flagged with the mined-out surface (as at April 30th 2019), mining complete exclusion zones and heritage restricted areas (where appropriate). Adjustments were then made to the Measured Mineral Resources to subtract the mined tonnage (assumed at average grade) for May and June, and to add in the stockpiled tonnes.

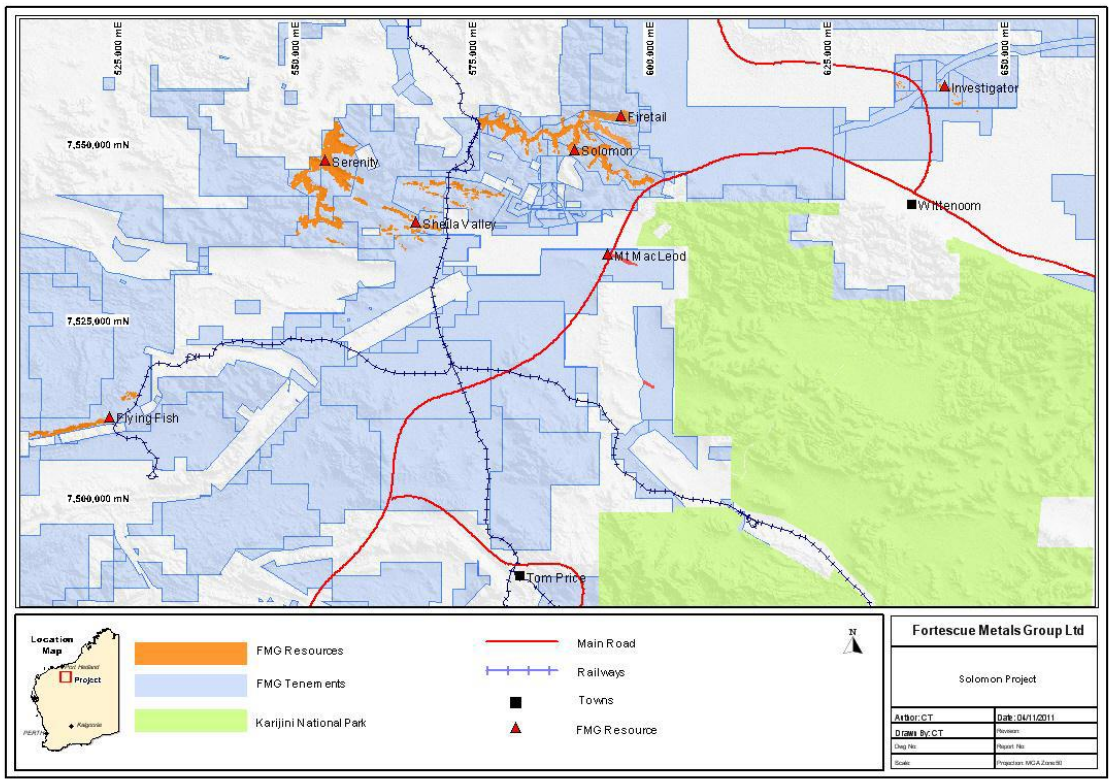
Solomon Deposits (Firetail, Kings & Queens)

Geological Setting

The Solomon Project area is situated approximately 60 kilometres to the north of the Tom Price township in the northern Hamersley ranges (Figure 3). Outcropping geology in the project area is dominated by the Dales Gorge, Whaleback Shale and Joffre Members of the Brockman Iron Formation which hosts large BID throughout the Hamersley Province. The Firetail deposit contains the major tonnages of BID at Solomon, where geological favourable environments have allowed for the formation and preservation of large tonnages of iron mineralisation.

Incised into this bedrock geology are regional palaeochannel systems, predominantly one to two kilometres in width, and stretching for tens of kilometres. During the Miocene period deep chemical weathering and erosion of the generally iron rich material into these fluvial channels formed CID. Through Fortescue's interpretation of drill hole results, the CID can be subdivided into an upper 'hard CID' and a lower 'ochreous CID'. Clay lenses are observed as semi-discrete bands often several meters thick, sometimes of a poddy nature although often traceable between drill holes. Approximately 40 km of buried CID is preserved in the Kings CID system, with a further 25 km of CID located in the Serenity deposit to the west. Other CID occurrences are also known throughout the Solomon project area. The material overlying the CID (and other areas) has been eroded from adjacent mineralised and un-mineralised bedrock. This clastic material is concentrated into horizons of elevated iron grade termed DID, which forms part of the sequence of overlying late Tertiary aged alluvial and colluvial deposits.

Figure 3 – Location of the Solomon Deposits



Data and Mineral Resource Estimation

The Mineral Resource estimates for each deposit are based solely on Reverse Circulation (RC) drilling. Drill hole spacing includes areas at 400 x 100m, 200 x 100m, 100 x 50m and 50 x 50m, with some areas infilled at 25 x 25m. Drill hole collar locations were surveyed using a base station differential GPS with collar accuracies to within 10cm (laterally and vertically). In addition, diamond drills holes have been drilled

to provide material for metallurgical test work and some were twinned with RC drill holes to check geological and grade continuity. A number of RC/RC twins were also drilled, again to check geological and grade continuity. No major bias was identified.

Exploration RC samples were collected over 1m intervals using cone splitters from which ~3kg of material was pulverised to produce a sub-sample for analysis. Field quality control procedures involved assay standards and duplicates, 'field' standards were inserted at a rate of 1 in 100 samples, pulp standards at 1 per lab batch and duplicates at a rate of 1 in 30 samples. Sample pulps were analysed for Fe, Al_2O_3, SiO_2, TiO_2, CaO, MgO, Na_2O, K_2O, Mn/MnO, P, S, As, Pb, Zn, Cu and Cl and 3-point LOI (at 370, 650 & 1,000°C) by thermogravimetric methods (note: for some samples only the 1,000°C LOI measurement was made). This is considered to be close to a "total analysis".

Geochemical and geological logging data were used to define geological domains within each deposit (Table 1), 3-D wireframes were used to code the drilling data and define samples within each geological domain. Model limits were controlled by drill hole data extents and Mining/Exploration Lease boundaries. Statistics were determined for each analyte within each domain, this confirmed that each domain was statistically discrete and justified the use of hard boundaries in statistical analysis and modelling.

Table 1 - Geological Domains within the Resource Models

Firetail North	Firetail South	Kings	Queens
Detritals	Detritals	Detritals	Detritals
CID Lower	Hardcap	Hardcap (CID)	Oakover
J1	CID Lower	CID Upper	Hardcap
J2	Joffre	CID Lower	CID Upper
J3	Whaleback Shale	Bedded	CID Lower
Whaleback Shale	D4	Joffre	Peat
D4	D3	D4	Bedded
D3	D2	D3	Dolerite Dykes
D2	D1	D2	
D1	Mt. McRae Shale	D1	
Mt. McRae Shale		Whaleback Shale	
		Mt. McRae Shale	

An indicator method was used to define high grade zones within each stratigraphic unit. The block models were constructed using a parent block size appropriate for the drill hole spacing. In the Firetail South area, sub-celling to 5.0mE x 5.0mN x 0.25mRL was used, in Kings and Firetail North a minimum block size of 12.5mE x 12.5mN x 1mRL was used and in the Queens area parent cells of 50mE x 25mN x 1mRL with sub-celling to 12.5mE x 12.5m N x 1mRL was used. All estimation was undertaken using Ordinary Kriging (OK) at parent cell scale. Multiple estimation search passes were used for each domain. Hard boundaries were applied between all estimation domains. Validation of the block models (using visual, statistical and trend analysis methods) shows good correlation of the input data to the estimated grades.

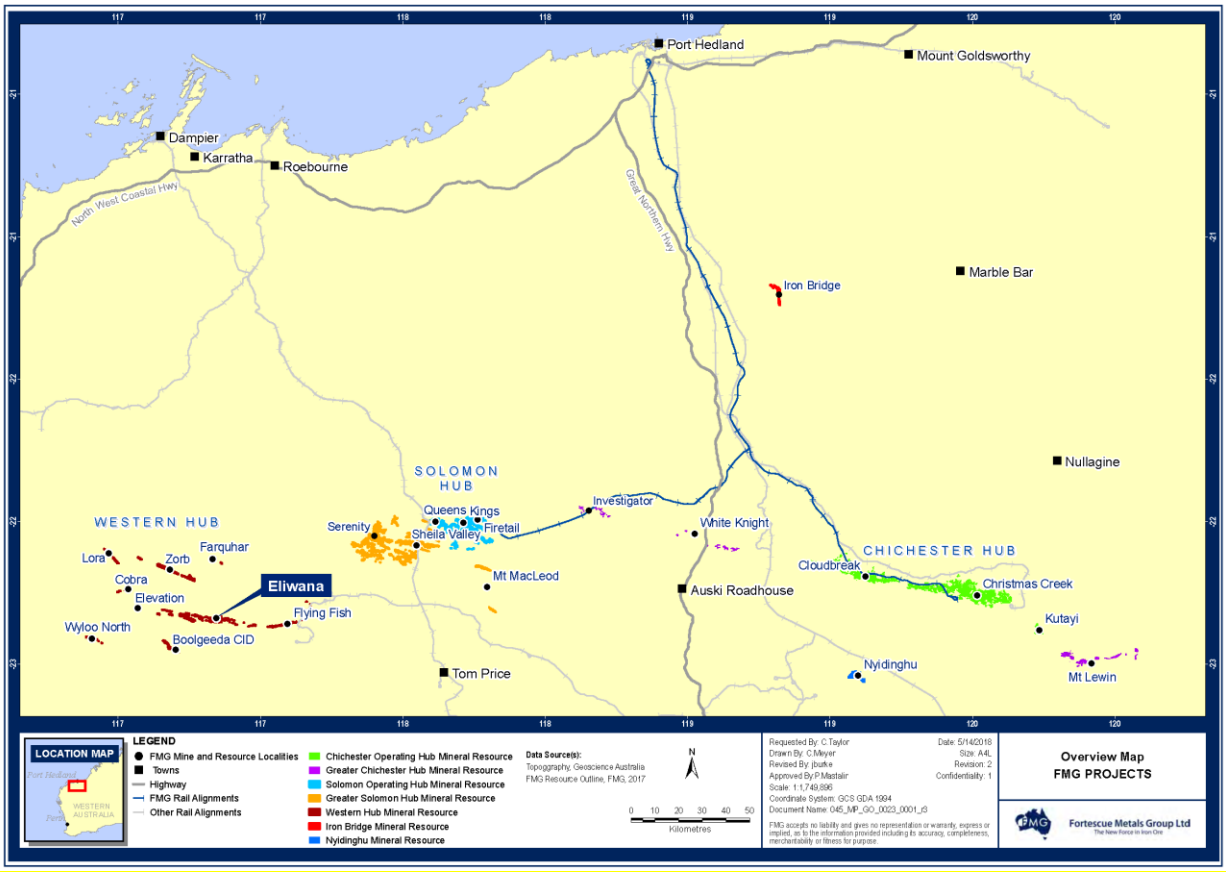
The mineralised domains have demonstrated sufficient geological and grade continuity to support the definition of Mineral Resource and Ore Reserves and the classification applied under the JORC Code. Drill spacing and data integrity, geological complexity, estimation risk and mineralisation continuity based on the semi-variogram ranges of influence were used to determine Mineral Resource classifications.

Eliwana (part of Western Hub)

Project location

The Eliwana deposit is located approximately 100km north-west of Tom Price and 120km west of Fortescue's Solomon operations in the Pilbara region of Western Australia (Figure 4).

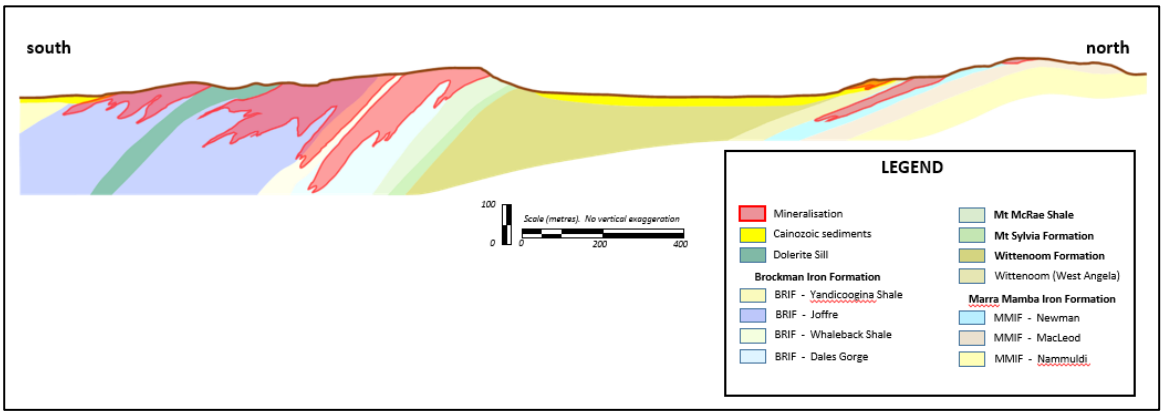
Figure 4 - Fortescue Mineral Resource overview



Geology

The Eliwana deposit is situated on the southern limb of the Jeerinah anticline in the western Hamersley Province. The deposit covers a narrow zone that follows the outcrop of mineralised Brockman and Marra Mamba Iron Formations. Tertiary sediments occur in the valley separating these outcropping formations. Mineralisation predominantly occurs as bedded iron deposits (BID) with some detrital iron deposits (DID). Mineralisation is distributed variably within an area of approximately 40km along strike and 3.5km across strike. Mineralisation occurs at surface and extends to depths of 350m below surface (Figure 5).

Figure 5 - Eliwana schematic geological cross section



Data and Mineral Resource Estimation

Drill samples at Eliwana are from Reverse Circulation (RC) drilling rigs with cone splitters. RC drill holes have been drilled on a nominal 50m × 25m, 50m × 50m, 100m × 50m, 100m × 100m, 200m × 100m, 400m × 100m and 800m × 100m spaced grid.

All data is captured electronically and has to pass extensive quality assurance and quality control (QAQC) procedures. QAQC is an ongoing analysis and includes validation of drill hole collar coordinates, field standards, laboratory standards, field duplicates, twin holes as well as 'round robin' checks between laboratories. No major issues were identified with precision, accuracy or bias. The estimations incorporate all of the validated RC holes drilled in the area by Fortescue that have collar and assay information loaded into the acQuire database. Geological logging, geochemistry and geophysical data were used to identify the stratigraphic units which were then modelled in 3D.

Grades estimated in the models were Fe, SiO_2, Al_2O_3, P, Mn, MgO, CaO, TiO_2, Na_2O, S, K_2O, LOI 371, LOI 650, LOI 1000 and LOI total. Variography and detailed statistics using Snowden Supervisor software was used to determine the estimation parameters for the grade modelling. Ordinary Kriging and inverse distance cubed were used as modelling techniques to estimate grades. Estimation was done using Vulcan software.

The estimates have been classified as Measured, Indicated and Inferred Mineral Resources and reported in accordance with the JORC Code, 2012 Edition. The classification is derived from consideration of the confidence in geological and mineralisation continuity, sample spacing, sample statistics, estimation parameters, interpretational uncertainties, mapping and the potential for economic extraction.

Table 2 - Hematite Operational Mineral Resources (as at 30th June 2019)

	June 2019						June 2018					
	In-Situ Tonnes (mt)	Iron Fe %	Silica SiO_2 %	Alumina Al_2O_3 %	Phos P %	Loss On Ignition LOI %	In-Situ Tonnes (mt)	Iron Fe %	Silica SiO_2 %	Alumina Al_2O_3 %	Phos P %	Loss On Ignition LOI %
Cloudbreak												
Measured	460	56.6	5.69	3.44	0.058	8.6	479	56.7	5.55	3.48	0.057	8.7
Indicated	414	56.2	6.66	3.43	0.060	8.0	428	56.1	6.69	3.43	0.059	8.0
Inferred	123	56.4	6.31	3.60	0.054	7.7	134	56.4	6.42	3.56	0.053	7.7
Total	**997**	**56.4**	**6.17**	**3.45**	**0.058**	**8.3**	**1,041**	**56.4**	**6.13**	**3.47**	**0.058**	**8.3**
Christmas Creek												
Measured	556	56.9	6.28	3.13	0.047	7.9	515	56.9	6.28	3.09	0.047	7.8
Indicated	935	56.1	6.59	3.70	0.051	7.9	1,004	56.1	6.58	3.72	0.051	7.9
Inferred	463	55.6	6.90	3.80	0.055	7.9	501	55.6	7.05	3.75	0.054	7.8
Total	**1,954**	**56.2**	**6.57**	**3.56**	**0.051**	**7.9**	**2,020**	**56.2**	**6.62**	**3.57**	**0.051**	**7.9**
Sub-total Chichester Hub												
Measured	1,016	56.8	6.01	3.27	0.052	8.2	994	56.8	5.93	3.28	0.052	8.2
Indicated	1,349	56.1	6.61	3.62	0.054	7.9	1,433	56.1	6.61	3.64	0.053	7.9
Inferred	586	55.8	6.77	3.75	0.055	7.8	635	55.8	6.92	3.71	0.054	7.8
Total	**2,951**	**56.3**	**6.44**	**3.53**	**0.053**	**8.0**	**3,061**	**56.3**	**6.45**	**3.53**	**0.053**	**8.0**
Firetail												
Measured	14	57.9	6.28	3.34	0.121	6.9	8	57.5	5.91	3.43	0.123	7.8
Indicated	195	58.1	6.86	2.67	0.119	6.8	170	58.1	6.79	2.81	0.113	6.7
Inferred	110	56.1	8.02	3.74	0.106	7.4	133	57.2	7.36	3.35	0.107	7.0
Total	**319**	**57.4**	**7.23**	**3.07**	**0.115**	**7.0**	**310**	**57.7**	**7.01**	**3.06**	**0.111**	**6.8**
Kings and Queens												
Measured	183	54.8	7.48	3.31	0.086	10.4	152	54.9	7.96	3.02	0.087	9.9
Indicated	1,137	55.1	8.25	3.34	0.079	9.0	919	55.3	7.98	3.40	0.072	8.9
Inferred	585	54.6	8.71	3.72	0.079	8.7	669	55.0	8.00	3.47	0.082	9.2
Total	**1,905**	**54.9**	**8.32**	**3.44**	**0.080**	**9.0**	**1,741**	**55.1**	**7.99**	**3.39**	**0.077**	**9.1**
Sub-total Solomon Hub												
Measured	197	55.1	7.39	3.15	0.089	10.1	160	55.0	7.86	3.04	0.088	9.8
Indicated	1,331	55.5	8.05	3.25	0.085	8.7	1,089	55.7	7.79	3.31	0.078	8.6
Inferred	694	54.9	8.60	3.72	0.083	8.5	802	55.4	7.89	3.45	0.086	8.9
Total	**2,223**	**55.3**	**8.16**	**3.39**	**0.085**	**8.7**	**2,051**	**55.5**	**7.84**	**3.34**	**0.082**	**8.8**
Eliwana												
Measured	229	60.0	4.89	2.61	0.141	5.8	**229**	**60.0**	**4.89**	**2.61**	**0.141**	**5.8**
Indicated	122	58.4	5.44	2.77	0.096	7.2	**113**	**58.5**	**5.40**	**2.81**	**0.098**	**7.1**
Inferred	650	58.1	5.76	3.40	0.102	7.0	**668**	**58.4**	**5.70**	**3.21**	**0.107**	**6.7**
Total	**1,001**	**58.6**	**5.52**	**3.14**	**0.110**	**6.7**	**1,010**	**58.8**	**5.48**	**3.03**	**0.114**	**6.6**
Total Hematite Operational Mineral Resources												
Measured	1,442	57.0	6.02	3.15	0.071	8.1	1,383	57.1	5.98	3.14	0.071	8.0
Indicated	2,802	55.9	7.24	3.40	0.071	8.2	2,634	56.0	7.05	3.47	0.066	8.2
Inferred	1,930	56.2	7.09	3.62	0.081	7.8	2,105	56.5	6.90	3.45	0.083	7.9
Total	**6,175**	**56.3**	**6.91**	**3.41**	**0.074**	**8.1**	**6,122**	**56.4**	**6.76**	**3.39**	**0.073**	**8.0**

Notes:

- Mineral Resources are compared with those at 30th June 2018.
- Chichester Mineral Resources are quoted at a cut-off grade of 53.5% Fe, Solomon Hub and Eliwana Mineral Resources are reported at a cut-off grade of 51.5%.
- Mineral Resources are inclusive of Ore Reserves and Stockpiles

Ore Reserves

Fortescue Ore Reserves are based on integrating contributions from the various mine-sites and assembling bedded iron deposit (BID) and channel iron deposit (CID) into blended saleable products at the port.

The BID products are Western Pilbara Fines (WPF), Fortescue Blend (FB) and Super Special Fines (SSF). The CID product is Kings CID (KCID). Within the primary BID and CID product streams, controlled blending of non-primary ore types occurs on an opportunistic basis to optimise product outcomes.

Due to the deposit integration inherent in the Ore Reserve, the following supporting data is comprehensive and addresses the Ore Reserve generation process collectively for all deposits.

A separate JORC Table 1 (Section 4) was prepared specifically for Eliwana in 2018, however the description below relates to the integrated mining operation that includes all contributing operations.

Mining Models

Mining Models consist of regularised resource models overprinted with grade control models. Application of reconciliation grade adjustment factors to incorporate historical mining losses and dilution into the in-situ estimates is used to generate estimates of Run of Mine (ROM) ore. Conversion of ROM to Product by the ore processing facilities (OPFs) is achieved by the application of OPF upgrade factors. This process is summarised as

1. The Resource models are regularized to a block size consistent with both the Resource Model and Grade Control (GC) Model block size (typically 12.5m x 12.5m x 1m).
2. Grade Control models – built to an origin and orientation consistent with the Resource Models - are merged into the regularized resource models, creating the Merged Models.
3. The Merged Models are regularized to a block size consistent with the selective mining unit (SMU) that is appropriate to mining method that will be applied for each style of deposit (eg 25m x 25m x 3m).
4. Factoring of in-situ grades is based on reconciliation between the underlying models (Resource or GC) and actual diluted plant feed, back-calculated from sales. Twelve months of historical model performance is used to derive factored grades in the Mining Models. Grade adjustment factors for Fe and major impurities (SiO_2 and Al_2O_3) are typically minor.
5. Application of respective OPF mass yield and upgrade factors. The Chichester OPF upgrade factors are based on a combination of actual OPF performance and metallurgical test-work. The Solomon CID mining models incorporate theoretical Kings OPF yields and upgrade factors based on metallurgical test-work. The Firetail and Eliwana OPFs are operating in “dry” mode and therefore have no beneficiation factors applied.

Scheduling Inventory

Pit optimisation software is used to determine how the mining inventory varies as a function of ore cut-off grade (Fe) and limiting strip-ratio for selected ultimate pit wall slopes.

A combination of selected Fe cut-off and limiting strip ratio is then used to identify the starting geometry for the pit design. Higher strip-ratio peripheral shells are used to identify where ramps should be located without unnecessarily compromising value.

Due to the large lateral extensions and flat and shallow nature of the deposits in the Chichesters it is not feasible, nor necessary, to maintain detailed ultimate pit designs for the entire deposits. Life of Mine (LOM) planning is carried out using Lerchs-Grossman pit optimisation geometries (with conservative slope angles)

to generate inventories based on limiting strip ratios. Detailed pit designs are developed closer to the time of mining of the deposit parts, incorporating the required ramp and wall geometries to facilitate safe, practical and efficient mining.

Solomon and Eliwana mining is by conventional drill and blast followed by excavators, and Life of Mine (LOM) ultimate pit designs are generated and used as the bounding geometry for Ore Reserves estimation.

In all cases, Inferred material is converted to waste, generating mining costs but contributing no revenue.

Mine Scheduling

Mine scheduling is integrated across all Fortescue properties to maximise value. Chichester mineralisation is combined with Solomon BID (principally from Firetail, and in future with Eliwana) to manufacture the BID blended products - WPF, FB and SSF. The CID product, KCID is predominantly sourced from the Kings and Queens deposits and will include a proportion of BID and detrital iron deposit (DID) mineralisation incidental to mining the CID channels.

Scheduling aims to maintain the target blended ore quality and maximise NPV. In general terms this equates to deferring higher strip ratio, higher mining cost mineralisation until later in the collective scheduled mine life. A commercial linear programming package is used to identify the integrated mining sequence that will deliver the maximum NPV for the nominated constraints. Major constraints include the nominated ore tonnage and blend quality and the maximum OPF treatment rates that, in turn, are matched to the logistics capacity of the Fortescue rail and port system.

Blending between sites takes advantage of impurity synergies that maximise the ore supply relative to products being sourced from single sites. The proportion of each of the collective BID and CID products will change with time depending on the respective ore quality being delivered from individual deposits. The constituent products are manufactured at the port by blending individual trains onto port stockpiles.

The scheduling inventory is initially collected into ore “bins” based on Fe and impurity cut-offs. Since mineralisation distributions and presentation varies with time, so too may the shorter term effective ore cut-off grade. The Ore Reserve cut-off can be approximated by an Fe-only cut-off that closely approximates that portion of the scheduling inventory that is converted into product over the life of the Ore Reserve schedule (see below).

Financial Analysis

The scheduling programme utilises unit revenue (per product brand) and cost (per deposit per activity) information to allow an NPV to be targeted and to allow relative NPV values to be assigned to schedule alternatives, however these do not constitute a robust valuation. Further financial analysis to determine more realistic absolute financial indicators and sensitivity analysis is performed separately using the quantity and quality data extracted from the scheduler. This analysis is performed by the Finance team using audited business valuation models and assumptions.

A +/-30% sensitivity of the main financial drivers was carried out on the base case valuation and was demonstrated to be robustly NPV positive under all cases tested.

Ore Reserve Statement

The Fortescue hematite Ore Reserve is quoted on a dry product basis as of 30 June 2019. Individual BID deposits included in the Ore Reserve include Cloudbreak, Christmas Creek, Kutayi, Firetail and Eliwana.

The Kings and Queens Ore Reserves are principally CID mineralisation.

Due to opportunistic blending and stockpiling, the Ore Reserve is not reported at a fixed cut-off. However, the reported Ore Reserve quantity and quality can be closely approximated by the following Fe cut-ff grades:

Site	Cut-Off Grade (%Fe)
Cloudbreak	53.5
Christmas Creek	53.5
Firetail	53.5
Kings	52.0
Queens	53.0
Eliwana	55.5

Ore Reserves are summarised in Table 3.

Table 3 - Hematite Ore Reserves as at 30th June 2019

	June 2019						June 2018					
	Product Tonnes (mt)	Iron Fe %	Silica SiO_2 %	Alumina Al_2O_3 %	Phos P %	Loss On Ignition LOI %	Product Tonnes (mt)	Iron Fe %	Silica SiO_2 %	Alumina Al_2O_3 %	Phos P %	Loss On Ignition LOI %
Cloudbreak												
Proved	231	57.6	5.29	2.69	0.055	8.27	270	57.3	5.45	2.86	0.053	8.38
Probable	255	57.4	5.82	2.67	0.063	7.67	276	57.1	6.09	2.81	0.059	7.69
Total	**486**	**57.5**	**5.57**	**2.68**	**0.059**	**7.96**	**546**	**57.2**	**5.78**	**2.83**	**0.056**	**8.03**
Christmas Creek												
Proved	340	56.9	6.07	2.75	0.048	7.59	302	57.0	5.96	2.77	0.040	7.72
Probable	492	57.5	5.18	2.96	0.054	7.61	528	57.1	5.52	3.09	0.046	7.68
Total	**832**	**57.3**	**5.54**	**2.88**	**0.052**	**7.60**	**831**	**57.1**	**5.68**	**2.97**	**0.044**	**7.69**
Sub-total Chichester Hub												
Proved	570	57.2	5.75	2.73	0.051	7.86	572	57.1	5.72	2.81	0.046	8.03
Probable	748	57.5	5.40	2.86	0.057	7.63	804	57.1	5.71	2.99	0.050	7.68
Total	**1,318**	**57.4**	**5.55**	**2.80**	**0.055**	**7.73**	**1,376**	**57.1**	**5.72**	**2.92**	**0.049**	**7.82**
Firetail												
Proved	8	59.5	5.69	2.58	0.115	6.07	4	58.7	6.24	2.71	0.113	6.60
Probable	118	59.1	6.02	2.24	0.112	6.61	90	59.3	5.66	2.45	0.107	6.68
Total	**126**	**59.1**	**6.00**	**2.26**	**0.113**	**6.57**	**94**	**59.2**	**5.68**	**2.46**	**0.107**	**6.67**
Kings and Queens												
Proved	102	56.0	6.29	2.72	0.078	10.54	91	55.9	7.23	2.57	0.074	9.96
Probable	539	56.9	6.68	2.69	0.070	8.79	475	57.1	6.50	2.69	0.064	8.76
Total	**641**	**56.8**	**6.62**	**2.70**	**0.071**	**9.07**	**566**	**56.9**	**6.61**	**2.67**	**0.066**	**8.95**
Sub-total Solomon Hub												
Proved	110	56.3	6.24	2.71	0.080	10.22	95	56.0	7.18	2.57	0.076	9.82
Probable	657	57.3	6.56	2.61	0.077	8.40	565	57.4	6.36	2.65	0.071	8.42
Total	**768**	**57.2**	**6.52**	**2.63**	**0.078**	**8.66**	**660**	**57.2**	**6.48**	**2.64**	**0.072**	**8.62**
Eliwana												
Proved	136	60.8	4.39	2.41	0.137	5.41	**79**	**61.1**	**4.22**	**2.51**	**0.144**	**5.21**
Probable	66	58.7	5.28	2.64	0.096	7.10	**135**	**59.5**	**5.27**	**2.37**	**0.115**	**6.27**
Total	**202**	**60.1**	**4.68**	**2.49**	**0.124**	**5.96**	**213**	**60.1**	**4.88**	**2.42**	**0.126**	**5.88**
Total Hematite Ore Reserves												
Proved	816	57.7	5.59	2.67	0.069	7.77	746	57.4	5.75	2.75	0.060	7.96
Probable	1,471	57.5	5.91	2.74	0.068	7.95	1,504	57.5	5.92	2.81	0.064	7.83
Total	**2,288**	**57.5**	**5.80**	**2.72**	**0.068**	**7.89**	**2,250**	**57.4**	**5.86**	**2.79**	**0.063**	**7.87**

Notes in reference to table

- The diluted mining models used to report the 2019 Ore Reserves are based on Christmas Creek Mineral Resource model reported in 2016, Firetail Mineral Resource model revised in 2018, Queens Mineral Resource model completed in 2019, Cloudbreak Mineral Resource model completed 2016 and Kings Mineral Resource model released in 2017, Kutayi Mineral Resource model released in 2014 and Eliwana Mineral Resource model completed in 2019.
- Diluted mining models are validated by reconciliation against historical production.
- Proved Ore Reserves are inclusive of ore stockpiles at the mines totalling approximately 31.3mt on dry product basis.
- The Chichester Ore Reserve is inclusive of the Cloudbreak, Christmas Creek and Kutayi BID deposits. Selected Christmas Creek Ore Reserves will be directed to the Cloudbreak OPF to optimise upgrade performance and balance Cloudbreak and Christmas Creek OPF lives.
- Tonnage information has been rounded and as a result the figures may not add up to the totals quoted.

JORC Code, 2012 Edition – Table 1
Fortescue Chichester Deposits (Cloudbreak, Christmas Creek & Kutayi)

Section 1 Sampling Techniques and Data

Criteria	Commentary
Sampling techniques	The deposits were sampled using Reverse Circulation (RC) and Diamond drill holes (DD). Drill hole spacing ranges from 800m x 200m to a staggered 50m x 50m pattern. In the area of the test pit this was reduced to 12.5m x 12.5m (plus some at 6.5m x 6.5m). Grade Control (GC) drilling uses a 25m x 25m pattern. RC samples only were used for resource estimation. Approximately 30% of holes were down hole geophysically logged. Initial exploration holes were assayed from collar to end of hole. Partway through the exploration program the sampling regime was modified and analysis was restricted to samples with visually higher Fe, infill GC holes are sampled in a similar manner. This may mean that not all potentially mineralised material has been analysed.
	All holes were surveyed by qualified surveyors using a Base station Differential GPS, with collar accuracies to within 5 centimetres (laterally and vertically). Analytical standards were used to assist in checking laboratory results. Field duplicates are used to assist with determining sampling quality at the rig. Geophysical probes are calibrated on a regular basis (using static methods and specific calibration holes).
	For RC drilling, samples from 0.5m or 1m intervals pass through cyclone and cone splitter, 2-3kg sample collected in calico bag (~6-7% of samples total volume). Samples from mineralised zones (plus ~5m above and below), as selected, are sent for analysis.
Drilling techniques	Standard face sampling hammer drilling samples from ~130mm or ~140mm diameter RC drill holes used for Resource Estimation. Over 200 diamond drill holes have been completed. Some of these were drilled as twins to RC holes, the rest were drilled to provide samples for metallurgical test work, provide geotechnical information or for down hole geophysical data calibration purposes. Most holes were PQ size, core was not oriented as the majority of the holes were drilled vertically. No diamond drill hole data has been used for grade estimation. Drilling of large diameter (Bauer) holes (0.78 or 1m) commenced during the Exploration phase and ceased in ~2010. These holes were limited to shallow parts of the deposit (by working depth of rigs). Samples were primarily used for metallurgical test work, data from these holes was not used in creation of Resource and GC models.
Drill sample recovery	The quality of each sample is recorded at the time of logging and categorised as either poor, moderate or good.
	No significant issues with sample collection system identified during Exploration drilling or subsequent infill programs. Minimal loss of fines was achieved through the use of an automated sample collection and splitting system.
	Approximately 40 RC drill holes were twinned with diamond drill holes. In general there was good correlation between both grade and geology.
	There is assumed to be no expected relationship between sample recovery and grade.
Logging	Geological logging was completed by personnel experienced in iron mineralisation, logging considered to be adequate for resource estimation.
	Quantitative – chemical analysis of samples logged as mineralised, down hole geophysical surveys of approximately 30% of drill holes. Qualitative – logging is completed over the whole drill hole, based on this 'ore' +/- 3-4m surrounding waste is submitted for analysis. Detailed texture logging of GD drilling ceased during 2017, a smaller data set is now collected. There is some risk of material being mis-logged and therefore not analysed.

Criteria	Commentary
	Effectively 100% for RC during Exploration, limited to mineralised intersections +/- 3-4m surrounding waste during infill programs.
Sub-sampling techniques and sample preparation	The majority of diamond holes were drilled to provide material for metallurgical testwork. No assays from diamond holes were used in the estimate.
	Samples are collected in labelled bags from each 1m of drilling, which are stored onsite or sent for analysis. These samples are collected using a cone splitter installed directly beneath the cyclone. Wet samples are collected using the same technique as dry samples, with thorough cleaning of gear between samples. Wet samples are allowed to dry before being processed. For drill rigs using riffle splitters, once wet samples are encountered, the splitter is changed to a chisel splitter. Larger samples are collected and later split.
	All sub-sample preparation undertaken by the laboratory performing the sample analysis.
	Field QC procedures involved the use of certified reference material as assay standards together with the collection of duplicate samples.
	During Exploration drilling, field (rig) duplicates were collected at a rate of 1 in 20 samples at Cloudbreak and Christmas Creek, and at a rate of 3 in 100 samples at Kutayi. Analysis of duplicates did not indicate that there were any issues. QA/QC reports are available. For Grade Control drilling, field (rig) duplicates were originally collected every 50 samples, subsequently increased to every 33 samples. Sample numbers are pre-determined, therefore it is possible that not all duplicates will be analysed. Monthly QA/QC reports are now routinely prepared.
	No formal analysis of the appropriateness of sample size compared to grain size has been completed but the sampling regime is considered to be industry best practice.
Quality of assay data and laboratory tests	Various laboratories have been used, including SGS (Christmas Creek and Perth), Ultra Trace and Intertek (Cloudbreak, Solomon, and Perth) and Genalysis (Perth)). All laboratories have National Association of Testing Authorities, Australia (NATA) accreditation. All chemical analysis by XRF using 'standard iron ore suite' (reported as Fe, Al_2O_3, SiO_2, TiO_2, CaO, MgO, Na_2O, K_2O, MnO (Exploration) or Mn (Grade Control), P and S). Also 3-point LOI (370, 650 & 1,000°C) by thermogravimetric methods. This is considered to be close to “a total analysis”. From early 2013 As, Pb, Zn, Cu and Cl have also routinely been included in sample analysis.
	Details of geophysical tools used for down hole geophysical analysis are available in the drill hole database.
	Exploration (Cloudbreak and Christmas Creek) - Field (rig) duplicates collected 1 in 20 samples. Standards submitted at 1 in every 50 samples. Analysis of duplicates and standards did not indicate that there were any issues. QA/QC reports were prepared. Exploration (Kutayi) - Field (rig) duplicates collected 3 in 100 samples. Standards submitted at 1 in every 100 samples. Analysis of duplicates and standards did not indicate that there were any issues. QA/QC reports were prepared. Grade Control - Field (rig) duplicates collected 1 in 50 samples. Standards submitted at 1 in every 100 samples (historically). Since ~Q1 2009, field duplicates collected 1 in 33 samples and standards submitted 1 in 50. Sample numbers for duplicates & standards are pre-determined, if they occur in waste in a drill hole they may not end up being submitted to the laboratory for analysis. QA/QC is performed on laboratory analyses prior to accepting the data in the acQuire database. Monthly QA/QC reports are now routinely prepared. Concerns over the quality of a few of the historical standards have been raised. Through investigation it appears that this is due to standard preparation methods, size of standards, and homogenisation issues (similar problems have not been noted in

Criteria	Commentary
	newer standards). Also issues with inadequate round-robin testing resulting in over-precise certified values.
Verification of sampling and assaying	Significant intersections have been visually inspected by senior Fortescue personnel and by independent consultants.
	Approximately 40 RC drill holes were twinned with diamond drill holes. In general there was good correlation between both grade and geology.
	Several different methods/systems have been used to store sample data (including GBIS and an 'in-house' system). The sample data is now stored in customised acQuire drill hole databases, which include a series of automated electronic validation checks. Fortescue data entry procedures are documented. Only trained personnel perform further manual data validation.
	Conversion of MnO% to Mn% for grade estimation has been made where necessary (mainly exploration data). Samples reporting below detection limits were given the value of half the detection limit.
Location of data points	All holes were surveyed by qualified surveyors using a Base station Differential GPS, with collar accuracies to within 5 centimetres (laterally and vertically) (or better at Kutayi). Holes for which there is no collar survey data, or where the collar RL is significantly different from the topographic surface, are excluded from Resource and GC modelling.
	Grid coordinates given for each point are Map Grid of Australia (GDA94) and heights are in the Australian Height Datum. The Cloudbreak and Christmas Creek deposits lie within UTM zone 50, The Kutayi deposit lies within UTM zone 51. Drill hole collar elevations are also validated against local topographic data.
	The topography was created from 1 metre contours from LIDAR data (Cloudbreak and Christmas Creek) and 2 metres from a Landgate 20 metre DEM (Kutayi). Vertical accuracy of the LIDAR data is +/-0.2 metres.
Data spacing and distribution	NOTE: No Exploration Results Reported. Data spacing reported below is for reported Mineral Resources. Exploration Drilling - Ranges from 800 x 200m down to staggered 50 x 50m. In the area of the test pit this was reduced to 12.5 x 12.5m (plus some at 6.5 x 6.5m). Grade Control Drilling - Infill commences at 100 x 100m (where Exploration drilling missing), with subsequent infill at 50 x 50m and 25 x 25m. All RC holes were drilled vertically.
	Considered adequate for Resource Modelling. Studies demonstrated that Mineral Resource Classification is closely related to drill hole spacing.
	Samples are not composited prior to analysis.
Orientation of data in relation to geological structure	Sampling considered unbiased in terms of possible geological structures. Drilling is perpendicular to (ie vertical) main geological structure controlling mineralisation (bedding, horizontal).
	No sampling bias is apparent.
Sample security	Consignment notes (sample submission information) generated for each batch of samples. Samples trucked to Perth laboratories, samples delivered directly to site laboratories.
Audits or reviews	Several audits have been undertaken with varying recommendations. Those relating to Exploration drilling concluded that there were no major risk factors relating to the sampling and assaying of the Exploration data. An audit of grade control drilling at Cloudbreak highlighted the lack of routine formal QA/QC reporting. Preparation of monthly QA/QC reports is now standardised and implemented across all operational sites.

Criteria	Commentary
	An independent audit of the CC Resource model has been conducted and found no fatal flaws, in process or output.

Section 2 Reporting of Exploration Results

Criteria	Commentary
Mineral tenement and land tenure status	The Cloudbreak deposit is located within the following 100% owned Fortescue Exploration and Mining Leases: E45/2497, E45/2498, E46/590, M45/1082, M45/1083, M45/1102, M45/1103, M45/1104, M45/1105, M45/1106, M45/1107, M45/1124, M45/1125, M45/1126, M45/1127, M45/1128, M45/1138, M45/1139, M45/1140, M45/1142, M45/1263, M46/356, M46/357, M46/401, M46/404, M46/407, M46/408, M46/409, M46/410, M46/411, M46/449, M46/450, M46/452, M46/453 and M46/454. The Cloudbreak project area is within the external boundaries of the Nyiyaparli and Palyku registered native title determinations. In 2005, Fortescue entered into comprehensive Land Access Agreements (LAA) with the Nyiyaparli and Palyku traditional owners. The LAAs facilitate the certain grant of all required Fortescue tenure and related approvals. In consideration, Fortescue provides the traditional owners with: training, employment, business opportunity, and consultation on a range of project–related matters including regular meetings, comprehensive Aboriginal heritage identification and management procedures. On 15 December 2016, an indigenous Land Use Agreement (ILUA) between Fortescue and the Nyiyaparli People was registered on the National Native Title Tribunal's (NNTT's) Register of Indigenous Land Use Agreements. On 3 November 2017, an ILUA between Fortescue and Palyku People was registered on the NNTT's Register of Indigenous Land Use Agreements. The Christmas Creek deposit is located within the following 100% owned Fortescue Exploration and Mining Leases: E46/566, E46/612, M46/320, M46/321, M46/322, M46/323, M46/324, M46/325, M46/326, M46/327, M46/328, M46/329, M46/330, M46/331, M46/332, M46/333, M46/334, M46/335, M46/336, M46/337, M46/338, M46/339, M46/340, M46/341, M46/342, M46/343, M46/344, M46/345, M46/346, M46/347, M46/348, M46/349, M46/350, M46/351, M46/352, M46/353, M46/354, M46/355, M46/402, M46/403, M46/405, M46/406, M46/412, M46/413, M46/414, M46/415, M46/416, M46/417, M46/418, M46/419, M46/420, M46/421, M46/422, M46/423, M46/424 and M46/534. The Fortescue Christmas Creek mine and resource development proposed activity area will be undertaken within the Nyiyaparli native title determination area. Fortescue signed a Land Access Agreement (LAA) with the Nyiyaparli People on the 10th of October 2005 which facilitates Fortescue's exploration and mining activities within the Nyiyaparli determination area. To ensure compliance with the Aboriginal Heritage Act 1972 (AHA) Fortescue conducts both archaeological and ethnographic surveys over all land prior to the commencement of ground disturbing works. Within the Christmas Creek mining and resource area heritage surveys have identified places that are highly significant to the Nyiyaparli People; and in some instances, neighbouring Traditional Owner Groups. This includes the ethnographic place Mankarlyirrkurra (ETH-NYI11-001), and Heritage Restricted Zones associated with Kakutungutanta CB10-093 (HRZ-0132) and CB09-292 (HRZ-0005), which should be excluded from the mining resource area into the future. Fortescue Marsh has significance to the Nyiyaparli People and neighbouring Traditional Owner groups. The creek lines that run through the Christmas Creek mining and resource area towards Fortescue Marsh and the quality/flow of water entering the marsh system are important to the Traditional Owner groups. In accordance with our LAA with the Nyiyaparli People Fortescue has an obligation to minimise impact to creeks and has committed to avoiding Kandama Creek (Christmas Creek, HRZ-006) and portions of Kakutungutanta Creek (HRZ-0259 and HRZ-0007) which should be

Criteria	Commentary
	excluded from the mining resource area into the future. Wherever possible, when creeks must be temporarily diverted for mining purposes they should be re-established following completion of the project operations. Fortescue has agreed not to undertake exploration or mining on the Fortescue Marsh without the consent of the Nyiyaparli People, and is committed to ensuring the flow and quality of water entering the marsh system is not affected by mining activities. Most notably this is focused on the protection of known ethnographic 'Yintha' sites along the Marsh edges, which are fed by creek flows into the Marsh. This is currently managed by consultation with the group and the implementation of various water management methods including monitors, diversions, containments and conveyance. These water management methods must be continued and maintained during the development of Christmas Creek mine to ensure compliance with the Nyiyaparli LAA. The Kutayi deposit is located with the 100% owned Fortescue Mining Lease M46/533. It is also within the Nyiyaparli native title determination area.
	The tenure is currently in good standing and no impediments are known to exist.
Exploration done by other parties	Both BHP and Hancock Prospecting Pty Ltd (HPPL) have undertaken exploration for iron within the project boundaries. No historical data has been used by Fortescue.
Geology	The majority of the iron mineralisation is hosted by the Nammuldi Member which is the lowest member of the late Archaean aged Marra Mamba Iron Formation (MMIF). The Nammuldi Member is characterised by extensive, thick and podded iron rich bands, separated by equally extensive units of siliceous and carbonate rich chert and shale. The Nammuldi Member in the Chichester Range is interpreted to be up to 60 metres in true thickness. Underlying the Nammuldi Member rocks are black shales and volcanic rocks belonging to the Jeerinah Formation. Limited iron mineralisation also occurs in the overlying Tertiary alluvial material.
Drill hole information	Collar details of the RC holes used in the Cloudbreak, Christmas Creek and Kutayi estimates are not reported here.
Data aggregation methods	No exploration results are being reported. For methods used in the estimation of Cloudbreak and Christmas Creek please refer to: *Section 3 Estimation and Reporting of Mineral Resources*
Relationship between mineralization widths and intercept lengths	No exploration results are being reported. Please refer to: *Orientation of data in relation to geological structure* in *Section 1 Sampling Techniques and Data* for the geometry of mineralisation with respect to drill hole angle.
Diagrams	The Mineral Resource extents are shown in the release.
Balanced reporting	No exploration results are being reported
Other substantive exploration data	No exploration results are being reported.
Further work	Further infill drilling is planned for at all deposits. Extensions to known mineralisation may exist at all deposits.

Section 3 Estimation and Reporting of Mineral Resources

Criteria	Commentary
	Since 2011 all drill hole data has been captured and stored in acQuire drill hole databases. Field (texture) logging data is captured electronically, assay and down hole

Criteria	Commentary
Database integrity	geophysical data are uploaded directly from source files. Sample numbers are unique to each site and pre-numbered and barcoded sample bags are used. These methods are all aimed at minimising data errors. Exploration data older than this has been transferred between a number of different data storage systems, there is a risk that some of it may have been lost or compromised in the process (but this data only represents a small subset of the overall data used for Resource and GC modelling).
	All drill hole data used to update the resource models were reviewed by Fortescue geologists. Complete drill holes and individual samples were excluded if any problems with the data were noted (eg erroneous drill hole co-ordinates, suspect assays, missing texture data etc). Data exclusion is considered to have been minimal. The acQuire drill hole databases include semi-automated validation procedures designed to minimise data errors.
Site visits	Site visits were undertaken by senior Fortescue personnel and by independent consultants during Exploration drilling programs. Site visits by the current Competent Person are undertaken on a semi-regular basis to discuss drilling/modelling progress and any other issues.
Geological interpretation	For the updated resource models, four geological zones were interpreted on the basis of geochemistry: overburden, hanging wall, ore zone and footwall. There is some risk of mis-interpretation in areas of wider spaced drilling where assay data is limited, this is not considered to be material. In future model updates texture logging from the wider spaced drilling should also be reviewed to refine definition of the overburden/hanging wall contact. For the Grade Control models, up to 14 geological zones are interpreted on the basis of geochemistry and down hole geophysical logging: overburden (separating CID where possible), U8, U7U, U7l, U6, U6l, U5, U5l, U4, U3, U2, U1 & Roy Hill Shale. The U7U, U7l, U6, U6l & U5 units correspond to the ore zone of the Resource Models.
	Interpretation based on geochemistry of RC drill samples and down hole gamma logging.
	The updated resource models are an alternative interpretation of the drill hole data used to create earlier resource models and incorporate additional drill hole data.
	All samples are flagged with their host geological zone, only samples with the same geological zone as the block to be estimated can be used in grade estimation.
	There are a number of factors which have an impact of geological and grade continuity: • Faults (geology and grade) – minor impact • Creeks (grade and to a lesser extent geology) – slightly more significant impact (evidenced by a reduction of iron grades at both sites and erosion of the ore body, primarily at Christmas Creek but also locally at Cloudbreak) • Late stage hardcapping/weathering of mineralisation • Localised late stage supergene Mn mineralisation
Dimensions	Cloudbreak and Christmas Creek - Up to ~80km along strike and up to 5km plan width. Upper limit of mineralised domain is located between 0m to 125m below the surface. Lower limit of mineralised domain is located between 1m and 130m below the surface. The average thickness of the mineralised domain is 7.0m and the range of thickness is 1m to 28m. Kutayi – Mineralisation occurs in an area covering approximately 4.5km (N-S) and 3.5km (E-W). Mineralisation extends from surface to depths of up to around 50m. The defined mineralised units are approximately between 1m and 40m thick.
Estimation and modelling techniques	Grade estimation using Ordinary Kriging (OK) was completed using Vulcan™ software for 14-18 analytes (see above). Drill hole sample data was flagged using three dimensional wireframes.

Criteria	Commentary
	Variography undertaken on 1m drill hole composites in unfolded space. Initial variography on Fe indicator values (<48% Fe = 0, >48% Fe = 1), was used to create wireframe solids of areas within the ore zone with indicator values >0.4 (note 48% Fe was selected after substantial testing to get the 'best' fit of block grade Fe distribution vs the composite data distribution). The drill hole composites were re-flagged using these solids to give 'high grade' and 'low grade' data sets. Additional variography was then undertaken for Fe, SiO_2, Al_2O_3, P and LOI on these data sets. Variograms were generally robust (low nuggets, long horizontal ranges and short Z ranges), 'low grade' variography was used for waste domains. A separate Mn indicator was also created (at 1%) and used to control estimation of Mn. Quantitative kriging neighbourhood analysis used to establish optimum search and estimation parameters. Each geological domain was interpolated separately, the ore zone domain was separately interpolated for high and low grade areas. Mn modelled separately with no geological domaining.
	Reconciliation of previous model against production showed a loss of tonnage, decreased iron grade and increased contaminant grades. Preliminary reconciliation of the updated models against historic production shows a marked improvement.
	No assumptions regarding the recovery of by-products have been made.
	The iron ore suite of Fe, Al_2O_3, SiO_2, TiO_2, CaO, MgO, Na_2O, K_2O, Mn/MnO, P, S, LOI 370, LOI 650 and LOI 1000 has been estimated. Pb, As, Cl and Cu have also been estimated but as they are not sampled at the same density as the previously discussed analytes, they are not considered as accurate. A program of selected analysis of waste material for potentially deleterious elements (eg Se, As) has commenced (these are not currently included in the Resource Models). Routine analysis for arsenic (by Intertek) is now part of the grade control drilling program, this data will be included in future models when sufficient information is available to allow interpolation.
	Following kriging neighbourhood analysis, statistical investigations and discussions with Fortescue staff, for Cloudbreak and Christmas Creek, a parent block size of 25m x 25m x 1m was selected (drill hole spacing varies from 800mx 200m to 6.25m x 6.25m in some small areas). To allow for integration of grade control block models and to aid in following the folded geometry of the geological domains, sub-celling to 12.5m x 12.5m x 1m was allowed. For the GC Models a block size of 12.5m x 12.5m x 1m is used (drill hole spacing nominally 25m x 25m). For Kutayi, a parent block size of 50mE x 100mN x 1m was selected (reflecting half the nominal drill hole spacing and orientation of mineralisation).
	No selective mining units were assumed in these estimates.
	No assumptions about correlations between variables were made in these estimates.
	Drill hole samples were geologically flagged using the interpreted domain wireframes. These domains were used as hard boundaries to select samples populations for variography and estimation.
	For both Resource Models, some element grades were top-cut during estimation based on coefficient of variation values higher than 1.2.
	All models (Resource and GC) are validated as follows: • Block geology vs geological surfaces; • Visual comparison of block grades vs drill hole data (all analytes, 50m sections); • Review of average grades by geology (blocks vs composites); • Grade Trend plots on eastings, northings and rl for all analyses (100m slices (eastings & northings), 1m slices (vertically));

Criteria	Commentary
	• Block total assay check; • Un-estimated block check; • Reconciliation against production (where possible).
Moisture	The tonnages are estimated on a dry basis.
Cut-off parameters	Cut-offs were not used to define domains, they are used to report Mineral Resources.
Mining factors or assumptions	The models are considered suitable for the current mining method (drill & blast nominally on 3m benches).
Metallurgical factors or assumptions	It has been assumed that current OPF's will continue to be used in the future.
Environmental factors or assumptions	A program of waste characterisation sampling is now in place as part of the requirements allowing mining. No significant concentrations of environmentally deleterious elements have been identified to date.
Bulk density	Densities are average above water table (AWT) down hole geophysical strand (stratigraphic) densities. Although the current down hole geophysical density data has not been fully calibrated with diamond core measurements, reconciliation against historic production data is considered reasonable. Densities in all resource models are dry.
	Down hole geophysical probes measure the in-situ bulk density which accounts for void spaces. The measurements are grouped by geological domains.
	The densities used are similar to known densities of other deposits in the region.
Classification	Overall Resource Model limits were designed to minimise extrapolation of drilling data, all material within the model boundaries could at least be classified as Inferred. The following range of criteria were considered in determining the final resource classification over each model: • Geological and mineralisation continuity; • Data quality; • Drill hole spacing; • Modelling technique; • Estimation properties including search strategy, number of informing data and average distance of data from blocks; The Mineral Resource classification methodology used also incorporated a number of parameters derived from the kriging algorithms in combination with drill hole spacing and continuity and size of mineralised domains.
	Appropriate account has been taken of all these factors in creation of the updated resource models. Block model validations show good correlation of the drill hole data to the estimated grades.
	The Mineral Resource classification reflects the views of the Competent Person.
Audits or reviews	An external audit of both the CB and CC resource models has been completed, no fatal flaws were identified. Several external audits of the Grade Control modelling process have been undertaken.
Discussion of relative accuracy/ confidence	Statistical/geostatistical procedures have not been used to quantify the relative accuracy of the resources. However, comparisons with local grade control models show that on average tonnage and grades are similar (in some areas grade control models show reduced tonnages when compared with the resource models, in other areas the opposite is the case).

Criteria	Commentary
	Resource models are global in that they include as much of each deposit as is covered by sufficient drilling to support geological and grade continuity.
	Comparisons with production data are available for mined areas. Currently these only cover limited areas of the resources. The updated resource models show an improved reconciliation against production data.

Competent Person's Statements

The information in this report that relates to Chichester Mineral Resources is based on information compiled by Mr David Frost-Barnes, a Competent Person who is a Member of The Australasian Institute of Mining & Metallurgy. Mr Frost-Barnes is a full-time employee of Fortescue Metals Group Limited. Mr Frost-Barnes has sufficient experience that is relevant to the style of mineralisation and type of deposit under consideration and to the activity being undertaken to qualify as a Competent Person as defined in the 2012 Edition of the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves'. Mr Frost-Barnes consents to the inclusion in the report of the matters based on his information in the form and context in which it appears.

JORC Code, 2012 Edition – Table 1

Fortescue Solomon Deposits (Firetail, Kings and Queens)

Section 1 Sampling Techniques and Data

Criteria	Commentary
Sampling techniques	The deposits were sampled using Reverse Circulation (RC) and Diamond drill holes (DD). Approximate drill hole spacings are as follows: Firetail – 200m x 100m and 50m x 50m. Kings – 400m x 100m, 200m x 100m, 100m x 100m, 100m x 25m and 25m x 25m. Queens – 400m x 50m and 100m x 50m. Grade control drilling uses a 25m x 25m pattern. RC samples only were used for resource estimation. Where possible, all holes undergo down hole geophysical logging.
	All holes were surveyed by qualified surveyors using a Base station Differential GPS, with collar accuracies to within 3-10 centimetres (laterally and vertically). Analytical standards used to assist in checking laboratory results. Field duplicates are used to assist with determining sampling quality at the rig. Geophysical probes are calibrated on a regular basis using static methods and specific calibration holes.
	RC drilling, samples from 1m intervals pass through cyclone and cone splitter, 2-3kg sample collected in calico bag (~6-7% of samples total volume). Samples from mineralised zones (plus ~5m above and below), as selected by a geologist, are sent for analysis, all other samples are moved to a bag farm.
Drilling techniques	Standard face sampling hammer drilling samples from ~130mm or ~140mm diameter RC drill holes used for Resource Estimation. All holes are drilled vertically with the exception of 14 inclined holes at Firetail North targeting Joffre mineralisation. Diamond drill holes were drilled as twins to reverse circulation holes and for metallurgical test work, they were not incorporated into resource models. Core size was predominantly PQ with some 6 inch holes. All diamond holes were drilled vertically, the core was not oriented. Drilling of large diameter (Bauer) holes (0.78 or 1m) commenced during the Exploration phase and ceased in ~2010. These holes were limited to shallow parts of the deposit (by working depth of rigs). Samples were primarily used for metallurgical test work, data from these holes was not used in creation of Resource and GC models.
Drill sample recovery	The quality of each sample is recorded at the time of logging and categorised as either poor, moderate or good.
	No major issues with sample collection system identified during drilling. Minimal loss of fines was achieved through the use of an automated sample collection and splitting system.
	Twin holes were drilled to compare grades, no significant sample bias was identified.
Logging	Geological logging was completed by geologists experienced in iron mineralisation, logging considered to be adequate for resource estimation.
	Detailed geological logging captured the following qualitative and quantitative information: mineralogy, sample quality, colour and numerous physical characteristics. This data is relevant for both mineral resource estimation and future mining and processing.
	100% of drilled meters logged.
Sub-sampling techniques and sample preparation	Majority of diamond holes drilled to provide material for density determinations and for metallurgical test work. Whole core was used for metallurgical test work.
	Samples are collected in labelled bags from each 1m of drilling, which are stored onsite or sent for analysis. These samples are collected using a cone or multi-tier riffle splitter of dry cuttings installed directly beneath the cyclone. Wet samples are collected using the same technique as dry samples, with thorough cleaning of gear

Criteria	Commentary
	between samples. Wet samples are allowed to dry before being processed. For drill rigs using riffle splitters, once wet samples are encountered, the splitter is changed to a chisel splitter. Larger samples are collected and later split.
	All sub-sample preparation undertaken by the laboratory performing the sample analysis.
	Coarse standards were inserted at rates of 1 per 50 samples.
	Field (rig) duplicates were collected at a rate of 1 in 33 samples.
	No formal analysis of the appropriateness of sample size compared to grain size has been completed but the sampling regime is considered to be industry best practice.
Quality of assay data and laboratory tests	All samples were sent to SGS Perth, Ultra Trace or the on-site laboratory for analysis. All laboratories now have National Association of Testing Authorities, Australia (NATA) accreditation. The standard elements tested were Fe, SiO_2, Al_2O_3, P, MnO/Mn, MgO, CaO, TiO_2, Na_2O, S and K_2O by X Ray Fluorescence (XRF) and a three point LOI thermo gravimetric analysis at 371, 650 and 1000 degrees Celsius. The three point LOI was not undertaken for all samples with only the LOI 1000 being completed. A three point LOI was subsequently carried out on all samples with a Fe grade greater than 50%. This is considered to be close to "a total analysis". From early 2013 As, Pb, Zn, Cu and Cl have also routinely been included in sample analysis.
	Details of geophysical tools used for down hole geophysical analysis are available in the drill hole database.
	Field duplicates were collected 3 in 100 samples. Standards submitted at 1 in every 50 samples. Analysis of duplicates and standards did not indicate there any major issues. QA/QC reports were prepared for the project areas. Concerns over the quality of a few of the historical standards have been raised. Through investigation it appears that this is due to standard preparation methods, size of standards, and homogenisation issues (similar problems have not been noted in newer standards). Also issues with inadequate round-robin testing resulting in over-precise certified values.
Verification of sampling and assaying	Significant intersections have been visually inspected by senior Fortescue personnel and by independent consultants.
	Twin holes have been completed to check the variance of the ore body and sampling. Results show good correlation between the original RC hole and the twin hole.
	Sample data is now stored in customised acQuire drill hole databases, which include a series of automated electronic validation checks. Fortescue data entry procedures are documented. Only trained personnel perform further manual data validation.
	Conversion of MnO% to Mn% for grade estimation has been made where necessary (mainly exploration data). Samples reporting below detection limits were given the value of half the detection limit.
Location of data points	Drill hole collar locations have been surveyed using a differential GPS (by Navaids Pty Ltd and VEKTA Pty Ltd), with an accuracy of better than +/- 10 cm for Easting and Northing and RL for the majority of drill holes. Down hole survey data is available for drill holes which have been down hole geophysically surveyed by PWS (now WSG), as the majority of drill holes are vertical and less than 200m in total depth, deviations from vertical are negligible. Collar survey data is validated against planned coordinates and dtm surface. Holes for which there is no collar survey data, or where the collar RL is significantly different from the topographic surface, are excluded from Resource and GC Modelling.
	Grid co-ordinates are Map grid of Australia (GDA94), heights are in Australia Height Datum. Area is within UTM zone 50, AusGeoid98 used to obtain separation between GDA94 spheroid and the Geoid.

Criteria	Commentary
	The topography was created from 1 metre contours from LIDAR data. Vertical accuracy of the LIDAR data is +/-0.2 metres.
Data spacing and distribution	Firetail: Drill hole data on nominal 200m x 100m spacing for assays and geology with 100m x 50m, 50m x 50m and 25m x 25m sections of infill and some more sparsely drilled 400m x 100m areas. Kings: Drill hole data on nominal 200m x 100m spacing for assays and geology with 100m x 50m and 50m x 50m sections of infill and some more sparsely drilled 400m x 100m areas. The drilling is on an imprecise grid spacing with three different grid orientations. Queens: Drill hole data on nominal 200m x 50m spacing for assays and geology with 100m x 50m sections of infill and some more sparsely drilled 400m x 100m areas. The drilling is on an imprecise grid spacing with two different grid orientations. For all deposits Grade Control (GC) drilling is on a nominal 25m x 25m grid.
	This level of data density is sufficient to define geological and grade continuity for a mineral resource estimate. Locally, the drilling pattern may be inadequate to fully define bedded mineralisation. In some areas, there are also uncertainties in detritals/bedded interface.
	No sample compositing was conducted for this estimation.
Orientation of data in relation to geological structure	Firetail: Drilling grid oriented perpendicular to the local bearing of mineralisation, all but 14 holes are vertical (the inclined holes were drilled to test for mineralisation in the Joffre). This results in no significant sampling bias. Kings & Queens: Drill hole data have been drilled as vertical holes in grid orientations sub-parallel to the local bearing of the orebody, and thus the mineralisation (paleochannel). This results in no significant sampling bias.
	No sampling bias is apparent.
Sample security	Use of consignment notes (sample submission information), direct delivery to site laboratories.
Audits or reviews	Fortescue has had a sampling audit by Snowden (in the Chichester's), there were no major risk factors relating to the sampling and assaying of the data. Similar rigs and splitter systems were utilised in this area.

Section 2 Reporting of Exploration Results

Criteria	Commentary
Mineral tenement and land tenure status	The Firetail deposit is located within the following 100% owned Fortescue Exploration and Mining Leases: E47/1334, E47/3762, M47/1413 (M47/1546 Pending), M47/1431 (M47/1545 Pending), M47/1453 (M47/1543 Pending), M47/1473 (M47/1549 Pending) and M47/1513. The Kings deposit is located within the following 100% owned Fortescue Exploration and Mining Leases: E47/1334, M47/1409 (M47/1542 Pending), M47/1411 (M47/1541 Pending), M47/1431 (M47/1545 Pending), M47/1453 (M47/1543 Pending), M47/1474 (M47/1550 Pending), M47/1475 (M471554 Pending) and M47/1511. The Queens deposit is located within the following 100% owned Fortescue Exploration and Mining Leases: E47/1333, E47/1821, M47/1410 (M47/1540 Pending), M47/1411 (M47/1541 Pending), M47/1493 (Pending) M47/1573 (Pending) and M47/1577.
	The Solomon project area intersects with the Eastern Guruma native title determination area and the Yindjibarndi #1 native title determination area.

Criteria	Commentary
	Fortescue signed a Land Access Agreement (**LAA**) with the Wintawari Guruma Aboriginal Corporation on behalf of the Eastern Guruma native title holders on 15 December 2009, which facilitates Fortescue's exploration and mining activities, including the grant of tenure and processing of approvals within the determination area. Through the LAA the Eastern Guruma People have secured financial compensation; training, employment and business opportunities; as well as Aboriginal cultural heritage protection beyond that afforded by legislation. Fortescue does not have an executed agreement with the Yindjibarndi native title holders over the tenure associated with the Solomon Mineral Resource and Ore Reserve; however, Fortescue conducts regular heritage surveys and consultation with Yindjibarndi People, ensuring legislative compliance. Fortescue meets regularly with Yindjibarndi people to consult on a range of project-related matters and has developed an excellent working relationship with Yindjibarndi people through the Wirlu-Murra Yindjibarndi Aboriginal Corporation (**WMYAC**). In partnership with the WMYAC, Fortescue has delivered contracts for road maintenance, earthworks, airport transfers & across various operational sites in the Pilbara, including the Solomon Project, providing a valuable revenue stream for the community and a variety of job opportunities. Fortescue has further committed $3 million to a cultural project (Gamburlarna Project), driven by Yindjibarndi people & supported by the WA National Trust, which includes community initiatives in Roebourne & on Yindjibarndi country.
	The tenure is currently in good standing and no impediments are known to exist.
Exploration done by other parties	Both BHP and Hamersley Iron have undertaken exploration for iron within the project boundaries. No historical data has been used by Fortescue.
Geology	Mineralisation within the Solomon area is hosted by buried Channel Iron Deposits (CID), Bedded mineralisation (BID and Detrital mineralisation (DID). Outcropping geology in the area is the Dales Gorge, Whaleback Shale and Joffre Members of the Brockman Iron Formation which contain the BID mineralisation. Incised into this bedrock geology are the large Channel systems which contain the DID and CID mineralisation.
Drill hole information	Collar details of the RC holes used in these estimates are not reported here.
Data aggregation methods	No exploration results are being reported. For methods used in the estimation of Mineral Resources for these deposits please refer to: *Section 3 Estimation and Reporting of Mineral Resources*
Relationship between mineralization widths and intercept lengths	No exploration results are being reported. Please refer to: *Orientation of data in relation to geological structure* in *Section 1 Sampling Techniques and Data* for the geometry of mineralisation with respect to drill hole angle.
Diagrams	The Mineral Resource extents are shown in the release.
Balanced reporting	No exploration results are being reported and this is not pertinent to the reporting of Mineral Resources.
Other substantive exploration data	No exploration results are being reported and this is not pertinent to the reporting of Mineral Resources.
Further work	Further infill drilling is planned for all deposits. Extensions to known mineralisation may exist in all deposit areas.

Criteria	Commentary
Database integrity	Sample data is stored using a customised acQuire database (a secure and industry standard system), which includes a series of automated electronic validation checks.
	Only trained personnel perform further manual validation which passes on the data in order to confirm results reflect field collected information and geology. In order to ensure integrity of the database, any changes to the database only occur after a review of the suggested changes are authorised, and these changes can only be performed by a single person. Prior to modelling, further validation was performed on the dataset being used. No issues were uncovered in this final validation step.
Site visits	Site visits, by both the Competent Person and resource modelling/estimation geologist(s), are undertaken on a semi-regular basis to discuss drilling/modelling progress and issues.
Geological interpretation	Logging and geological interpretation was completed by geologists experienced in iron mineralisation. Geology over the majority of the deposit is relatively straight forward. There is some risk of misinterpretation in areas of wider spaced drilling with limited assay data, this is not considered to be material.
	Geological interpretation based on geological logging and geochemistry of RC drill samples.
	The stratigraphy of the deposits is well known and it is envisaged that any alternative geological interpretation, with or without further drilling, would not have a material impact on the resource estimates. Further close spaced drilling may improve the confidence in the stratigraphic interpretation of the BID mineralisation in the Kings & Queens deposits.
	All samples are flagged with their host geological zone, only samples with the same geological zone as the block to be estimated can be used in grade estimation.
	Kings & Queens: The major source of error is at detrital/bedded and detrital/CID interface. The structure and stratigraphy is unknown in the bedded material over much of the deposits.
Dimensions	Firetail: The bedded mineralisation has a strike length of 7km and outcrops on the north and south limbs of an anticline. Mineralisation is strata bound, has an average thickness of 20m and extends to a depth of 100m below surface in places. Kings: The CID mineralisation has a strike length of 20 km and a width of 1 - 2km. Though the CID mineralisation outcrops in the southeast corner of the deposit, the majority of the CID mineralisation is buried and occurs at depths of up to 40m below surface and the defined mineralised units are between 1m and 65m thick Queens: The CID mineralisation has a strike length of 10km and a width of 0.5 - 1km. The CID mineralisation is buried and occurs at depths of up to 60m below surface and the defined mineralised units are between 1m and 65m thick.
Estimation and modelling techniques	Ordinary Kriging was used to estimate grades. Estimation was undertaken using Vulcan™ software. The model areas extend half the distance of drill spacing away from the drilling. Kriging parameters were derived from semivariograms using Supervisor software. The deposit was domained by stratigraphy, local orientation of the paleochannel, and mineralised/un-mineralised zones.
	Comparison with previous resource estimates generally showed an increase in tonnes with slight decrease in Fe grades together with a slight increase in contaminant grades. Insufficient production data to date (Firetail and Kings) for reconciliation.
	No assumptions regarding the recovery of by-products have been made.
	The iron ore suite of Fe, Al_2O_3, SiO_2, TiO_2, CaO, MgO, Na_2O, K_2O, Mn/MnO, P, S, LOI 370, LOI 650 and LOI 1000 has been estimated.

Criteria	Commentary
	A program of selected analysis of waste material for potentially deleterious elements (eg Se, As) has commenced (these are not currently included in the Resource Models. Routine analysis for As, Zn, Pb, Cu and Cl is now part of the grade control drilling program, this data will be included in future models when sufficient information is available to allow interpolation.
	Firetail: Ordinary kriging into parent cells of 25mE x 25mN x 1mRL. In Firetail South, sub blocking down to 5m x 5m x 0.25m was used along domain boundaries to better define the domain interface. Kings: Ordinary kriging into block sizes of 12.5m x 12.5m x 1m and panel sizes of 50mE x 100mN x 1mRL and 100mE x 50mN x 1mRL. Queens: Ordinary kriging into parent cells of 50mE x 25mN x 1mRL. Sub blocking down to 12,5m x 12.5m x 1m was used along domain boundaries to better define the domain interface. For the GC Models a parent block size of 12.5m x 12.5m x 1m was used.
	No selective mining units were assumed in these estimates.
	No assumptions about correlations between variables were made in these estimates, however significant correlation between certain variables was noted during statistical analysis of the drilling data
	The definition of mineralised zones within each stratigraphic unit was accomplished using an indicator approach. The probability of any zone being mineralised was estimated using appropriate geochemical indicator cut-offs for Fe, SiO_2 and Al_2O_3 for the individual stratigraphic units. These cut-offs were based on data population statistics and visual validation. A 'geozone' code was assigned to each sample, defined by the stratigraphic unit and mineralisation.
	Grades were top cut for estimation based on high coefficient of variation values as well as other statistical characteristics of the distributions for the Firetail and Queens Resource Models. Grade cutting is not used in GC models nor in the Kings Resource Model.
	Visual validation of the block model coding of the geozones was completed prior to estimation. Once estimated, the grade of all elements was also visually validated. Visual validation of both the geozones and grade were completed in Vulcan™ by comparing section and plan slices of the block model against the drill holes. Statistics for the mean grade of the mineralised blocks within each stratigraphic unit were compared to the mean grade of the mineralised samples within each stratigraphic unit. Overall, the mean values between the model and samples are well within an acceptable range. Trend analysis graphs have been created for each of the mineralised geozones. These have been generated in Northing, Easting and RL, for all elements. The trend analysis graphs show the modelled grade vs. the raw data grade at a particular slice in space. The trend analysis charts show that overall, the model grade is consistent with the raw data. Areas with a large number of samples correlate much better with the model grade than do areas with few samples.
Moisture	The tonnages are estimated on a dry basis.
Cut-off parameters	Cut-offs were not used to define domains, they are used to report Mineral Resources.
Mining factors or assumptions	It has been assumed that current mining methods will continue to be used in the future, the block size in the models is appropriate for this.
Metallurgical factors or assumptions	It has been assumed that current OPF's will continue to be used in the future.

Criteria	Commentary
Environmental factors or assumptions	A program of waste characterisation sampling is now in place as part of the requirements allowing mining. No significant concentrations of environmentally deleterious elements have been identified to date.
Bulk density	Kings: Density has been calculated from physical diamond core measurement throughout the deposit. Average densities by geological unit and mineralisation have been applied globally to the model. Physical density measurements are measured from diamond PQ core. Density measurements are taken at least 4 weeks after the core has been drilled to drive off any excessive moisture. Although the core has not been oven dried the core has been dried in the high temperatures, high evaporation rates and low humidity of the Pilbara would have driven off any free moisture. No good quality down hole geophysics density is available in the Kings area, therefore no comparisons could be made with the diamond measurement. Firetail & Queens: Density has been calculated from physically measured diamond core and down hole geophysical gamma-gamma measurements conducted at Firetail & Queens. Average densities by geological unit and mineralisation have been applied globally to the model. Physical density measurements are measured from diamond PQ core. Density measurements are taken at least 4 weeks after the core has been drilled to drive off any excessive moisture. Although the core has not been oven dried the core has been dried in the high temperatures, high evaporation rates and low humidity of the Pilbara would have driven off any free moisture. Geophysical density data is collected and validated with caliper data to ensure down hole data integrity.
	Where used, the down hole geophysical probes measure the in-situ bulk density which accounts for void spaces. The measurements are grouped by geological domains.
	The densities used are similar to known densities for current and historic mines, of similar geology and mineralisation, across the Pilbara.
Classification	Firetail & Kings: The resources are classified as Measured, Indicated and Inferred. This takes into account drill spacing and data integrity, geological complexity, and estimation risk and mineralisation continuity based on the semi-variogram ranges of influence. Queens: The resource is classified as Indicated and Inferred. This takes into account drill spacing and data integrity, geological complexity, and estimation risk and mineralisation continuity based on the semi-variogram ranges of influence.
	Appropriate account has been taken of all these factors in creation of the updated resource models. Block model validations show good correlation of the drill hole data to the estimated grades.
	The Mineral Resource classification reflects the views of the Competent Person.
Audits or reviews	An external audit of the updated Kings Resource Model has been completed, no major issues with the model were identified, internal peer reviews of the other models have been completed. Several external audits of the Grade Control modelling process have been undertaken.
Discussion of relative accuracy/ confidence	Statistical/geostatistical procedures have not been used to quantify the relative accuracy of the resources. However, comparisons with local grade control models show that on average tonnage and grades are comparable (in some areas grade control models show reduced tonnages when compared with the resource models, in other areas the opposite is the case). Resource models are global in that they include as much of each deposit as is covered by sufficient drilling to support geological continuity. An external audit of the resource estimation methodology used by Fortescue at the Solomon Project has been undertaken by a respected Consultancy group. Overall, the methods used to categorise the Kings and Firetail Mineral Resource estimates were

Criteria	Commentary
	considered to be fair, reasonable and consistent with industry standards in the iron ore sector. Recommendations included further twin hole drilling; deeper drill holes to be down hole surveyed; statistical comparison to use de-clustered sample data; additional bulk density measurements required using other techniques.

Competent Person's Statements

The information in this report that relates to Chichester Mineral Resources is based on information compiled by Mr David Frost-Barnes, a Competent Person who is a Member of The Australasian Institute of Mining & Metallurgy. Mr Frost-Barnes is a full-time employee of Fortescue Metals Group Limited. Mr Frost-Barnes has sufficient experience that is relevant to the style of mineralisation and type of deposit under consideration and to the activity being undertaken to qualify as a Competent Person as defined in the 2012 Edition of the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves'. Mr Frost-Barnes consents to the inclusion in the report of the matters based on his information in the form and context in which it appears.

JORC Code, 2012 Edition – Table 1

Fortescue Western Hub Deposits (Eliwana)

Section 1 Sampling Techniques and Data

Criteria	Commentary
Sampling techniques	The deposits were sampled using Reverse Circulation (RC) and Diamond Drill (DD) holes. Over 2,800 RC holes have been drilled and used in the model. Over 70 diamond drill holes have also been completed in the area these were used for bulk density, geotechnical and metallurgical test work. No diamond drill samples were used for the Mineral Resource grade estimate. RC samples sent for analytical work were selected based on potential ore-grade material with a reasonable envelope both above and below this interval. Where possible, most holes undergo down-hole geophysical logging.
	Analytical standards were used to assist in checking laboratory results. Field duplicates were used to assist with determining sampling quality at the rig. Geophysical probes were calibrated on a regular basis using static methods and specific calibration holes. Drill hole locations were determined by survey contractors.
	All samples were taken on 1m intervals from reverse circulation drill holes. A sample weighing approximately 1 to 3 kilograms was collected for each metre which was transported to a commercial laboratory and then pulverised for XRF analysis.
Drilling techniques	Reverse circulation drill holes of approximately 140mm diameter were completed using a standard face sampling hammer. The majority of the RC holes are vertical with only 14 being drilled on an angle. All diamond holes were triple tube and had either a PQ or 6 inch drill bit size. 28 diamond holes were drilled on an angle and were orientated using core barrel mounted tools.
Drill sample recovery	The quality of the RC samples from each metre drilled was recorded by the logging geologist at the time of drilling and categorised as either poor, moderate or good. 82% of samples were recorded as good, 3% were recorded as moderate and 2% were recorded as poor. 13% of samples were not recorded. Core recovery was recorded during geotechnical logging for all diamond holes and was considered to be of an acceptable level.
	No major issues with the sample collection system were identified during drilling. For RC holes, minimal loss of fines was achieved through the use of an automated sample collection and splitting system. Triple tube sampling was used for diamond holes to minimise core loss.
	There is assumed to be no expected material relationship between sample recovery and grade.
Logging	Logging was completed by geologists, metallurgists and geotechnical engineers experienced in iron ore mineralisation. The standard of logging is suitable to support an estimate of Mineral Resources.
	Stratigraphy, mineralogy, recovery, hardness, colour, moisture and sample quality were recorded qualitatively for both RC and diamond holes. Geotechnical logging was completed on diamond holes. Chip trays from RC holes were collected on an intermittent basis and diamond holes have been photographed. Down-hole televiewer data for RC and diamond holes has also been interpreted for geotechnical purposes.
	All drill holes were geologically logged.
Sub-sampling techniques and sample preparation	RC drilling samples are collected in labelled bags, which are stored onsite or sent for analysis. These samples are collected using a cone splitter installed directly beneath the cyclone. Wet samples are collected using the same technique as dry samples, with thorough cleaning of sampling system between samples. Wet samples are allowed to dry before being processed.
	The sample collected from the cone splitter represents approximately 6 to 7% of the total sample interval. Cone splitters are the preferred splitting system used by Fortescue as they generally give the most representative sample in both dry and wet conditions.
	At the laboratory, samples were weighed, dried and pulverised to either 90% passing through 106 microns (Ultra Trace and SGS) or 85% passing through 75 microns (Genalysis).

	Coarse field standards (approximately 1 in 100 samples) and laboratory standards (1 per lab job) were used as a quality control measure at different sub-sampling stages.
	Rig duplicate samples are taken at an average of 3 rig duplicate samples per approximately 100 samples sent to the laboratory. An analysis of these duplicate samples indicates that they are of good quality and repeatable.
	No formal analysis of the appropriateness of sample size compared to grain size has been completed but the sampling regime is considered to be industry best practice.
Quality of assay data and laboratory tests	All samples were sent to SGS, Genalysis or Ultra Trace laboratories for analysis. All laboratories have National Association of Testing Authorities, Australia (NATA) accreditation. The standard elements tested were Fe, SiO_2, Al_2O_3, P, MnO/Mn, MgO, CaO, TiO_2, Na_2O, S and K_2O by X Ray Fluorescence (XRF) and a three point LOI thermo gravimetric analysis at 371, 650 and 1000 degrees Celsius. This is considered a total analysis. As, Pb, Zn, Cu and Cl have also routinely been analysed in more recent sample submission.
	No geophysical tools were used to determine any element concentrations used in the estimate.
	Field duplicates were collected at a rate of approximately 3 in 100 samples. Standards are submitted at approximately 1 in every 100 samples. Analysis of duplicates did not indicate any major issues. Analysis of laboratory standard results indicates high confidence in XRF analysis at each laboratory. Analysis of field standards have indicated results are generally acceptable however issues with laboratory sample preparation and standard certification have been noted. Field standard and duplicate results are monitored for all laboratory submissions and reported on monthly and annually. Ongoing discussions with field personnel and laboratory staff are completed in order to mitigate any issues.
Verification of sampling and assaying	Significant intersections have been visually verified by Fortescue's Exploration and Resource Geology Managers.
	An RC/RC twin hole study has been completed on over 50 sets of holes throughout the project area. In general the level of grade and geology correlation between holes noted was acceptable.
	Sample data is stored using a customised acQuire database, which includes a series of automated electronic validation checks. Fortescue data entry procedures are documented and readily available. Only trained personnel perform further manual validation in order to confirm results reflect field collected information and geology.
	Samples returning below detection limits were given the result of half the detection limit. Missing data was set to -99 and those samples were excluded from statistical analysis and estimation.
Location of data points	Drill hole collar locations have been surveyed using a differential GPS by Down Under Surveys, with an accuracy of better than 3 cm for Easting and Northing and 5 cm in elevation. Down hole surveys have been completed on approximately 12% of drill holes. Collar survey data is validated against planned coordinates and the topographic surface.
	Grid coordinates given for each point are Map Grid of Australia (GDA94) and heights are in the Australian Height Datum. The project area lies inside UTM zone 50.
	The topography was created from 0.5m or 2m contours produced from 1 metre LIDAR data. Vertical and horizontal accuracy of this data is+/-0.15 metres.
Data spacing and distribution	The grade estimate used predominantly vertical RC drill holes which occur nominally on 50m × 25m, 50m × 50m, 100m × 50m, 100m × 100m, 200m × 100m, 400m × 100m and minor 800m × 100m spacings with some more sparsely drilled areas for assays and geology.
	This level of drill spacing is sufficient to establish the degree of geological and grade continuity required for a Mineral Resource estimate and the classification applied as deemed by the Competent Person.
	No sample compositing was conducted for this estimation.

Orientation of data in relation to geological structure	Drill holes have been predominantly drilled as vertical holes in drill lines sub-perpendicular to the local bearing of the ore body. The mineralisation is sub-horizontal and these vertical holes are sufficient to imply geological and grade continuity.
	No material relationship is apparent between sampling bias and geological orientation.
Sample security	To ensure sample security consignment notes (sample submission information) have been used and direct delivery to site laboratories has been carried out.
Audits or reviews	All sampling has been carried using Fortescue standard procedures.
	For analogous deposits Fortescue has had a sampling audit conducted by Snowden. For this project there were no major risk factors relating to the sampling and assaying of the data. Similar rigs and splitter systems were utilised in this deposit.

Section 2 Reporting of Exploration Results

Criteria	Commentary
Mineral tenement and land tenure status	FMG Pilbara Pty Ltd is a wholly owned subsidiary of Fortescue Metals Group Ltd and owns 100% of all mineral rights in the tenements which cover the project area: M47/1509 (M47/1553 Pending), M47/1522, M47/1523, M47/1524, M47/1537, P47/1667, P47/1668 and P47/1670. With the exception of M47/1553, these are all live, granted tenements.
	The tenements are within the Puutu Kunti Kurrama and Pinikura (PKKP) native title determination (WAD6007/2001). Fortescue has a current Land Access Agreement with the PKKP native title holders.
	The tenure is currently generally in good standing and no impediments are known to exist.
Exploration done by other parties	Exploration work prior to Fortescue within the Eliwana project area has been conducted since the mid-1970s. Several companies have held ground within the region including Robe River Mining Company Pty. Ltd., Hamersley Iron Pty. Ltd., Talisman Mining Ltd. and De Beers Australia Exploration Ltd. No historical data has been used by Fortescue.
Geology	The Eliwana project is situated on the southern limb of the Jeerinah anticline in the western Hamersley Province. Geographically, the Eliwana deposit covers a relatively narrow (average width of approximately 2km) zone which follows the outcropping of mineralised Marra Mamba and Brockman Iron Formations.
Drill hole Information	Collar details of the RC drill holes used in the Eliwana estimate are not being reported here. Significant intersections have been released previously.
Data aggregation methods	No exploration results are being reported. For methods used in the estimation of Eliwana please refer to: *Section 3 Estimation and Reporting of Mineral Resources.*
Relationship between mineralisation widths and intercept lengths	No exploration results are being reported. Please refer to: *Orientation of data in relation to geological structure* in *Section 1 Sampling Techniques and Data* for the geometry of mineralisation with respect to drill hole angle.
Diagrams	The Mineral Resource extents are shown in the report.
Balanced reporting	No exploration results are being reported and this is not pertinent to the reporting of Mineral Resources.
Other substantive exploration data	The density study carried out at Eliwana is discussed in: *Section 3 Estimation and Reporting of Mineral Resources.*
	Geological surface mapping of the Eliwana project has been carried out by Fortescue geologists. Dip and strike measurements, stratigraphy and mineralisation have been recorded into a database.
	Down hole geophysics has been carried out on some drill holes including: televiewer, natural gamma, magnetic susceptibility and gamma gamma density.

	The estimated groundwater level has been recorded in most RC drill holes.
Further Work	Further infill drilling and metallurgical test work is planned for Eliwana. Extensions to known mineralisation may occur in the Eliwana area.

Section 3 Estimation and Reporting of Mineral Resources

Criteria	Commentary
Database integrity	Sample data is stored using a customised acQuire database, which includes a series of automated electronic validation checks. acQuire is a secure and an industry standard strength database.
	Only trained personnel perform further manual validation on the data in order to confirm results reflect field collected information and geology. In order to ensure integrity of the database, any changes to the database only occur after a review of the suggested changes are authorised, and these changes can only be performed by an authorised person. Prior to modelling, further validation was performed on the dataset being used.
Site visits	The Competent Person and Competent Persons team conducts regular site visits to inspect the model area, RC drill hole logging and sampling practices. Discussions are held regularly with site geologists.
Geological interpretation	Logging and geological interpretation was completed by geologists experienced in iron mineralisation. Geology over the majority of the deposit is relatively straight forward. There is some risk of misinterpretation in areas of wider spaced drilling with limited assay data, however, this is not considered to be material.
	Geological interpretation is based on geological logging, down hole geophysics and geochemistry of RC drill samples.
	The stratigraphy of Eliwana is reasonably well known and it is envisaged that any alternative geological interpretation, with or without further drilling, would not have a material impact on the Mineral Resource estimate. Extrapolation of mineralisation has been restricted to approximately half of the nominal drill spacing.
	All samples are flagged with their host geological zone, only samples with the same geological zone as the block to be estimated can be used in grade estimation.
	The grade and geological continuity is generally good compared with analogous areas. The main factors affecting continuity are stratigraphy, structure, erosion and weathering.
Dimensions	Mineralisation is distributed variably within an area of approximately 40km in an east west direction and 3.5km in a north south direction. Mineralisation occurs at surface and extends to depths of up to 350 metres below the ground surface. The reported tonnes and grade in the Mineral Resource occur at depths of up to 350 metres.
Estimation and modelling techniques	Ordinary kriging was used to estimate all mineralised domains and inverse distance cubed for all waste domains. Estimation was done using Vulcan software. Mineralisation was extrapolated approximately half the distance of drill spacing away from the drilling. The deposit was domained by stratigraphy, local strike/orientation and mineralised/un-mineralised zones.
	Check estimates were completed in selected areas of the deposit using inverse distance cubed. Strings from the previous resource estimate were initially used to aid in the geological interpretation. An increase of 137 million tonnes with negligible variation in grade has occurred when compared to the previous Inferred Mineral Resource. The increase in tonnes is predominantly due to drilling within new areas.
	No assumptions regarding the recovery of by-products have been made.
	The iron ore suite of Fe, SiO_2, Al_2O_3, P, Mn, MgO, CaO, TiO_2, Na_2O, S, K_2O, LOI Total, LOI 371, LOI 650 and LOI 1000 has been estimated. In addition, As, Pb, Zn, Cu and Cl are also estimated where this data is available.

	Size and orientation of parent blocks reflected predominantly half to a quarter of the nominal drill spacing and orientation of mineralisation. Sub blocking was used along domain boundaries to better define the domain interface.
	Up to three estimation passes were used for each element, gradually increasing search ellipse distances with each pass. Search distances along strike and across strike varied between each domain. These were primarily defined by sample spacing within each domain and determined by neighbourhood iterative tests.
	No assumptions behind the modelling of selective mining units have been made.
	Correlation between some elements has been noted during statistical analysis. Similar variogram parameters were achieved for mineralised domains that had elements with a correlation coefficient of > 0.7 or < -0.7.
	The definition of mineralised zones within each stratigraphic unit was accomplished using an indicator approach. The probability of any zone being mineralised was estimated using appropriate geochemical indicator thresholds for Fe, SiO_2 and Al_2O_3 for the individual stratigraphic units. These thresholds were based on data population statistics and visual validation. A domain code was assigned to each sample, defined by the stratigraphic unit and mineralisation.
	Some element grades were top-cut during estimation based on coefficient of variation values higher than 1.2.
	Visual validation of the block model coding of the domains was completed prior to estimation. Once estimated, the grade of all elements was also visually validated. Visual validation of both the domains and grade were completed in Vulcan by comparing section and plan slices of the block model against the drill holes. Statistics for the mean grade of the mineralised blocks within each stratigraphic unit were compared to the mean grade of the mineralised samples within each stratigraphic unit. Overall, the mean values between the model and samples are within an acceptable range. Trend analysis graphs have been created for each of the mineralised domains. These have been generated in Northing, Easting and RL, for all elements. The trend analysis graphs show the modelled grade vs. the raw data grade at a particular slice in space. The trend analysis charts show that overall, the model grade is consistent with the raw data and shows no bias. Areas with a large number of samples correlate much better with the model grade than do areas with few samples.
Moisture	Tonnages are estimated on a dry basis.
Cut-off parameters	Cut-offs were not used to define domains, they are used to report Mineral Resources.
Mining factors or assumptions	It is assumed that mining will be carried out with medium to large scale mining equipment using 5 metre bench heights, though bench heights may vary depending on mining studies. These methods will be similar to analogous Fortescue deposits such as Firetail where conventional: truck & shovel/excavator; drill & blast and; grade control methods are used. The impact of dilution will be assessed as part of the mining studies.
Metallurgical factors or assumptions	It is assumed that similar metallurgical techniques to analogous Fortescue operations such as Firetail will be utilised. The expectation is that it will be a process as applied at Firetail. Final processing methods will be defined by further mining studies.
Environmental factors or assumptions	Fortescue has an extensive environmental and heritage approvals process. Waste is considered to be inert and formed waste dumps will conform to WA standards. Waste will be formed as dumps or into mining voids. In the case of acid and fibre mitigation, Fortescue has industry standard procedures. Some beneficiation may take place but reject is considered to be inert and there are no foreseen problems with tailings disposal. It is assumed material will be transported to an ore processing facility and use tailings disposal infrastructure.
Bulk density	Density has been measured from down-hole gamma-density and diamond core throughout the deposit. Whilst on site down-hole geophysical tools are calibrated fortnightly in a designated test diamond drill hole. Density values have either been estimated or applied globally to the model. Ordinary kriging was used for mineralised domains and inverse distance was used for unmineralised domains when density has been estimated. A formula was then applied to the estimated values to yield a dry bulk density. For areas where density was applied globally,

	average rounded densities by geological unit and mineralisation have been compared with analogous areas/deposits and applied globally.
	Down-hole geophysical probes measure the insitu bulk density which accounts for void spaces. These measurements are not corrected for moisture but are validated against known dry bulk densities from diamond core drilled in the area. Down-hole geophysical measurements are grouped by geological and mineralisation domains.
	The densities used are similar to known densities for current and historical mines, of similar geology and mineralisation, across the Pilbara.
Classification	The Mineral Resource has been classified as Measured, Indicated and Inferred. This takes into account drill spacing, data integrity, geological complexity, grade estimation quality and interpreted risk.
	The Mineral Resource classification reflects the views of the competent persons.
Audits or reviews	Internal peer reviews have been completed during all stages of the estimate. An external audit of a previous Inferred Mineral Resource for Eliwana was completed by Snowden with no significant flaws identified. Similar processes have been used for this estimate.
Discussion of relative accuracy/ confidence	Estimation uncertainty analysis has been completed on certain areas of the deposit using sub-set estimates and the estimation variance. The volumes of the areas tested are approximately equivalent to annual and quarterly rates of production. The accuracy noted is similar to analogous Fortescue operational deposits and the confidence level of the Mineral Resource is appropriate as deemed by the Competent Person.
	No production data is available at this stage.

Competent Person's Statements

The information in this report that relates to Eliwana Mineral Resources is based on information compiled by Mr Stuart Robinson who is a Fellow of The Australasian Institute of Mining and Metallurgy, and Mr Nicholas Nitschke and Ms Erin Retz who are Members of The Australasian Institute of Mining and Metallurgy. Mr Stuart Robinson, Mr Nicholas Nitschke and Ms Erin Retz are full-time employees of Fortescue Metals Group Ltd. Mr Robinson, Mr Nitschke and Ms Retz have sufficient experience that is relevant to the style of mineralisation and type of deposit under consideration and to the activity which they are undertaking to qualify as a Competent Person as defined in the 2012 Edition of the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves'. Mr Robinson, Mr Nitschke and Ms Retz consent to the inclusion in this report of the matters based on this information in the form and context in which it appears.

JORC Code, 2012 Edition – Table 1
Combined Fortescue Hematite Deposits (Excluding Eliwana)
Section 4 Estimation and Reporting of Ore Reserves

<table>
<tr><th>Criteria</th><th>Commentary</th></tr>
<tr><td>Mineral Resource estimate for conversion to Ore Reserves</td><td>The Chichester and Solomon individual resource models described in Section 3, depleted by mining to 31 April 2019, are the basis for the conversion to Ore Reserves (which are subsequently adjusted for an additional 2 months of mining depletion to reflect Ore Reserves position at end of June 2019). These models are regularised, merged with Grade Control Models and adjusted based on reconciliation history to create the Mining Models that form the basis for Ore Reserve reporting.
Mineral Resources are inclusive of the Ore Reserves quoted here.</td></tr>
<tr><td>Site visits</td><td>Periodic site visits are undertaken by the Competent person to monitor on-going mining and processing operations relevant to estimation of Ore Reserves.</td></tr>
<tr><td>Study status</td><td>Cloudbreak and Christmas Creek Ore Reserves relate to operating properties that have been established for over 9 years. The Firetail deposit has been mined and processed for approximately six years while mining and processing has occurred at the Kings CID deposit for five years. Routine integrated short, medium and long term planning activities are carried out according to a company planning calendar, including annual life-of-mine (LOM) and Ore Reserve plans. The technical feasibility of mining and processing activities is well understood based on the operating history for both the Chichester and the Solomon deposits. Where possible, material Modifying Factors are derived from actual operating history to maximise the confidence in plan and Reserve outcomes. The LOM and associated Ore Reserve plans include an ore sales product strategy, ore definition and cut-offs, mine and waste designs and schedules, infrastructure designs including roads, drainage, remote crushing, dewatering, tails dams and the like, closure designs and schedules, fleet and manpower requirements, operating and capital costs and financial analysis. Due to the site operating history and the 170Mt per annum installed infrastructure, the Chichester and Solomon Ore Reserve estimations are considered to be equivalent or better than a “definitive” feasibility study standard. Shorter term plans (1 to 3 years) are supported by a detailed budgeting process.</td></tr>
<tr><td>Cut-off parameters</td><td>The company produces a number of standard BID and CID blended products that are delivered by rail and assembled at the Fortescue Port Hedland ore stockyards from contributions of each mine-site. A linear programming approach is adopted where “ore bins” are created and the maximum tonnage of blended ore is assembled that meets the product specification of each of the BID and CID brands. Since the quality of mineralisation varies with time at each deposit and site, the cut-off grade(s) can also vary with time to achieve the required product outcome. Due to the methodology, and opportunistic blending, a fixed cut-off is not used for Ore Reserve reporting. However, Fe cut-off and SiO_2 cut-off for each major ore type deposit can be applied to approximate the Ore Reserve outcome. The Fe grade that most closely approximates the Ore Reserve for all deposits is 53.5%
<table>
<tr><td>Cloudbreak</td><td>53.5</td></tr>
<tr><td>Christmas Creek</td><td>53.5</td></tr>
<tr><td>Firetail</td><td>53.5</td></tr>
<tr><td>Kings</td><td>52.0</td></tr>
<tr><td>Queens</td><td>53.0</td></tr>
<tr><td>Eliwana</td><td>55.5</td></tr>
</table></td></tr>
<tr><td>Mining factors or assumptions</td><td>Both the Chichester and Solomon resource models are estimated into parent block and sub-cells and are regularised to a common block size to match the Grade Control (GC) models (typically 12.5m x 12.5m x 1m) to allow for model merging.
After regularisation, the resource models are merged with Grade Control models (built to a common origin and orientation as the GC models) to reflect the greatest level of detailed information available for each deposit.</td></tr>
</table>

Criteria	Commentary
	Both the Chichester and Solomon merged models are then regularised to the most appropriate block size to simulate the expected mining selectivity, dilution and ore loss for the mining method applied at each deposit (eg 25m x 25m x 3m). The resulting models are compared with sales data over the prior twelve months to derive reconciliation factors (for both the Resource and GC modelled areas) that are then applied to the in-situ regularised tonnage and quality attributes to create the adjusted Run Of Mine (ROM) estimates of tonnage and grade in the "Mining Model". Ore Processing Facility (OPF) upgrade factors (predicted based on test-work and/or reconciled from actual OPF upgrade performance) are then applied to the ROM data to create a "product" data set. There is no beneficiation associated with ore directed to the Firetail OPF at Solomon, so the ROM values constitute the product data set. It is this product dataset that is used as the basis for both LOM and Ore Reserve plans and Ore Reserve reporting. Chichester pit geometry with an average overall slope angle of approximately 40 degrees are optimised based on the latest available excavator mining models with inferred materials included in the optimisation. Due to the Chichester ore body flat and shallow nature, no detailed ultimate pit designs are maintained, optimised pit shells are used directly for mine scheduling. Solomon pits are fully designed geometries with dimensions consistent with the scale of mining equipment employed, and geotechnical and operational considerations made. The LOM plan fully includes Inferred mineralisation. For the Ore Reserve plan, only Measured and Indicated Mineral Resources are considered. Inferred mineralisation is treated as waste for the purposes of scheduling, reporting and financial valuation of the Ore Reserve.
Metallurgical factors or assumptions	Cloudbreak (CB) and Christmas Creek (CC) mineralisation is all treated through 3 existing wet processing plants at a collective Reserve design rate of 90 (wet) Mt of product per annum. Processing consists of primary, secondary and tertiary crushing; screening, and downstream beneficiation based on particle sizing and density. Low grade reject is directed to wet tailings disposal facilities. The processes are well tested and the sites have developed an operating history for both mass yield and element upgrades for typical OPF feed to supplement historical test-work. Specifically, CB OPF yields and upgrades are based on recent test work carried out on diamond drill core. This program aimed to better predict up-coming mineralisation types. Previous 12 months operating history is then used to augment these factors. CC OPF yields and upgrades are based on the last 12 months operating history which demonstrates a sustained ability to achieve these factors over the longer term. Kings OPF factors were developed to reflect recent test-work and the last 12 months operating history. Firetail OPF is a dry plant with 100% yield and no upgrading.
Environmental	The CB and CC mines and associated infrastructure were initially approved under the *Iron Ore (Fortescue Chichester Pty Ltd) Agreement Act 2006* (State Agreement) per CB Ministerial Statement 721 and CC Ministerial Statement 707 and subsequent amendments. Scope of these approvals included mine pits, ore processing facilities, tailings storage facilities, above ground landforms, rail, conveyors, camps, roads, water abstraction and injection infrastructure and other infrastructure associated with mining. Significant changes relative to these primary approvals are subject to assessment by both State and Commonwealth entities including the WA Environmental Protection Authority (EPA) and other State authorities and the Department of the Environment and Energy (DoEE). Such revision to the Cloudbreak mine was approved by Ministerial Statement 0899 in June 2012 and the Federal Approval EPBC 2010/5696 in November 2012. A revised Christmas Creek Proposal was approved by Ministerial Statement 1033 in August 2016 and EPBC 2013/7055 in January 2017. Operating licences (L8199/2007/2 for CB and L8454/2010/2 for CC) and various Works Approvals issued by the WA Department of Water and Environmental Regulation (DWER) are in place for both sites.

Criteria	Commentary
	The Solomon project was initially referred to the EPA under Part IV of the Environmental Protection Act (EP Act) in July 2010 and State Ministerial approval was granted in April 2011 subject to the conditions of Ministerial Statement (MS) 862. Subsequent project amendments to MS 862 addressed an increase to the railway footprint (2011) and additional bore field clearing (2013). The project was also assessed and approved by the ~~(~~DoEE~~)~~ under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). A revised Solomon Proposal was approved by Ministerial Statement 1062 in October 2017 and EPBC 2014/7275 in June 2018. The Solomon project is also subject to regulation by the DWER through Part V of the EP Act and Fortescue holds a number of Works Approvals and a Licence for the site. Construction of the mine(s) and associated infrastructure is also subject to assessment and approval by way of Mining Proposals as required under Section 82A(2) of the Mining Act 1978 administered by the Department of Mines, Industry Regulation and Safety. Fortescue also holds a number of licences under the Rights in Water and Irrigation Act 1914 for the abstraction of groundwater issued by DWER. Future amendments to existing approvals and licences will be sought on a routine basis as more information is gathered during the course of normal mining and processing operations.
Infrastructure	All mine sites are well established with all required infrastructure and services already in place. As the centre of gravity of ore mining operations moves further away from existing OPF's, additional remote crushing and ore conveying facilities and associated infrastructure will be established on an as-needed basis to offset higher ore haulage costs. The scheduling optimisation process has included the capex required for mine development and transport for Queens deposit development at Solomon and the Kutayi deposit at the Chichesters. The capital cost of construction of the Eliwana mine and associated infrastructure has also been included in the Ore Reserves Schedule.
Costs	The majority of planned capital costs to support operations are sunk. Future capital costs, including sustaining capital are subject to normal annual budget financial analysis standards. Operating costs are derived based on operating history and LOM cost target prediction. Rail freight and port handling costs are internal costs and are forecast based on operating history. Sea freight rates are forecast based on operating history and external sources. OPF treatment costs are based on operating history and LOM cost target prediction. An iron ore fines royalty of 7.5% is payable for non-beneficiated product. For that portion of OPF product that meets the beneficiation criterion the lower royalty of 5% is allowed. The resulting overall average royalty rate is approximately 7.3%. No private royalties are payable.
Revenue factors	Forecast metal prices and exchange rates are based on analysis of internal and external sources. Forecast sales prices and adjustments used to determine Ore Reserves consider market prices for equivalent products, value-in-use assessment plus global industry capacity and consumption trends. The forward price profile is commercially sensitive and is not disclosed. The individual Cloudbreak, Christmas Creek and Firetail BID OPF products are blended at the port to create Western Pilbara Fines (WPF), Fortescue Blend (FB) and Super Special Fines (SSF). These products are sold based on Fe content at a price adjustment to the 62% Fe benchmark price. The Kings OPF treats Channel Iron Deposit (CID) plus minor detrital and bedded (DID and BID) ore to produce Kings (KCID) CID products. The KCID product is sold based on Fe content at a price adjustment to the 62% Fe benchmark price.
Market assessment	The majority of current and future Fortescue iron ore sales are expected to be to Chinese customers with an increasing proportion to other Asian customers. Demand in this market is driven by internal consumption. Fortescue has demonstrated it can compete successfully with other suppliers and adapt products to match changing market requirements. Current Fortescue product blend

Criteria	Commentary
	ratios are maintained over the near term (approx. 5 years) and then determined by schedule optimisation to decide the optimum product ratios to deliver highest Net Present Value (NPV).
Economic	Economic analysis is based on discounted cash flow assessment to derive the NPV of the Ore Reserves plan. The NPV robustness is tested by carrying out a +/-30% sensitivity analysis of the major financial drivers (price, foreign exchange rate, opex, capex and discount rate). These sensitivity analyses demonstrate that the Ore Reserves meet the required internal Fortescue investment criteria and deliver positive NPV outcomes. The details of the economic inputs are commercially sensitive and are not disclosed.
Social	The Cloudbreak and Christmas Creek project areas are within the external boundaries of the Nyiyaparli and Palyku native title determinations. In 2005, Fortescue entered into comprehensive Land Access Agreements (LAA) with the Nyiyaparli and Palyku traditional owners. The LAA's facilitate the certain grant of all required Fortescue tenure and related approvals. In consideration, Fortescue provides the traditional owners with: training, employment, business opportunity, and consultation on a range of project–related matters including regular on-country meetings, comprehensive Aboriginal heritage identification and management procedures, and cash compensation. In 2016, Fortescue entered into Indigenous Land Use Agreements (ILUA) with the Kariyarra, Palyku and Nyiyaparli People. An ILUA is a statutory agreement arising out of the Native Title Act 1993 (Cth). Once registered, the ILUA binds all persons 'who hold or may hold' native title over the relevant areas of land and waters. The ILUAs also empower the Government to dispense with the statutory timeframes required for native title processes before granting new tenure to Fortescue. In this way, the ILUAs provide greater certainty to Fortescue's existing and future tenement holdings. On 15 December 2016, the ILUA between Fortescue and the Nyiyaparli People was registered on the National Native Title Tribunal's Register of Indigenous Land Use Agreements. On 3 November 2017, the ILUA between Fortescue and Palyku was registered and on 8 March 2018, the ILUA between Fortescue and Kariyarra was registered on the National Native Title Tribunal's Register of Indigenous Land Use Agreements. The ILUAs augment rather than replace the LAAs. The Solomon project area is within the Eastern Guruma and the Yindjibarndi #1 native title determination area. In 2009, Fortescue entered into a comprehensive Land Access Agreement (LAA) with the Eastern Guruma traditional owners. The LAA facilitates the certain grant of all required Fortescue tenure and related approvals. In consideration, Fortescue provides the Eastern Guruma People with training, employment, business opportunity, consultation on a range of project–related matters including regular on-country meetings, comprehensive Aboriginal heritage identification and management procedures, and cash compensation. Fortescue has developed an excellent working relationship with Yindjibarndi People through the Wirlu-Murra Yindjibarndi Aboriginal Corporation (WMYAC). In partnership with the WMYAC Fortescue has delivered significant training, employment, business development opportunity to Yindjibarndi people and protection of heritage areas identified as being important to Yindjibarndi People. Fortescue has secured all tenure required to access and develop the Solomon Mineral Resource and Ore Reserve through the processes provided under the Native Title Act 1993 (Cth), and is confident that this will continue into the future.
Other	Approvals status is addressed under the environmental section. There are reasonable grounds to assume that required Government approvals will continue to be granted within the timeframes anticipated in the mine schedules supporting the Ore Reserve reporting. There are no material legal agreements or marketing agreements that are anticipated to impact on the Ore Reserve.

Criteria	Commentary
	This year, Mr Chris Fowers was lead CP, and estimates were compiled under his direction, with and Mr Martin Slavik as assisting CP and Mr Jamie Davies as CP-in-training.
Classification	Proven Ore Reserves stated are all derived from Measured Mineral Resources. The majority of Measured Mineral Resources and Proved Ore Reserve are located in areas that have been infill drilled on a close-spaced 25m x 25m grade control (GC) pattern. Probable Ore Reserves are all derived from Indicated Mineral Resources, and no Inferred Mineral Resource has been converted to Ore Reserve. The Competent Person agrees that the classification properly represents the risk associated with the Ore Reserve estimate.
Audits or reviews	An Ore Reserve Estimation Audit focusing on the contribution made by the Valley of Kings (VK) deposit to the EOFY2019 Fortescue Hematite Ore Reserve was carried out by external Golders Consultants in May and June 2019. No material issues with the input data, assumptions or output from the Ore Reserves Estimation process, were identified during this review. A number of recommendations were made for process improvement, and many of these have been adopted. The internal Fortescue Ore Reserve process includes progressive multi-disciplinary technical peer review and is a sub-set of the annual LOM planning process. Annual auditing of various aspects of Mineral Resources and Ore Reserves estimation is carried in accordance with the Resources and Reserves Audit Calendar, overseen by the Audit and Risk Management Committee (ARMC) of Fortescue Board of Directors.
Discussion of relative accuracy/ confidence	The Fortescue mine sites contributing to Ore Reserves have been active for a number of years at full mining and processing rates with production data collected and reconciled against Mining model predictions. The reconciliation data is used to measure against and, when necessary, recalibrate the Mining models that the Ore Reserves estimates are derived from. The operating history of the last 12 months of mining in the Chichesters and Solomon areas has been incorporated into the reconciliation process and is reflected in the factors applied to the mining models used for this year's Ore Reserves estimate.

Competent Person's Statements

The information in this report that relates to the Fortescue Ore Reserve is based on information compiled and reviewed by Mr Chris Fowers (lead Competent Person), Mr Martin Slavik (assisting Competent Person) and Mr Jamie Davies (Competent Person-in-training). All Competent Persons are Members of The Australasian Institute of Mining and Metallurgy. Mr Fowers, Mr Slavik and Mr Davies are full-time employees of Fortescue Metals Group Limited. Mr Fowers and Mr Slavik have sufficient experience that is relevant to the style of mineralisation and type of deposit under consideration and to the activity being undertaken to qualify as Competent Persons as defined in the 2012 Edition of the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves'. Mr Fowers and Mr Slavik consent to the inclusion in the report of the matters based on their information in the form and context in which it appears.

JORC Code, 2012 Edition – Table 1
Eliwana Hematite Deposit
Section 4 Estimation and Reporting of Ore Reserves

Criteria	Commentary
Mineral Resource estimate for conversion to Ore Reserves	The Eliwana individual resource model described in Section 3, is the basis for the conversion to Ore Reserves position at end of June 2019. The model is regularised to create the Mining Model that forms the basis for Ore Reserve reporting. Mineral Resources are inclusive of the Ore Reserves quoted here.
Site visits	The competent person visited Eliwana in April 2019
Study status	Eliwana is a greenfields operation. Production will begin in 2020. The feasibility study was completed in 2018.
Cut-off parameters	The cut-off grade for Marra Mamba and Brockman ores at Eliwana is greater than or equal to 55.5% Fe.
Mining factors or assumptions	The Mineral Resource models for Eliwana were regularised to a block size of 25 m E x 25 m N x 5 m RL for the Marra Mamba deposits, 25 m E x 25 m N x 10 m RL for West End (Brockman deposit) and 25 m E x 25 m N x 6 m RL for the other Brockman deposits, which was determined to be the selective mining unit following analysis of a range of selective mining units. Dilution and mining recovery were modelled by applying the regularisation process to the sub-block geological model. Pit optimisations, utilising Limiting Strip Ratio (LSR) methodology were undertaken. This optimisation utilised the regularised Mineral Resource model together with cost, revenue and geotechnical inputs. The resultant pit shells were used to develop detailed pit designs with due consideration of geotechnical, geometric and access constraints. These pit designs were used as the basis for production scheduling and economic evaluation. Conventional mining methods (truck and shovel) similar to other Fortescue operating mines are utilised. Geotechnical design recommendations for the Eliwana Feasibility Study have been supplied based on geotechnical studies of 16 fully cored and geotechnically logged diamond drill holes (totalling 5,940 m). The resultant design recommendations produce inter-ramp slope angles varying between 27 and 56 degrees depending on the local rock mass, hydrogeology, and structural geological conditions.
Metallurgical factors or assumptions	The Eliwana ore is to be processed through a dry crush and screen plant with 100% yield and no upgrading.
Environmental	The Environmental Review Document (ERD) includes a detailed impact assessment and description of proposed mitigation and management measures for the environmental factors identified in the Environmental Scoping Document. The Eliwana Proposals were referred to the Western Australia Environmental Protection Authority (EPA) under Section 38 of the EP Act on the 3rd and 7 July 2017 for the Rail and Mine proposals respectively. The EPA determined both Proposals required assessment under Part IV of the EP Act and set the level of assessment at Public Environmental review (PER). The EPA released its report, recommending the projects be approved, on 29 April and 24 June 2019. The projects are currently under consideration by the WA Minister for the Environment for approval. Both Proposals were also referred under Section 68 of the EPBC Act to the DoEE on 23 August 2017. The DoEE determined that both Proposals had the potential to impact upon Matters of National Environmental Significance and were therefore considered to be controlled actions.
Infrastructure	Proposed infrastructure includes; • Ore Processing Facility and associated conveyors • Stockyard and Train Loadout facilities

Criteria	Commentary
	• Railway extension between Eliwana and Solomon • Roads and drainage • Camp • Airport • Buildings/yards/fuel/lube • Borefields/water supply/distribution • Water treatment plants • Power Supply and distribution • IT and Communications • AN Facility • Mine Roads and associated infrastructure • Surface and pit water management • Waste storage areas • ROM and Stockpile areas
Costs	Eliwana operating costs were benchmarked against similar operating Fortescue mine sites. The capital costs for Eliwana are based on the Feasibility Study, utilising experience from the construction of existing similar Fortescue projects in the Pilbara, Western Australia. Transportation costs were based on existing operating experience at Fortescue sites in the Pilbara, Western Australia. Allowances have been made for royalties to the Western Australian government.
Revenue factors	Eliwana ore will be a contributor to the existing Fortescue product suite - Western Pilbara Fines (WPF), Fortescue Blend (FB) and Super Special Fines (SSF). These products are sold based on Fe content at a price adjustment to the 62% Fe benchmark price. Forecast sales prices and adjustments used to determine Ore Reserves consider market prices for equivalent products, value-in-use assessment plus global industry capacity and consumption trends. The forward price profile is commercially sensitive and is not disclosed.
Market assessment	The majority of current and future Fortescue iron ore sales are expected to be to Chinese customers with an increasing proportion to other Asian customers. Demand in this market is driven by internal consumption. Fortescue has demonstrated it can compete successfully with other suppliers and adapt products to match changing market requirements. Current Fortescue product blend ratios are maintained over the near term (approx. 5 years) and then determined by scheduling optimiser to decide the optimum product ratios to deliver highest Net Present Value (NPV).
Economic	Economic analysis is based on discounted cash flow assessment to derive the NPV of the Ore Reserves plan. The NPV robustness is tested by carrying out a +/-30% sensitivity analysis of the major financial drivers (price, foreign exchange rate, opex, capex and discount rate). These sensitivity analyses demonstrate that the Ore Reserves meet the required internal Fortescue investment criteria and deliver positive NPV outcomes. The details of the economic inputs are commercially sensitive and are not disclosed.
Social	Eliwana is located within the Puutu Kunti Kurrama and Pinikura (PKKP) and Eastern Guruma Native Title Determination areas. Fortescue signed an LAA with Wintawari Guruma Aboriginal Corporation, Eastern Guruma's Prescribed Body Corporate' on 15 December 2009, which facilitates Fortescue's exploration and mining activities within the Native Title Determination area. Fortescue meets with and consults regularly with the Traditional Owners over all

Criteria	Commentary
	aspects relating to the identification, protection and management of their cultural heritage, consistent with Heritage Legislation and the Cultural Heritage Principles agreed between Fortescue and the Traditional Owners as set out in the LAA. Fortescue signed a Land Access Agreement (LAA) with the PKKP people on 28 May 2010, which facilitates Fortescue's exploration and mining activities within the Native Title Determination area. Fortescue also engages in regular consultation with the PKKP People, to ensure traditional owners remain informed about the progress of Fortescue projects. This ensures that, under DAA Cultural Heritage Due Diligence Guidelines, all Fortescue works are conducted consistent with Heritage Legislation and industry standard Cultural Heritage Principles. Heritage surveys commissioned for the MDE and involve anthropologists, archaeologists and representatives from the Traditional Owners. The surveys are consistent with the requirements and expectations for heritage surveys as defined in the EPA Guidance Statement Number 41: Assessment of Aboriginal Heritage (EPA, 2004c) and the Aboriginal Heritage Act 1972. The surveys identified over 500 archaeological sites and six ethnographic sites within the MDE. Archaeological sites are places where evidence of the past activities of Aboriginal groups or people has been preserved; they typically comprise artefacts and/or features. While ethnographic sites are places known to Traditional Owners as part of their cultural traditions, and typically have mythological or ceremonial meaning. Avoidance • Disturbance to sites of archaeological or ethnographic significance will be avoided where practicable and in accordance with the requirements of the Aboriginal Heritage Act 1972. Minimisation • Disturbance to sites of archaeological or ethnographic significance will be planned and managed in consultation with Traditional Owners and the DAA as detailed in the Fortescue Guideline for the Management of Aboriginal Cultural Heritage (45-PL-HE-0002). • Fortescue will continue to consult with the relevant Native Title Groups and obtain approval under Section 18 of the *Aboriginal Heritage Act 1972* as required, prior to the disturbance of any heritage sites. Heritage Sites will be managed in accordance with the *Management of Aboriginal Cultural Heritage, Fortescue Project Areas, Revision 2 (*100-GU-HE-0003*)*. • Fortescue also uses key heritage principles outlined in the existing LAAs for all exploration and expansion work yet to be finalised with the Traditional Owners, including work in the Proposal area. In addition, Fortescue regularly consults with the Traditional Owners for matters relating to the protection and management of cultural heritage sites, as well as establishing staff training and education on Aboriginal heritage and cultural awareness • In relation to amenity impacts, Fortescue will minimise dust emissions, as far as practicable, through implementation of the Fortescue *Mine and Rail Dust Management Plan* (45-PL-EN-0030), which includes the following requirements: ○ use of water carts on high traffic areas ○ incorporation of dust control measures into project design ○ progressive rehabilitation ○ ambient dust monitoring where appropriate. • Noise and vibration will be managed in accordance with the *Mine and Rail Noise Management Plan* (100-PL-EN-0028). Rehabilitation/Revegetation • Rehabilitation and closure of the Proposal will be undertaken to meet land use outcomes agreed in consultation with Native Title Groups. Offset

Criteria	Commentary
	• As part of previous projects, Fortescue has contributed to community services and facilities, regional development and local procurement of goods and services (FMG, 2008). • Fortescue has a target to achieve spending of 10% of total procurement with Aboriginal businesses by 2021 (currently 7% in FY19). In FY19, Fortescue spent approximately A$230 million with 54 Aboriginal businesses. Since its inception in 2011, Fortescue's Billion Opportunities initiative has awarded contracts, sub-contracts and new works worth A$2.3 billion to 117 Aboriginal-owned businesses and joint ventures. • Aboriginal people currently make up 15.0 % of Fortescue's mining operational workforce. Fortescue has a target of achieving an employment rate of 20 % for Aboriginal people across Fortescue by 2020 (Fortescue Metals Group Limited, 2017). • Training and employment of Aboriginal people is undertaken through the Fortescue funded Vocational Training and Employment Centre (VTEC) in South Hedland and Roebourne/Karratha (FMG, 2011b). Training programs include Fortescue values and safety commitments, leadership, teamwork and communication development, time management and information technology skills, financial management and health/wellbeing courses with wrap around support and mentoring throughout– all designed to prepare students for successful employment. Since the establishment of VTEC in 2006, Fortescue has provided training and employment opportunities and support to more than 1,500 Aboriginal people (Fortescue Metals Group Limited, 2017)
Other	Approvals status is addressed under the environmental section. There are reasonable grounds to assume that required Government approvals will continue to be granted within the timeframes anticipated in the mine schedules supporting the Ore Reserve reporting. There are no material legal agreements or marketing agreements that are anticipated to impact on the Ore Reserve.
Classification	Proven Ore Reserves stated are all derived from Measured Mineral Resources. The majority of Measured Mineral Resources and Proved Ore Reserve are located in areas that have been infill drilled on a close-spaced 25m x 25m grade control (GC) pattern. Probable Ore Reserves are all derived from Indicated Mineral Resources, and no Inferred Mineral Resource has been converted to Ore Reserve. The Competent Person agrees that the classification properly represents the risk associated with the Ore Reserve estimate.
Audits or reviews	No external audits have been performed on the Ore Reserves estimate, however the deposit Resource modelling has been audited and validated by External independent consultants. Internal Fortescue peer review process and internal Fortescue technical reviews have been completed as part of the Feasibility Studies. These reviews concluded that the fundamental data collection techniques and assumptions used are appropriate.
Discussion of relative accuracy/ confidence	Fortescue operates multiple mines in the Pilbara region of Western Australia. The Ore Reserve estimation techniques utilised for Eliwana deposits are consistent with those applied at the existing operations. Reconciliation of actual production with planning model estimates for individual deposits is generally within 2 percent for tonnes and grades on an annual basis. This result is indicative of a robust Ore Reserve estimation process.

Competent Person's Statements

The information in this report that relates to the Fortescue Ore Reserve is based on information compiled and reviewed by Mr Chris Fowers (lead Competent Person), Mr Martin Slavik (assisting Competent Person)

and Mr Jamie Davies (Competent Person-in-training). All Competent Persons are Members of The Australasian Institute of Mining and Metallurgy. Mr Fowers, Mr Slavik and Mr Davies are full-time employees of Fortescue Metals Group Limited. Mr Fowers and Mr Slavik have sufficient experience that is relevant to the style of mineralisation and type of deposit under consideration and to the activity being undertaken to qualify as Competent Persons as defined in the 2012 Edition of the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves'. Mr Fowers and Mr Slavik consent to the inclusion in the report of the matters based on their information in the form and context in which it appears.

Fortescue
The New Force in Iron Ore

Attachment 2
Magnetite Ore Reserve and Resources Report

Iron Bridge Magnetite Mineral Resources and Ore Reserves Reporting

as at 30th June 2019

Magnetite Mineral Resources and Ore Reserves

Details of updated Mineral Resources and Ore Reserves were provided in an ASX release entitled 'Iron Bridge Magnetite Mineral Resources and Ore Reserves Update: Operating Properties' (2nd April 2019). There has been no change to the stated Mineral Resources and Ore Reserves so they have not been re-stated in this document.

From:	Rebecca Dunn
To:	Grace O"Connor; Kevin Huang; Michael Williams; Caitlin Meade; Daisy Cullen; Molly Allen; Mike Hales; Daniella Lambert; Meaghan Philp; Oliver Hoare
Cc:	Paul Dewar; Jessica Sapountsis; Ashley Cameron; Rohit Dighe
Subject:	RE: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]
Date:	Friday, 6 June 2025 12:11:27 PM
Attachments:	image003.png

Dear Colleagues

We refer to your email below.

We reject the suggestion that our clients' Lists of Documents are "defective". In our experience, the content of Parts 2 and 3 align with standard practice in this Court, consistent with filings from various law firms, including your own.

In any event, we are in the process of preparing new Lists of Documents which provide additional descriptions of documents falling within Parts 2 and 2 of the Lists. We anticipate serving those Lists early next week.

Regards

Rebecca Dunn

Rebecca Dunn
Partner | Gilbert + Tobin

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RDunn@gtlaw.com.au

Level 35, Tower Two, International Towers Sydney
200 Barangaroo Avenue, Barangaroo NSW 2000

Gilbert + Tobin acknowledges Australia's First Nations peoples as the Traditional Custodians of this land. We pay our respects to Elders, both past and present, and extend that respect to all First Nations peoples across these lands.

This email and any attachment is confidential between Gilbert + Tobin and the addressee. If it has been sent to you in error, please delete it and notify us. Any opinion expressed in it is not the opinion of Gilbert + Tobin unless that is stated or apparent from its terms.

From: Grace O'Connor <GOConnor@dcc.com>
Sent: Friday, 30 May 2025 10:53 AM
To: Rebecca Dunn <RDunn@gtlaw.com.au>; Kevin Huang <KHuang@dcc.com>; Michael Williams <MWilliams@gtlaw.com.au>; Caitlin Meade <CMeade@gtlaw.com.au>; Daisy Cullen <DCullen@gtlaw.com.au>; Molly Allen <MAllen@gtlaw.com.au>; Mike Hales <mike.hales@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Meaghan Philp <Meaghan.Philp@minterellison.com>; Oliver Hoare <oliver.hoare@minterellison.com>
Cc: Paul Dewar <PDewar@dcc.com>; Jessica Sapountsis <JSapountsis@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Rohit Dighe <RDighe@dcc.com>
Subject: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]

Dear Colleagues,

We refer to your email of 21 May 2025 in which you state that you are "taking instructions" in relation to the List of Documents.

As noted in our letter of 9 May 2025, your clients' List of Documents is defective as it does not comply with rule 20 of the Federal Court Rules. You have in any event been on notice of this defect since the CMH on 30 April 2025 and yet as of 30 May 2025 it has still not been rectified.

Please remedy this defect without further delay.

Our clients reserve all of their rights, including in relation to any consequences for the timetabling of this matter arising from your clients' failure to promptly serve a compliant List of Documents.

Yours faithfully

Grace O'Connor
Managing Associate



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We extend our respect to all Aboriginal and Torres Strait Islander peoples throughout Australia and acknowledge the Traditional Owners and Custodians of the lands on which we work.
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Information on the members of the Group can be found **here**. Liability limited by a scheme approved under the Professional Standards Legislation.

From: Rebecca Dunn <RDunn@gtlaw.com.au>
Sent: Wednesday, 21 May 2025 1:04 PM
To: Grace O'Connor <GOConnor@dcc.com>; Kevin Huang <KHuang@dcc.com>; Michael Williams <MWilliams@gtlaw.com.au>; Caitlin Meade <CMeade@gtlaw.com.au>; Daisy Cullen <DCullen@gtlaw.com.au>; Molly Allen <MAllen@gtlaw.com.au>; Mike Hales <mike.hales@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Meaghan Philp <Meaghan.Philp@minterellison.com>; Oliver Hoare <oliver.hoare@minterellison.com>
Cc: Paul Dewar <PDewar@dcc.com>; Jessica Sapountsis <JSapountsis@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Rohit Dighe <RDighe@dcc.com>
Subject: RE: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]

Dear Colleagues

We refer to your letter dated 9 May 2025, and in particular to the section of that letter regarding the descriptions of the documents in the Lists of Documents.

We confirm that we are taking instructions in relation to the Lists of Documents, and will revert once we have obtained those instructions.

Regards

Rebecca Dunn/ Caitlin Meade

Rebecca Dunn
Partner | Gilbert + Tobin

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RDunn@gtlaw.com.au

Level 35, Tower Two, International Towers Sydney
200 Barangaroo Avenue, Barangaroo NSW 2000

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From: Grace O'Connor <GOConnor@dcc.com>
Sent: Friday, 9 May 2025 10:09 AM
To: Kevin Huang <KHuang@dcc.com>; Michael Williams <MWilliams@gtlaw.com.au>; Rebecca Dunn <RDunn@gtlaw.com.au>; Caitlin Meade <CMeade@gtlaw.com.au>; Daisy Cullen <DCullen@gtlaw.com.au>; Molly Allen <MAllen@gtlaw.com.au>; Mike Hales <mike.hales@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Meaghan Philp <Meaghan.Philp@minterellison.com>; Oliver Hoare <oliver.hoare@minterellison.com>
Cc: Paul Dewar <PDewar@dcc.com>; Jessica Sapountsis <JSapountsis@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Rohit Dighe <RDighe@dcc.com>
Subject: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]

Dear Colleagues,

Please refer to the ***attached** letter.

Yours faithfully

Grace O'Connor
Managing Associate

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From: Kevin Huang <KHuang@dcc.com>

Sent: Thursday, 8 May 2025 12:56 PM
To: Michael Williams <mwilliams@gtlaw.com.au>; Rebecca Dunn <rdunn@gtlaw.com.au>; Caitlin Meade <cmeade@gtlaw.com.au>; Daisy Cullen <dcullen@gtlaw.com.au>; Molly Allen <mallen@gtlaw.com.au>; Mike Hales <mike.hales@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Meaghan Philp <Meaghan.Philp@minterellison.com>; Oliver Hoare <oliver.hoare@minterellison.com>
Cc: Paul Dewar <PDewar@dcc.com>; Grace O'Connor <GOConnor@dcc.com>; Jessica Sapountsis <JSapountsis@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Rohit Dighe <RDighe@dcc.com>
Subject: NSD527/2024 | Fortescue Limited & Ors v Element Zero Pty Limited & Ors [ITUSEONLY-LAW.FID86345]

Dear Colleagues

Please see the **attached** correspondence and enclosure.

Yours sincerely

Kevin Huang
Lawyer

Paul Dewar
Principal

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