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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

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.

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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:	16 September 2025

Contents

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

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 (include state and postcode) Level 35, International Tower Two
200 Barangaroo Avenue, Barangaroo NSW 2000

Michael Williams, the solicitor for the Element Zero Respondents. I have sworn seven previous affidavits in these proceedings.

2. 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.

3. 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.

4. Exhibited to me at the time of swearing this affidavit is a bundle of documents marked "**Exhibit RMD-7**" to which I refer below. A reference to a page number of Exhibit RMD-7 is a reference to the document on the corresponding page of Exhibit RMD-7.

5. I make this affidavit in relation to proposed prayer 3A of the Applicants' proposed Amended Interlocutory Application (the **Applicants' Proposed AIA**). A copy of the Applicants' AIA is reproduced at page 2 to 10 of **Exhibit RMD-7**.

6. I have read the affidavit of Paul Alexander Dewar affirmed 19 August 2025 (the **Dewar Affidavit**). My seventh affidavit filed 9 September 2025 (**my Seventh Affidavit**) responds to the parts of the Dewar Affidavit relevant to the Applicants' Interloctory Application dated 17 June 2025. This affidavit responds to the Dewar Affidavit insofar as it relates to the Applicants' Proposed AIA. I have not responded to every statement appearing in that affidavit and do not intend to be taken to agree with statements to which I have not responded below.

Procedural history in relation to Discovery

7. The procedural history in relation to the Applicants' application for discovery from the Respondents is set out in detail in paragraphs 19 to 44 of my Seventh Affidavit.

8. In summary:

   (a) The Applicants' application for non-standard discovery was heard over two days (6 and 20 February 2025).

   (b) By orders dated 26 February 2025, the Respondents were ordered to produce documents by reference to 12 categories. Category 2 had 7 sub-categories and category 11 had 6 sub-categories.

(c) The Element Zero Respondents have produced 1333 documents in response to categories ordered by the Court.

(d) The Element Zero Respondents have produced an additional 565 documents by reference to the Third Respondent's discovered documents and queries raised by the Applicants. The exercise to produce documents by reference to the Third Respondent's discovery was extremely time consuming and took approximately 50 – 100 hours.

(e) The Third Respondent has produced 2511 documents in response to categories ordered by the Court.

9. As set out in my Seventh Affidavit, in providing discovery, the Element Zero Respondents conducted searches across materials seized during the execution of the search orders in this proceeding. I set out below some information from Mr Nigel Carson of Digital Trace (computer forensics expert), in relation to the nature of the material seized from the Element Zero Respondents and the steps he took to process that material. Mr Carson informs me, and I believe, that:

(a) The compressed forensic images seized from the Element Zero Respondents during execution of the search orders contain approximately 2.5 terabytes of content;

(b) Decompressing the forensic images so that they could be processed and reviewed took approximately 2-3 weeks;

(c) Once decompressed, the images expanded to approximately 8.7 terabytes;

(d) The images contained approximately 7 million individual files.

Response to Part G of the Dewar Affidavit

10. Part G of the Dewar Affidavit sets out the further discovery Fortescue seeks from the Respondents by way of eight new discovery categories, which I refer to in this affidavit as the "**New Categories**". While the Dewar Affidavit deals with these categories as sub-sections of Part G, he refers to these using "F" identifiers (for example F.1, F.2 etc). For clarity, I adopt the New Category numbers, rather than alphabetical sub-sections.

11. In summary, the Element Zero Respondents oppose each of the New Categories including for the following reasons:

(a) The Element Zero Respondents' discovery is complete. It was a large-scale exercise which (as set out in paragraphs 45 to 69 of my Seventh Affidavit) was taken very

seriously by the Element Zero Respondents who have provided appropriate discovery in answer to broad categories which were sought by the Applicants based on the pleaded case.

(b) Gilbert + Tobin lawyers and partners spent approximately 400 - 500 hours on the discovery exercise.

(c) In the circumstances, it would be oppressive to the Element Zero Respondents to require them to undertake a further round of discovery.

(d) As set out in relation to the individual new categories below, the Applicants have not established the relevance of the categories by reference to the pleaded case.

(e) To order the further categories would be contrary to Part 10 of the Federal Court Practice Note (**CPN-1**) and the Federal Court Rules (rule 20.11) which requires a Discovery Applicant to not make a request unless it will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

(f) The Applicants have not (in accordance with part 10.6 of CPN-1) demonstrated the utility of the request, the relevance and importance of the documentation or information sought, the limited and targeted nature of the request or that the documents sought are likely to be significantly probative in nature (or materially support or are materially adverse to any party's case).

(g) I estimate that to conduct further discovery would take 2 months (working very efficiently) and cost the Element Zero Respondents hundreds of thousands of dollars.

12. At the case management hearing on 10 September 2025, the following exchange took place between her Honour and Senior Counsel for the Applicants in relation to prayer 3A of the Applicants' AIA (T18.20 – 19.2):

> *MR COOKE: …3A arises because when we reviewed the respondent's discovery, it appeared that there was other documents in there that they haven't discovered….*
>
> *HER HONOUR: I don't understand 3A. Do you say that there are documents that are in the possession of the respondents that haven't been produced?*
>
> *MR COOKE: We say in relation to 3A that when we reviewed their discovery, what became apparent is that there were certain categories of documents which*

exist which we were not aware of, which your Honour needs for the purpose of a fair trial. And so we've included those categories - - -

HER HONOUR: So the documents have been discovered?

MR COOKE: They've not been discovered, no.

HER HONOUR: How did you work out they existed then?

MR COOKE: From the respondent's discovery in relation to other categories, and then we saw from the respondent's discovery in response to the other categories that there's bodies of material which are highly relevant to these proceedings which - - -

HER HONOUR: Which you didn't seek.

MR COOKE: - - - were not – because we didn't know about them.

HER HONOUR: Well, but you sought categories which you thought were relevant to the dispute….

13. A copy of the transcript from that hearing is reproduced at page 11 to 30 of **Exhibit RMD-7**.

14. I disagree that the New Categories are "highly relevant" to these proceedings. The Applicants previously sought and obtained categories that were relevant to the dispute, and to the Applicants' pleaded case. The Respondents have now produced documents responsive to those categories.

<u>New Category 15</u>

15. The Applicants' New Category 15 seeks documents which would fall in Categories 11(e) and 11(f) during the period November 2021 and December 2021.

16. The Element Zero Respondents object to New Category 15.

17. Category 11(e) relates to work undertaken by the Third Respondent during 2022, and category 11(f) relates to the research and development of the Element Zero Process. Cateogry 11(f) was time limited to January 2022 to February 2024.

18. The period between November 2021 and December 2021 is not relevant for the following reasons:

    (a) It is not relevant to the pleaded case. As set out in the Element Zero Respondents' Defence at [29], the research and development undertaken by Dr Kolodziejczyk and Dr Winther-Jensen in relation to a Green Iron technology process commenced around July 2022.

    (b) There is no utility in this category. The Element Zero Respondents have already discovered a large quantity of documents in relation to the research and development of the Element Zero process in answer to category 11(f).

    (c) In the circumstances, it would be oppressive to the Element Zero Respondents to carry out searches in relation to this category.

New Category 16 and 17

19. New Category 16 is directed to the Third Respondent only. However, New Category 17 requires production by all Respondents and relates to New Category 16 as it seeks documents recording or evidencing any use or disclosure of any of the documents produced under New Category 16.

20. The Element Zero Respondents' object to New Category 17 on the following bases:

    (a) The Applicants have not provided any explanation for the relevance of this category;

    (b) The category does not appear to me to be relevant to the pleaded case;

    (c) It would be oppressive to the Element Zero Respondents to carry out searches in relation to this category. The full extent of oppression cannot be known without the Third Respondent answering this category.

    (d) There is no utility in this category. The Element Zero Respondents have already discovered a large quantity of documents in relation to the research and development of the Element Zero process. The documents produced to date in response to Category 11 would capture any use of documents used in the development of the Element Zero process.

New Category 18 and 19

21. New Category 18 seeks documents recording or evidencing communications between any of the Respondents and NewPro in relation to a number of matters. As set out at

paragraph 80 of my Seventh Affidavit, NewPro Consulting & Engineering Services Pty Ltd is a third party engineering consulting firm engaged by Element Zero to develop its pilot plant.

22. New Category 19 seeks documents communicated or provided by any of the Respondents to NewPro in connection with matters in New Category 18.

23. The Element Zero Respondents object to New Category 18 and 19 on the following bases:

(a) The Categories are not relevant to the matters in issue in the proceeding.

(b) Mr Dewar does not give evidence about any alleged relevance.

(c) There is no utility in this category. The Element Zero Respondents have already produced documents authored by NewPro and communications with NewPro, which are relevant to the ordered discovery categories.

(d) The Third Respondent has produced various correspondence with NewPro under category 11(e) and (f). As referred to at paragraph 8 above, the Element Zero Respondents have now produced an additional 565 documents, the majority of those by reference to the documents produced by the Third Respondent under category 11(f) (which overlaps with category 11(e). The Respondents have therefore already produced a significant number of communications with NewPro.

(e) To conduct additional searches, and to then have to conduct an exercise of excluding documents already produced, would be oppressive, costly and time consuming to the Element Zero Respondents.

New Category 20 and 21

24. New Categories 20 and 21 seek communications between the Respondents and David Arnall and Robert Kerr in relation to (a) the Element Zero Process, (b) the development of a trial or pilot plant for Element Zero or (c) services provided or to be provided to or for Element Zero.

25. The Element Zero Respondents object to New Category 20 and 21 on the following bases:

(a) This category is not relevant to the matters in issue in the proceeding and Mr Dewar does not give evidence about any alleged relevance.

(b) There is no utility in this category. To the extent communications with David Arnall and Robert Kerr are relevant to the ordered discovery categories, they have been produced. To the extent those individuals were involved in the development of the Element Zero Process or the pilot plant, documents have already been produced.

(c) To conduct additional searches for documents relevant to these categories, including over the Seized Material, will incur significant additional time and cost and is oppressive.

(d) Sub-category (c) is unduly broad and not targeted to any issue in the proceeding.

(e) It appears that the Applicants are concerned that an ex-Fortescue employee was involved in Element Zero and that this category is a fishing expedition for ulterior purposes.

<u>New Category 22</u>

26. New Category 22 seeks documents in relation to the unregistered business name "BWJ Materials Consulting". Mr Dewar suggests that this was the name used by Dr Winther-Jensen to refer to the Element Zero venture before the incorporation of Element Zero.

27. I am informed by Dr Kolodziejczyk and believe, that:

(a) "BWJ Materials Consulting" is a trading name used by the Third Respondent for his sole trader ABN;

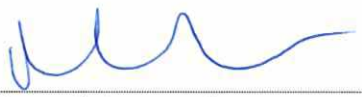
(b) BWJ Materials Consulting was not the name used prior to the incorporation of Element Zero;

(c) Dr Kolodziejczyk was never involved in "BWJ Materials Consulting";

(d) The reason for Dr Kolodziejczyk being on the email referenced in paragraph 236 of the Dewar Affidavit (BWJ.5000.0003.5792) is that he introduced Roy Hill to the Third Respondent.

28. The Element Zero Respondents object to New Category 22 as it appears to be irrelevant, constitute fishing, and on the basis that there is no utility in this category.

Sworn by the Deponent)
at Barangaroo)
in New South Wales)
on 16 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-7

This is a bundle of documents marked "**Exhibit RMD-7**" to the Affidavit of **Rebecca Mary Dunn** sworn before me on 16 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
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200 Barangaroo Avenue, Barangaroo NSW 2000

Form 35
Rule 17.01(1)

2

Amended Interlocutory application

No. NSD 527 of 2024

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

FORTESCUE LIMITED ACN 002 594 872 and others
Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others
Respondents

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:

Date:

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

Filed on behalf of	Fortescue Limited, Fortescue Future Industries Pty Ltd and FMG Personnel Services Pty Ltd, the Applicants		
Prepared by	Paul Dewar		
Law firm	Davies Collison Cave Law		
Tel	02 9293 1000	Fax	02 9262 1080
Email	PDewar@dcc.com		
Address for service	Level 4, 7 Macquarie Place, Sydney NSW 2000		

Interlocutory orders sought

1. Pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth), leave be granted to the Applicants and their representatives to inspect the Listed Things seized pursuant to the search orders of the Court dated 14 May 2024, such inspection to occur in a form and manner to be notified by the Applicants.

2. Pursuant to FCR rule 20.32, by a date to be fixed, each of the Respondents produce to the Applicants those documents referred to in Respondents' lists of documents as notified by the Applicants which ought to have been discovered without any claim to privilege.

3. Pursuant to FCR rules 20.15 and 20.17, by a date to be fixed, each of the Respondents give non-standard discovery of all documents within his/its control within **Annexure A** and responding to the searches set out in **Annexure B** to these orders, other than insofar as any document has already been discovered by that Respondent in this proceeding.

3A. Pursuant to FCR rules 20.15 and 20.17, by a date to be fixed, the Respondents give non-standard discovery of all documents within his/its control within **Annexure C**, other than insofar as any document has already been discovered by that Respondent in this proceeding.

3B. As to the Applicants' production of the Applicants' discovery document bearing identifier FRT.001.0002189, being Ms Kara Vague's work journal (**Journal**), subject to any claim of privilege, the Applicants be permitted to redact any parts of the Journal that do not fall within the discovery categories in Schedule 3 or 4 to the orders made on 26 February 2025.

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

5. Costs.

Service on the Respondents

It is intended to serve this application on all Respondents.

Date: 17 June 2025

Signed by Paul Dewar, DCCL
Solicitor for the Applicants

ANNEXURE A

1. 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

ANNEXURE C

15. *(As against all Respondents)* All versions (including drafts) of documents recording work, research or development during the period November 2021 and December 2021 and that would otherwise fall within the description in Category 11(e) or 11(f) of Schedule 1 to the orders made on 26 February 2025.

16. *(Against the Third Respondent only)* Documents in the following subfolders in the *"Toshiba Desktop 23-10-21"* folder in the Toshiba hard disk referred to as *"24EA019BC"* in the affidavit of the independent lawyer, Stephen Klotz, affirmed on 29 May 2024, including all subfolders within the following subfolders:

    (a) "FFI electrochem";

    (b) "FFI inventions";

    (c) "FFI pics";

    (d) "FFI planing";

    (e) "FFI Purchase admin";

    (f) "Flow cell";

    (g) "Green iron presentations";

    (h) "Green Steel";

    (i) "Grinding and Leaching".

17. *(As against all Respondents)* All documents recording or evidencing any use or disclosure of any one or more of the documents in Category 16 above by any one or more of the Respondents or their agents.

18. *(As against all Respondents)* All documents recording or evidencing communications between any of the Respondents and NewPro, in relation to:

    (a) the project referred to as the "Green Metals" project;

    (b) NewPro contract number "10182-0000-CS-CTC-0001";

    (c) NewPro reference "10182";

    (d) the project referred to as the "BKM" project;

    (e) the project referred to as the "Green Metals" project, "phase 2";

(f) NewPro contract number "10202-0000-CS-CTC-0001";

(g) NewPro reference "10202";

(h) the project referred to as the "Pilot Plant" project; or

(i) NewPro reference "10260".

19. *(As against all Respondents)* All documents and all documents recording the information communicated or provided by any of the Respondents to NewPro in connection with any of the matters in Categories 18(a)–18(i) above.

20. *(As against all Respondents)* All documents recording or evidencing communications between any of the Respondents and David Arnall, in relation to:

(a) the Element Zero Process (referred to in paragraph 29 of the EZ Parties' defence and/or in paragraphs 29(b)-(c) of Dr Winther-Jensen's defence);

(b) the development of a trial or pilot plant for Element Zero; or

(c) services provided or to be provided by Mr Arnall to or for Element Zero.

21. *(As against all Respondents)* All documents recording or evidencing communications between any of the Respondents and Robert Kerr, in relation to:

(a) the Element Zero Process (referred to in paragraph 29 of the EZ Parties' defence and/or in paragraphs 29(b)-(c) of Dr Winther-Jensen's defence);

(b) the development of a trial or pilot plant for Element Zero; or

(c) services provided or to be provided by Dr Kerr to or for Element Zero, including the provision of data or information.

22. *(As against all Respondents)* All documents in relation to "BWJ Materials Consulting".

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**

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For: Gilbert & Tobin Lawyers (NSW)
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TRANSCRIPT OF PROCEEDINGS

O/N H-2054335

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

8.59 AM, WEDNESDAY, 10 SEPTEMBER 2025

MR J.S. COOKE SC appears with MR D. LARISH and MR W. WU for the applicants
MR J.M. HENNESSY SC appears with MR C. McMENIMAN for the 1st, 2nd and 4th respondents
MR M. HALES appears for the 3rd respondent

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

MR J.S. COOKE SC: May it please the court. I appear with MR LARISH and MR WU for the applicants.

HER HONOUR: Yes. Thank you, Mr Cooke.

MR J.M. HENNESSY SC: May it please the court. I appear with my learned friend, MR McMENIMAN, for the EZ – Element Zero respondents.

HER HONOUR: Thank you, Mr Hennessy. And is there an appearance for the third respondent?

MR M. HALES: Yes. May it please, your Honour. My name is Michael Hales. I appear on behalf of the third respondent.

HER HONOUR: Yes. Thank you, Mr Hales. Right. We're here at your clients' request, Mr Hennessy.

MR HENNESSY: Yes. Thank you, your Honour. I was just going to remind my learned friend about that. Your Honour, in respect to this discovery dispute, it was first raised before you at a case management conference on 30 April. And at the outset, my client made very plain its real concern that Fortescue was seeking to drag out the proceeding against vastly smaller respondents. And as events unfolded during the discussion with your Honour, you did, with respect, emphasise to our learned friends to the left of me that there was a real need in this matter to move it along in a timely manner. And you did note that it, that is, the whole matter, should be dealt with or resolved in some fashion relatively expeditiously. And that was in the context of Fortescue claiming it needed a very, very significant amount of time to prepare its evidence and that it would only be doing that after a team had reviewed the discovered documents, which, of course, at that stage it was already claiming were going to be inadequate.

And the problem we've come here to try and address with your Honour this morning is that Fortescue has in the intervening period, most particularly since the last case management hearing on 19 June, where your Honour made programming orders for the hearing of the interlocutory application, significantly expanded that application in three respects. And we are trying to deal with that this morning. And we would say they're three respects that are effectively turning the interlocutory application into an unwieldy beast that is not going to conform with your Honour's expectation that this matter be dealt with or resolved in some fashion relatively expeditiously. The first issue is that there was a process of notification that your Honour created in the programming orders on 19 June whereby Fortescue would notify the respondents of the alleged inadequacies in their discovery, and then there would be a response. And that would create a table, in effect, like – not unlike a Redfern schedule, that, of course, one could then orderly go through.

What happened, we say, is that that was completely blown up by a notification process that Fortescue engaged in, where some 494 so-called issues or deficiencies were identified, which we are coming before you, incidentally, this morning to suggest should, at least, be identified as falling within one of seven categories, just to create some sanity out of this for the purpose of dealing with it. Those 494 issues, by the way, largely ignore the response that Fortescue got in many instances, which were effectively attempts to resolve the issues raised, for example, the production of a document that had been inadvertently not produced. And I will take you back to that in a little bit more detail shortly. The second issue is that two weeks late we were served with two very long, contentious, argumentative affidavits that Fortescue said it's going to rely upon at the interlocutory application. Any practitioner with any experience at all in reading them would appreciate that they are not the appropriate vehicles for a one-day interlocutory application.

HER HONOUR: Are they the Dewar and the Jacobson affidavits?

MR HENNESSY: Yes, the second of which is more egregious, and so I will deal with that a little bit more. But just as to the Dewar, just to give your Honour a flavour – and you might have observed this, but, appreciating your Honour's workload, maybe not. The body of it is 62 pages, and there are 521 pages of annexures to it. The second – and that might explain why they were two weeks late. But the second is an expert report or affidavit from a Dr Jacobson, who is now a patent attorney but, it turns out, for a significant part of his career, worked in the field of research and development at two of the world's largest corporations, Dow Chemicals and BP.

And he draws on that experience to talk about what are appropriate record-keeping standards for scientists engaged in research and development, in terms of conducting experiments, and he applies those lofty standards to Element Zero, a start-up, and says that he would expect to see particular types of documents, that he is told, and otherwise understands from the over 1400 documents he was provided with, for the purposes of this affidavit, that he would expect the documents exist. In other words, they just haven't been discovered. We say that affidavit, most particularly, has no place in this type of interlocutory application.

HER HONOUR: Well, you might object to its relevance.

MR HENNESSY: I - - -

HER HONOUR: And I might be sympathetic to those submissions.

MR HENNESSY: Quite, your Honour, but what your Honour would have - - -

HER HONOUR: Because I was going to ask of what assistance that affidavit could be to me, but that's not a question for today.

MR HENNESSY: But – well, the problem is this, though. We're a couple of weeks out from a one-day hearing that has - - -

HER HONOUR: No, I know, and it will – yes.

MR HENNESSY: - - - to be run nice and tightly, in a way that not only makes sense with respect to your Honour in terms of being conducted at a reasonable pace during the day, but then your Honour has to work through and resolve the disputes, and that's why we say this affidavit has no place, and we shouldn't be put in a position of having to wonder whether on the 24th, we can succeed in not having it – your Honour not granting leave to have it read, and I will come back to that if I may. I'm just identifying the three issues. So that's the second one. The third one is that, without warning, the possibility of an amendment to the interlocutory application was raised by Mr Dewar in the affidavit – his affidavit, that was served two weeks late, and that raised the possibility of additional categories.

We have sought to meet the Dewar affidavit, and that has been met by my instructing – our instructing solicitor, Ms Dunn, who has been responsible for the conduct of the discovery for the Element Zero respondents, and she has met Mr Dewar's affidavit as directed, namely, answering – providing evidence in answer to the interlocutory application, not some possible amended interlocutory application. And so there is no evidence on – in answer to that, because we have not had time, and nor has Fortescue bothered to actually apply to have it amended, in any event.

So we're seeking some case management, your Honour, to ensure this application is efficiently dealt with in the one day allocated to it, and we do so – that is, we attempt, or respectfully suggest that it be case managed in five particular respects, two of which, overnight, Fortescue seems to have accepted. So may I just quickly identify them?

HER HONOUR: Will you do that by reference to the proposed orders I've received?

MR HENNESSY: I'm happy to do so if that would assist your Honour.

HER HONOUR: Yes.

MR HENNESSY: Your Honour, it might be best - - -

HER HONOUR: If you tell me what to read.

MR HENNESSY: - - - can I suggest, if your Honour works, for my purposes, not with my proposed short minutes of order, but those of the third respondent?

HER HONOUR: Yes.

MR HENNESSY: Excuse me, your Honour. So, yes, I will work from these if it's acceptable to your Honour. So the first piece of case management is to limit the evidence that can be relied upon by the parties, and that is opposed by Fortescue, but within these short minutes, you will see proposed orders 2, 3 and 4 are directed at that issue. Your Honour, of course, being aware that controlling your own processes and taking into consideration case management principles and section 37M requirements can control what evidence is read before you, and we would say, with respect, that you should do so and make orders of the kind proposed in 2, 3 and 4. And if it pleases your Honour, I will come back and - - -

HER HONOUR: Okay, you will come back, because two has implicit a – if you like, a rejection of Dr Jacobson's affidavit - - -

MR HENNESSY: And that's the main issue. That is the main issue.

HER HONOUR: - - - without hearing properly as to its relevance or any other objection to it - - -

MR HENNESSY: Yes, I'm - - -

HER HONOUR: - - - on the run in a case management hearing where I have another four or five parties coming in at 9.30.

MR HENNESSY: I understand that. Understanding your Honour's ..... I'm not apologising for raising it.

HER HONOUR: No. No, and I'm not asking you to.

MR HENNESSY: But the fault lies elsewhere.

HER HONOUR: Yes, but it may not be something that I can resolve this morning.

MR HENNESSY: Entirely, your Honour.

HER HONOUR: And you might all have to come back.

MR HENNESSY: I'm not wishing to push against that proposition.

HER HONOUR: You have my ear, Mr Hennessy, insofar as you say this application ought to be confined, it ought to go no further than a day, it ought not require me to go away for weeks and opine about it and provide lengthy written reasons, which will then no doubt be subject to some form of application for leave to appeal. That is all said in the context of, do these parties really want to maintain their hearing date next year, because I can tell you, at the moment that date is under enormous threat and enormous pressure from other matters in my docket for parties wanting to have hearings who are entitled to have hearings in June and July next year.

MR HENNESSY: Your Honour, just quickly - - -

HER HONOUR: And why should I keep - - -

MR HENNESSY: - - - before I move on - - -

HER HONOUR: - - - those dates any longer?

MR HENNESSY: May I respond in this respect. We are absolutely determined to keep the 24th and to deal with what we say are just spurious allegations of inadequate discovery. That's point one. Point two, we are absolutely determined – insofar as it's within our control – to keep that final hearing date as well. We want Fortescue to run whatever case it says it has against us and dispatch with it as soon as possible. And the matters your Honour is raising, with respect, your Honour has had to raise before, including on 19 June and including by stating that your Honour was determined to have a one-day hearing. Our friends went for the one-to-two option, at a point in time, I might add, where they must have known that they were going to be relying on Dr Jacobson's affidavit, and I will explain why in due course.

So your Honour made the point about one day on the 24th, and your Honour made the point that you were going to endeavour to determine that dispute as quickly as possible. Your Honour, identifying the second issue that is dealt with in these short minutes in terms of case management, and it's to limit the hearing of the matter to the current formulation of the interlocutory application. You won't find provision for that in these short minutes, but what you will see is in the proposed short minutes by Fortescue, without any application or other attempt to do so, they've simply slipped into their proposed short minutes as Order 1 that you would be granting them leave to amend their application, and so that's opposed. The third issue is to require the applicants to properly formulate Prayer 1 of their interlocutory application to identify what "form and order to be notified" really means, because Prayer 1 ends with this ambiguous, in effect, promise that they're going to be providing notification of the form and order they're seeking.

HER HONOUR: Well, I was puzzled by that prayer for relief, because I thought the only person who could determine the form and manner would be me, but in any event - - -

MR HENNESSY: Ultimately, yes, if it's in dispute, there's – so far as our researches indicate – no Australian authority on the point, but there's an English Court of Appeal decision where, in fact, after discovery there was access granted to - - -

HER HONOUR: The whole of the material.

MR HENNESSY: - - - seized material, because there's no such case in Australia, but there is one in England. And it discusses the fact that the methodology for the access in the first instance is to be proposed by the parties seeking it to the party - - -

HER HONOUR: Giving it, yes.

MR HENNESSY: - - - whose materials have been seized, and if the parties can't agree on it, it's - - -

HER HONOUR: Comes to the court.

MR HENNESSY: - - - for the court to determine. The fourth issue then is the requirement that submissions be directed to the seven categories that we suggest somehow discipline or shape the 494 issues that Mr Dewar has come up with, and you can see provision for that - - -

HER HONOUR: That's paragraph 9.

MR HENNESSY: - - - in proposed order 9.

HER HONOUR: Yes.

MR HENNESSY: And there is an associated letter to the parties which explains those terms, and they would be well known to the applicants, because apart from anything else, the terms provide the identification in Mr Dewar's evidence where he has provided – who has made the complaint and then we've provided some examples to them of each. They oppose that. We say it's the only way – or it is a way, or an attempt to navigate the morass of 494 issues that Fortescue has erected on this application. And then the fifth matter, again – this time happily agreed – is setting some time limits for oral submissions on the 24th, and your Honour sees that at proposed order 10. And Fortescue overnight has indicated it would accept that regime, if I can describe it that way.

HER HONOUR: So paragraph 10 is agreed?

MR HENNESSY: Yes.

HER HONOUR: And is anything else agreed?

MR HENNESSY: 1 is as well, I gather.

HER HONOUR: All right.

MR HENNESSY: And that is just - - -

HER HONOUR: It's extending time.

MR HENNESSY: - - - providing us with an extension for the service of Ms Dunn's affidavit which was served yesterday.

HER HONOUR: Are 6, 7 and 8 agreed?

MR HENNESSY: Excuse me for a moment.

HER HONOUR: So the - - -

MR HENNESSY: No, there's a different regime put in place - - -

HER HONOUR: Filing of submissions, no. Okay.

MR HENNESSY: - - - by Fortescue, so I will let my learned friend deal with that in due course. Your Honour, before turning to the identified issues to give you a taste for it, I can just – I did mention this earlier, but on 19 June, you did emphasise this with respect to my learned friends to the left of me, which is noting that this is a commercial dispute and has to be fairly and properly dealt with, you said it has to be dealt with commercially, saying:

The matter can't go on forever, Mr Cooke. There is no perfection in the world.

And the gist of our concern, really, is that your Honour's remarks have been unheeded, and Fortescue really wishes to have us spend the next 12 to 24 months arguing about documents that it says should be discovered to it. So as to the identification of issues, as I said to your Honour, the table format is something you had suggested at the case management hearing on 19 June and stated that the intention behind that was that it may narrow the issues. And, of course, when we got this table that came in two communications from the applicants, it did start to ring alarm bells that there was this attempt to just identify anything and aggregate it. And you can see the flavour of that in the affidavit of Mr Dewar. I think we've given your Honour's associate a reference to the fact that we might be referring to pages 1, 5, 8 and following - - -

HER HONOUR: Of the annexure.

MR HENNESSY: - - - of the annexure, which is PAD41.

HER HONOUR: Yes, my associate has given that to me. Yes.

MR HENNESSY: I don't want to detain you for long on this, I'm just attempting to give you a flavour for it, your Honour.

HER HONOUR: Yes, that's a letter from Davies Collison Cave.

MR HENNESSY: Yes, and if you turn to the next page, 159, this was the first of two instalments of a table notifying us of issues, and there were 456 in this, but you

will see for example – let's just start at the beginning – the so-called deficiency is that in processing documents on a particular technology platform, the Element Zero respondents said certain documents were not recognised as family documents – that is, one related to another. And that was a response that had been given by Gilbert + Tobin, and you will see in the quote on the last three lines, Gilbert + Tobin said:

> *We've investigated this issue and confirmed that these documents were inadvertently omitted as they're not recognised as family documents –*

Pausing there, they were then – have been provided to Fortescue, but instead, the issue is kept alive because you will see on the middle line – that's the third line – the conclusion that Mr Dewar draws from the fact that there was a technical issue, and the documents were later identified and provided to him, is a conclusion that:

> *The Element Zero respondents have failed to discover an unknown number of documents.*

Now, you will unfortunately be entertained by a lot of this detail on the 24th, but that's the sort of level of credibility we say, attached with Fortescue's compilation of 494 documents. And what we're trying to grapple with is how to get this table to your Honour in some sensible sort of form for argument on the 24th. We had, I can tell your Honour, suspected, or hoped, that in fact, the issues might come down after we had received DCC's notices in the form of the affidavit that was then going to get served in support of the application from Mr Dewar, but sadly there was no reduction when it came to his affidavit, even though for the purposes – as your Honour understands, from cases like Mulley v Manifold, to try and establish inadequate discovery, a party has to actually rely on evidence that's non-contentious.

And we had thought that that non-contentious requirement would mean that a sensible list of issues much shorter than 494 would actually be put in play by the time the evidence of Fortescue was served, but that's just not the case. And that's one reason why we've come up with these seven categories, to try and direct the parties to the categories and make whatever arguments they want, use whatever examples they want for your Honour, and your Honour can then travel through those seven categories and make determinations. That's the thinking of it. As I've indicated, the really troublesome evidence is that of Dr Jacobson, and in our respectful submission, it's really inexcusable that a party, the applicant, could be in front of you on 19 June, no doubt having retained this expert already, and no doubt well underway with work on his report, and not even mention when the parties are talking about how long the interlocutory application is going to take, and your Honour is stressing the need for a sensible approach – not even mention that some expert inorganic chemist is going to be dropped into the fray to somehow add something of real substance to the debate about inadequate discovery.

I say he must have been retained by that stage. The applicants, no doubt sensitive to that issue, have refused to date to produce the letter of instructions or the retainer of this individual. But we can simply work it out as experienced practitioners, reading

this vast affidavit and appreciating that there are over 1400 documents that he was provided for. The estimate we can give is having an expert even review the 1400 documents, is a six-week process, and then, of course, having to actually express views in a lengthy, I think it's a 70-page affidavit, is weeks later. We're talking about a report, your Honour, that is a major, major sort of work, well over $100,000 sort of range in terms of costs associated with getting evidence together, and it's completely inappropriate and disproportionate, in terms of case management, to try and serve an affidavit like that, most of which is, frankly, to the extent it's not speculative, is addressed at final – it matters for the final hearing, such as, what were the experiment records that must have been created by the individual respondents, and where would they be? They must exist.

That's the sort of evidence that he has given. He has, as I've said – he is, as I've said, not qualified to give an opinion about what research and development start-ups do in keeping records of experiments. His only experience with start-ups in the R and D space, is advising them as a patent attorney. So he's not qualified, he doesn't have sufficient knowledge of the facts to give an opinion on what documents, in fact, the Element Zero respondents created in performing their research and development. That's just pure speculation. Can you just quieten down? I'm just trying to address her Honour.

As I've said, his opinion on matters insofar as they're admissible, is admissible only on a – at a final hearing, when he talks about the nature of chemical research and development projects, including the different stages involved, but applying these lofty standards from Dow Chemicals and BP to a start-up like Element Zero, and giving a litany of opinions as to what he would expect to have been undertaken and recorded by the respondents, or to speculate about documents that would have been created, is the sort of language he uses, renders much of his evidence inadmissible, inadmissible under section 79, as he ..... the expertise or experience to opine on the existence of documents created by a start-up, and otherwise objectionable under section 135, because the probative value of his evidence would be outweighed by the danger that the evidence might cause, or result in undue waste of time, or cause a respondent's prejudice.

And lastly, under a combination of sections 135 and 137, because at least as matters presently stand, he has failed to identify the bases of his opinion, including providing the instructions and assumptions he was provided with. So despite the court making it crystal clear on 19 June that this interlocutory application is to be heard on one day, and determined shortly thereafter, Fortescue goes ahead and serves, very late, evidence it knows is going – is likely to prejudice the respondent's ability to be ready for the hearing, and in circumstances where it must have appreciated that the court's ability to hear this application in one day, and determine it shortly thereafter, would be really in peril.

And so we say, in those circumstances, it is appropriate not to grant leave, at least at this stage, for the Fortescue respondents to rely on that evidence. Excuse me for one moment, your Honour. I just appreciate the - - -

HER HONOUR: Yes.

MR HENNESSY: - - - timing issues. Your Honour, in – just in relation, before I sit down, to Fortescue's proposed orders, I've indicated why we say it's entirely inappropriate for them at this stage, courtesy of some proposed short minutes of order, to try and amend an interlocutory application at this late stage.

HER HONOUR: Yes, no, I accept that. If it's – if the amendment is opposed, I will have to hear from both sides properly and deal with it, but I don't want to spend half a day on the 24th doing that.

MR HENNESSY: No. Thank you. And then, lastly, can I just deal - - -

HER HONOUR: And I don't want to spend the other half of the day dealing with the admissibility of Mr Jacobson's affidavit on the bases identified by Mr Hennessey or, more generally, as to its relevance on an application as to whether that – effectively, the discovery was inadequate such that I would make an order entitling the Fortescue parties to have access to the whole of the material seized, which is what I understand to be the nub of the application to be made before me. Perhaps I've misunderstood it. Documents either exist or they don't, one can accept that for the purposes of that application.

MR HENNESSY: Your Honour, there's only one other thing I should detain you with and that's by reference to Fortescue's proposed short minutes. Again, just slipped in for the purposes of this morning at 9 is an unforeshadowed application to extend the time for compliance with their own discovery. No affidavit evidence to support it, but the effect of it is to extend the time for Fortescue to produce documents under categories 1 and 2 of orders made by your Honour, in circumstances where those categories were the subject of a two-day debate over non-consecutive days in February in which your Honour made various comments about Fortescue's approach to discovery including that:

> *Someone needs to get on with this job.*

And again, speaking to my learned friends:

> *Your client is well resourced and needs to get on with it. It's your client's proceeding.*

And what has transpired is that Fortescue has now had ten months since Element Zero respondents' discovery interlocutory application was filed, and over seven months since your Honour ordered that they conduct the searches. And they now – as I say, courtesy of a proposed order – try and slip in an extension without evidence, seemingly ignoring the, sort of, very polite warnings or indications given to your Honour back in February as to the fact that a humongous party like this ought to just – pardon the pun – resource up and get its discovery done. And we say they should

do that. Our concern actually is there is no intention to discover material, and this is an attempt yet again to, sort of, push the day off and maintain their focus on our discovery, and embark on an ambitious exercise of trying to access the seized materials – never done before in Australia – while, really, ignoring any obligation to conduct their own discovery. May it please the court.

HER HONOUR: Yes, Mr Hennessy. Mr Hales, do you wish to add anything to that?

MR HALES: A couple of very short points, if I may. Firstly, we adopt what Mr Hennessy has just said. Secondly, I want to emphasise that the third respondent is also desperate to get this matter to trial next May and would resist any expansion of the hearing on 24 September. He is a retired individual. This proceeding places great stress on him, so that's an important factor. Turning to Mr Jacobson's affidavit in addition to the points Mr Hennessy has raised, the most startling thing about it is that it completely ignores the affidavit sworn by the third respondent in July last year, in which he explained exactly what he was doing in his garage, and why he did no work between November when he left Fortescue and April when he started his experiments, which was because he was in Denmark with his sister who had cancer and then he was in Thailand with his family.

Mr Jacobson was not given a copy of that affidavit, and one might speculate as to what his evidence would have been had he been given a copy of that affidavit. It certainly would, we submit, be very different to what it is now. And so we urge you, your Honour, on case management principles to exclude that affidavit now because it has absolutely no benefit for relevance to the hearing on the 24th, and it puts all respondents to great expense if we have to respond to it. But most importantly, it invites the third respondent to go into further sworn evidence as to the detail of what he did in his garage as a retired academic pursuing the hobby he loves, without any thought in mind as to whether he was going to create a new business or not. He shouldn't be required to explain his actions at this stage in the proceedings when this evidence is premature. So for those reasons, your Honour, we would invite you to exclude that affidavit at this stage to save the parties time and money. I have nothing further to add unless I can be of any further assistance.

HER HONOUR: Thank you, Mr Hales. Now, Mr Cooke, conscious of the time, conscious also that you're expected to be in front of Burley J at 10.15.

MR COOKE: At 10.

HER HONOUR: 10.

MR COOKE: We're in the middle of a cross-examination.

HER HONOUR: His Honour is very diligent.

MR COOKE: I could have gone for another 15 minutes then, your Honour.

HER HONOUR: You could have, yes. And I'm conscious that there seem to be two critical issues.

MR COOKE: Yes.

HER HONOUR: One is, one doesn't amend one's interlocutory application by whacking it behind an affidavit and serving the affidavit. One usually communicates with the other side and foreshadows the amendment, and sees if some consent can be elicited, and then maybe we avoid this argument.

MR COOKE: Yes.

HER HONOUR: So the first is the amendment, whether it should be allowed, because it does expand the issues. And the second is Dr Jacobson's affidavit and its admissibility. So I think Mr Hennessy is urging me to just exclude it. I obviously have to hear from you on that. I know you're going to tell me it's a question that I need to resolve on first principles, and I agree with that. I'm not sure I can do it now when I have a room full of people who expect to be before me at 9.30, properly so, and the argument may go for the next hour.

MR COOKE: Yes, your Honour. There might be a shortcut through Dr Jacobson.

HER HONOUR: And that is, you won't rely on it.

MR COOKE: No, your Honour.

HER HONOUR: No.

MR COOKE: The shortcut through is really this: in our submission, the relevance of that affidavit can only be assessed in light of the submissions appropriately at the hearing of the interlocutory application. And insofar as my learned friends say that it's not relevant, then of course, there's no prejudice - - -

HER HONOUR: No, but the problem is that if - - -

MR COOKE: - - - by them, because they don't have to respond.

HER HONOUR: - - - the ruling is that it is relevant, that your opponents are then prejudiced because they haven't come along prepared to meet it.

MR COOKE: But they've got to take a forensic decision, and - - -

HER HONOUR: Well - - -

MR COOKE: - - - they say it's not relevant, then they don't respond to it.

HER HONOUR: Well, they do but, you know, that is putting all one's eggs in one's basket and you've been litigating for long enough to know that, you know, it's a brave soul that does that, so - - -

MR COOKE: We don't have any - - -

HER HONOUR: - - - I really do think the question needs to be resolved before the 24th, if the 24th is to proceed in the way foreshadowed, two hours for you and two hours for Mr Hennessey.

MR COOKE: Yes, your Honour.

HER HONOUR: Which is the one order I'm prepared to make today, I think - - -

MR COOKE: Well, your Honour, if your Honour wants to hear us in relation to that issue - - -

HER HONOUR: Well, I think I need to, don't I?

MR COOKE: We've said to our learned friends that if they needed more time to respond to Jacobson, then we would be amenable if your Honour was amenable - - -

HER HONOUR: Yes, and I've read some correspondence that was sent up to my chambers, but that simply puts off the inevitable, doesn't it?

MR COOKE: Well, your Honour - - -

HER HONOUR: It means we don't come back until maybe the end of October, maybe, to hear this application, because I can tell you if you don't come back between now and October, you don't come back until next year.

MR COOKE: But just to put this in some context, this is not just a mere discovery dispute. This is an application under prayer 1 of our interlocutory application, it is an application to gain access to the materials that have been seized.

HER HONOUR: But it's underpinned, isn't it, by an allegation of inadequate discovery?

MR COOKE: It is.

HER HONOUR: Yes, so - - -

MR COOKE: But also to ensure - - -

HER HONOUR: You have to get over that hurdle.

MR COOKE: But to ensure that the proceeding is adequately and properly prepared for trial.

HER HONOUR: Well, adequately and properly prepared, I think we've had this debate before, Mr Cooke. If you fail in your application to access the whole of the seized material, you will just have to prepare the trial based on the material that has been provided, subject to any proved deficiencies in the discovery that can be cured, that haven't been cured already by an order.

MR COOKE: Yes, but just in relation to this application, as your Honour is aware, we're applying the Full Court's principles in - - -

MR HENNESSY: Obiter.

MR COOKE: - - - Metso Minerals.

HER HONOUR: Sorry, which – the application that is made?

MR COOKE: Yes.

HER HONOUR: Yes.

MR COOKE: Metso Minerals - - -

HER HONOUR: Which is based on – is that the UK decision?

MR HENNESSY: The obiter remarks of Justice - - -

MR COOKE: Sorry. Sorry. If I could allow - - -

MR HENNESSY: Sorry.

MR COOKE: If I could answer her Honour's questions, please.

HER HONOUR: Okay. The decision you rely on is Metso Minerals.

MR COOKE: Metso Minerals v Kalra [2009] FCAFC 57 at 17. Emmett, Jacobson and Perram JJ agreeing, who refer to Stewart J's decision in – sorry, Stewart J's decision, I apologise. Stewart J's decision in Rauland Australia v Johnson (No 2) [2019] FCA 1175 at 53 has followed the Full Court's decision. That's another relevant decision for your Honour. But it's a – I agree, your Honour, it's a serious application because we say there are gross deficiencies by the respondents in their discovery. Now, in relation to Dr Jacobson, I understand your Honour has got a busy list and we're putting it back to Burley J, but we do say that that evidence is highly relevant, because what Dr Jacobson explains is that he was given the respondent's R and D related discovery documents and their patent applications, and then was asked to consider whether the research and development documents supported the

experiments which appeared in the patent applications. And him being an experienced patent attorney and having experience in this area indicated in his firm view that that discovery did not support those experiments. It's a very serious matter, your Honour. Very serious matter.

And he also gives further evidence that the experimental records, even for a start up, are entirely – entirely – deficient. There are very big and serious unexplained anomalies in the respondent's discovery, and the evidence of Dr Jacobson is entirely relevant, and it's important evidence for our application. And your Honour won't be persuaded that it's irrelevant. Your Honour certainly won't be persuaded that it's irrelevant to cross that high threshold on this application. So with all due respect to the respondents, it's them that are wasting the court's time with this. Of course, it's relevant, and if they do want to answer it, then they should. If they do not want to answer it, well, they should not. And if your Honour wants to be heard further in relation to an application which was foreshadowed just today by Mr Hennessy about them asking for an advance ruling under section – an advance ruling in effect under section – well, it's under either relevance or I think he mentioned section 135. Well, we haven't had notice of that.

HER HONOUR: And I think the lacking expertise was the other 70 – there was a submission about lack of expertise of Dr Jacobson.

MR HENNESSY: 79, 135 and 137.

HER HONOUR: 79.

MR COOKE: Well, so if your Honour - - -

MR HENNESSY: .....

MR COOKE: - - - wants to hear further in relation to that and then wants to – is not satisfied that your Honour wants to hear it on the 24th, then I'm sure your Honour's calendar is very, very busy, as is mine, but I wouldn't be able to do it until the 22nd or the 23rd because I'm in this trial before Burley J.

HER HONOUR: I don't think that assists.

MR COOKE: But then we would least know – because even if it was next week, according to my learned friends they would need time to deal with it anyway, so they won't be ready for the 24th, in any event. So we've offered them more time if your Honour was amenable to that, but that hasn't been taken up. So, your Honour, that deals with Dr Jacobson's affidavit. In relation to the amended IA, that was to add some categories of discovery which only came out, I think principally from our review of the discovery documents. We don't have any difficulties with the respondent's suggestion, if it's suitable for your Honour, just to have the IA whenever it's going to be – the initial IA on 24 September or if it's deferred, for prayer 1 of the interlocutory application which is already in there. That's the order

we seek to gain access to these search materials. The other prayers concern additional discovery categories, and if your Honour doesn't want to deal with that on the 24th or doesn't have time, then we're fine to defer that to another time.

HER HONOUR: Well, there's no deferrals.

MR COOKE: All right.

HER HONOUR: You get one go to run this, Mr Cooke. Frankly, there's not sufficient time between now and the end of the hearing year to give you multiple days in this matter to fight about discovery. And as I understand counsel's respective diaries, there's no capacity, in any event. So we've got a day. We've had the day marked out since June. We're going to use the day to resolve any dispute there is currently about discovery, and we're going to use it in a pragmatic fashion that will lead to a resolution, and will hopefully not see the parties back here complaining about discovery yet again. This, I think, will be the fourth go at discovery before me this year, and that ought not to happen. These are sophisticated, well-resourced parties before me who should be able to resolve these issues, or most of them, between them. Now, what about the suggestion that submissions be focused on categories?

MR COOKE: We don't have difficulty with that, so long as they're the categories which Mr Dewar and Ms Dunn have addressed in their affidavits. So Mr Dewar has addressed the categories, if your Honour has it.

HER HONOUR: Well, are the categories agreed?

MR COOKE: They're different to what my learned friend is responding to.

HER HONOUR: Well, this is not something that I'm going to resolve. I'm going to send – there's plenty of people sitting to the left and right of you and behind you who can go off and agree some categories, and how you wish – how the parties wish to frame the dispute about discovery before me and how you want me to deal with it.

MR COOKE: Yes.

HER HONOUR: And I shouldn't have to go through painstakingly the affidavits that I've not yet read because it's not necessary for me to read them, I would have thought, before the applications are made, and I haven't digested and work out what the categories are. Simply can't be my role.

MR COOKE: Just to say this, your Honour, just to shortcut it: what Mr Dewar did was to distill it into 14 categories, C1 to C14, and then Ms Dunn has used the same categories in her affidavit that we received last night. With respect, we submit that they're the categories that will help your Honour.

HER HONOUR: But remember, you will only have two hours and 12 pages, so you might want to think about that when you're distilling the categories - - -

MR COOKE: Yes, your Honour.

HER HONOUR: - - - because I'm not changing that order. Now - - -

MR COOKE: Does your Honour have our mark-up - - -

HER HONOUR: Yes.

MR COOKE: - - - to the short minutes of order? So, in relation to the amended application, we do have a copy here, and it does contain – can I hand that up, your Honour.

HER HONOUR: Yes.

MR COOKE: Thank you. So just to prayer 2, your Honour, that was privileged. That has been dealt with on another occasion according with your Honour's direction at the last case management hearing. It's 3A and 3B. 3A arises because when we reviewed the respondent's discovery, it appeared that there was other documents in there that they haven't discovered. And 3B is to do with a production issue. We redacted, like, a journal kind of document containing a lot of irrelevant material.

HER HONOUR: I don't understand 3A. Do you say that there are documents that are in the possession of the respondents that haven't been produced?

MR COOKE: We say in relation to 3A that when we reviewed their discovery, what became apparent is that there were certain categories of documents which exist which we were not aware of, which your Honour needs for the purpose of a fair trial. And so we've included those categories - - -

HER HONOUR: So the documents have been discovered?

MR COOKE: They've not been discovered, no.

HER HONOUR: How did you work out they existed then?

MR COOKE: From the respondent's discovery in relation to other categories, and then we saw from the respondent's discovery in response to the other categories that there's bodies of material which are highly relevant to these proceedings which - - -

HER HONOUR: Which you didn't seek.

MR COOKE: - - - were not – because we didn't know about them.

HER HONOUR: Well, but you sought categories which you thought were relevant to the dispute. This is all a – these submissions all go to my view that discovery should never be by categories, but it should always be standard. We wouldn't be having these fights.

MR COOKE: Quite possibly.

HER HONOUR: Well, is that something a registrar can resolve, around a table, at a conference, with junior counsel assisting him or her? Assuming that amendment is no longer opposed, but that's a matter for Mr Hennessey.

MR COOKE: Yes.

HER HONOUR: Can I suggest this. I'm not going to resolve this now. It's 10 to 10. Parties should go away and work out the best way to resolve the argument about the amended interlocutory application – whether it can be filed. If the parties can't agree that the amended application should be filed, then you can come back and see me on a morning later this week or early next week, and I will resolve the question of the amendment. If the amendment is agreed in this fashion or some other fashion, then the parties should consider whether it can be resolved by registrar on an urgent basis in the next week or so. As to Dr Jacobson's affidavit, I think I do need to resolve that as soon as possible and before the 24th. Otherwise, the 24th will go off the rails.

What I suggest is that the parties give me some mutually convenient – about an hour in the next week or so, because we will have to do it in the next week or so, and agree some orders for the exchange of, say, three pages of submissions as to the relevance or any other objection to Dr Jacobson's affidavit on this application. I think that's the only fair way of resolving it. As for my own availability, you could come back – I've got fairly good availability for the rest of the week. And next week – I could deal with the matter on Monday next week, or after 2.15 Tuesday or Wednesday.

MR COOKE: Your Honour, what about the 22nd or 23rd?

HER HONOUR: Well, I think that's just too close. No.

MR COOKE: But, your Honour, they're not going to - - -

HER HONOUR: And I can't, in any event. I can't give you those days.

MR COOKE: Right.

HER HONOUR: So I think – and I think it's too close.

MR COOKE: Does your Honour have any availability after court, because we're in court for the remainder of this week and all of next week.

HER HONOUR: The only day I can give you after court is Tuesday the 16th if that's suitable to all parties. But that's a matter for discussion with Mr Hennessy, I think, who I suspect will want to be here.

MR COOKE: All right.

HER HONOUR: So Tuesday the 16th is the only day I can give you after court.

MR COOKE: All right. Thank you, your Honour. We will discuss it with Mr Hennessy. Your Honour, just in relation to our proposed order – you don't have to deal with this in the time, but seek order 2 which extends, I think, the dates for the filing of the evidence. Order 4, we only received Ms Dunn's affidavit last night. It's voluminous, and we were served with 500-odd new discovery documents. We need a week, your Honour, to be able to reply to that. We seek an extension to the 17th.

MR HENNESSY: That's opposed, your Honour.

HER HONOUR: Okay. Could the instructing solicitors send anything that's consented to – any order that's consented to in these morass of orders can be sent up to my chambers. I will make those orders by consent. Anything that's opposed will have to be resolved the next time I see you.

MR COOKE: May it please the court.

MR HENNESSY: Please the court.

HER HONOUR: All right.

MATTER ADJOURNED at 9.55 am UNTIL TUESDAY, 16 SEPTEMBER 2025