

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV-2008-404-008251

BETWEEN	CABCO GROUP LIMITED Plaintiff
AND	DOUGLAS BARTLETT First Defendant
AND	SHARYN BARRATT Second Defendant
AND	ALISTER GATES Third Defendant
AND	NVIZION GROUP LIMITED Fourth Defendant

Hearing: 18, 20 February and 2 March 2009

Appearances: SC Langton and A Schirnack for Plaintiff
AJ Lloyd and BA Smith for Defendants

Judgment: 18 March 2009 at 5:00 pm

JUDGMENT OF ASHER J

*This judgment was delivered by me on 18 March 2009 at 5:00 pm
pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

.....
Date

Solicitors:
SC Langton, Langton Hudson, PO Box 3690 Shortland Street, Auckland
B Smith, MinterEllisonRuddWatts, PO Box 3798, Auckland

Table of Contents

	Paragraph Number
Introduction	[1]
Background	[6]
<i>The development of Mi-Kart and Mi-Search</i>	[7]
<i>Mr Bartlett's activities</i>	[19]
<i>The statement of claim</i>	[29]
Approach to interim injunction	[30]
Serious question to be tried	[31]
<i>The past</i>	[32]
<i>The present and future</i>	[35]
<i>The fourth and fifth causes of action and the restraint of trade clause</i>	[50]
Balance of convenience	[58]
Overall justice	[70]
Orders consented to by the defendants	[73]
Result	[75]
Costs	[77]

Introduction

[1] This is an application by Cabco Group Limited (“Cabco”) seeking an interim injunction against its former director, shareholder and chief executive officer, Douglas James Bartlett, and three other defendants.

[2] The injunction application initially sought orders which, among other things, required the transfer of a patent application, and the removal of Mr Bartlett from his position as a director of Cabco. Mr Bartlett has since the filing of the proceedings transferred the patent to Cabco and resigned as a director. The application has been amended twice and now the first order sought is as follows:

1. That the first defendant, second defendant, third defendant and fourth defendant are prohibited from directly or indirectly on their own account or as directors, shareholders, contractors, agents, or employees *pursuing any electronic shopping kart venture which poses or may pose a competitive threat to the plaintiff's business*, including any electronic shopping kart venture that relates to:
 - (a) “Mi-Kart” – defined as an electronic shopping system for use with a shopping kart/trolley that delivers information to a shopper, by integrating product and/or shopper proximity information to potentially influence the shopper’s purchasing decisions and/or;
 - (b) “Mi-Search” – defined as (1) an electronic shopping system for use with a shopping kart/trolley that enables a shopper to search by product characteristics and/or shopper preferences, (2) can alternatively or additionally include a system which targets advertising to the shopper, influenced by shopper behaviour; and/or;
 - (c) As described in exhibit “KG-D” to the affidavit of Kerry John Gleeson dated 10 December 2008.

(Emphasis added)

[3] Orders are also sought prohibiting the defendants from using any intellectual property and/or confidential information that belongs to the plaintiff contrary to the plaintiff’s best interests, including ventures related to “Mi-Kart” and “Mi-Search”, the venture described in the “Prospectus”, and the venture described in the “Investment Document”.

[4] The hearing of this matter initially occurred on 18 and 20 February 2009. Following that hearing the parties ultimately by agreement filed quite extensive further affidavits and submissions. I do not propose tracing this procedural history as no point has been taken about this unusual procedure. This judgment proceeds on the basis that all the affidavits and submissions are properly before the Court.

[5] I will refer in this judgment to “shopping trolleys”, which is usual parlance in New Zealand, although I note that in the United States trolleys are referred to as “carts” or “karts”, and this is reflected in much of the terminology in the documents.

Background

[6] This being an interim injunction application I will set out the background facts in summary form.

The development of Mi-Kart and Mi-Search

[7] Mr Bartlett had worked on the developing, manufacturing and marketing of electronic shopping trolleys in New Zealand since 1998. He claims to have developed the world’s first electronic shopping trolley for parents with young children in that year. In 2000 Mr Bartlett applied for patents of several aspects of the shopping trolley technology he had developed. Patents were granted in 2002.

[8] Cabco was incorporated by Mr Bartlett in 2002 with his wife, Sharyn Barratt, the second defendant. In 2002 the Bartlett Trust granted a license to Cabco to operate shopping trolleys in countries other than New Zealand, which was specifically excluded. Mr Bartlett became the chief executive officer of Cabco. On 5 February 2003 Mr Bartlett licensed his intellectual property to Cabco. In 2006 Mr Bartlett signed an employment contract with Cabco which included a restraint of trade clause.

[9] Terry John Gleeson became an approximately ten per cent shareholder in Cabco in 2002. In 2006 Collins Asset Management Equity Limited (“Collins”), became the holder of approximately 52 per cent of the shares in Cabco.

[10] Cabco is a developer and operator of shopping trolleys which were and are supplied to retail chains in the United States. The shopping trolleys are particularly suitable for parents with young children. The current shopping trolley sold by Cabco is called the TV-Kart, which is a trolley for parents with children. It has a video screen which enables children to watch programmes from a pre-programmed menu. More recently, technology has enabled TV-Karts to stream advertising to the shopper via a screen on the trolley. Cabco supplies large quantities of such trolleys, that are made in China, to substantial retail chains in the United States.

[11] By 2008 Cabco was seeking to develop a more generic shopping trolley of general interest and application to all shoppers. This development was called 'Mi-Kart' and began in late 2006. It is described as a 'generic shopping cart'. Cabco describes Mi-Kart and its related search technology, Mi-Search, as the next generation of trolley to be developed and operated. The technology does not provide a trolley for parents with children. Rather, it is a "media-enabled kart" which is intended to provide mobile advertising and interactive point messages to shoppers as they make their product choices, with an associated search function. Mi-Search is the user interface. It provides a touch-screen mounted on Mi-Karts with a feature enabling the shopper to select items by applying criteria to obtain a listing of products, and to then select the items of choice. This can be done by a customer inserting price discounts and health requirements. Mi-Search, if fully developed, will enable the shopper to create personal shopping lists, provide store aisle mapping, provide email functions, personal shopper profiles, discount advice and access to other data bases such as nutrition and allergy sites.

[12] As part of the development process, in February 2008 Cabco contracted with a company, Kauri Point Consultants Limited ("Kauri Point"), to produce a "technology roadmap". The technology roadmap was essentially a blueprint setting out the background to the project, the Mi-Kart functions and options, and summarising the hardware and technology required for Mi-Search.

[13] As part of the development Cabco developed a particular handle design which consisted of both a handle and screen. The design was created and manufactured by a company called Providence, which is based in China. Cabco also

developed a Mi-Kart “contact charging concept” which was a device which would potentially continually charge the trolley batteries while the trolley was parked at the charging station.

[14] It is important to note that the concept of electronic shopping trolleys with screens is in the public domain. A different company from Cabco introduced the idea of an electronic shopping trolley approximately 15 years ago. Other companies hold patents in the area. One set of patents for an electronic shopping trolley has expired because the patent period has expired. Mr Bartlett has stated, and it has not been disputed, that two companies, MediaCart and Concierge, already have electronic shopping trolleys in a trial stage and have exhibited in trade shows, and shown details of the trolleys on their websites. These developments provide the services that it is envisaged will be provided by Mi-Kart. Cabco is essentially entering the same market and doing the same thing, but endeavouring to do it better. Cabco has never attempted to patent Mi-Kart or its services.

[15] Cabco has not defined with precision the intellectual property in respect of which it claims ownership. Clearly, however, it does own intellectual property in the trolley handle design and in certain specific designs or molds of its proposed trolleys. This is acknowledged by Mr Bartlett.

[16] The Mi-Search concept was developed in September 2007. It was developed specifically by Mr Bartlett. Mr Bartlett acknowledges this is a new idea which belongs to Cabco.

[17] By the beginning of 2008 the Mi-Kart development had reached a level where Cabco had produced four to six prototype shopping trolleys and was in a position where a retail store trial could be carried out. The outer structure of the Mi-Kart prototype was in existence and 14 elements of related software had been conceptualised. However, the Mi-Kart concept was still unproved and a lot of software development was required. Efforts to obtain further financial backing were not successful. In August 2008 the Cabco Board decided to postpone the development of Mi-Kart and focus Cabco’s energy time and money on further

development of a TV cart. Once the TV cart was established and viable it was then intended to continue with the development of Mi-Kart.

[18] During 2008 a cost decision was also made to close down the New Zealand Cabco office and relocate its functions to the United States. As a result of this decision a number of New Zealand positions were terminated.

Mr Bartlett's activities

[19] On 29 February 2008 Mr Bartlett registered a patent relating to electronic shopping trolleys in his own name. Cabco paid the patent attorneys for the patent. At a Board meeting on 8 July 2008 Mr Bartlett agreed to transfer this patent to Cabco. However, through 2008 he did not do so. The present chairman of the Board of Cabco, Mr Gleeson, states that Mr Bartlett assured the Board that he had in fact transferred the patent to Cabco.

[20] Through mid-2008 Mr Bartlett took various steps on his own without reference to Cabco, relating to the development of shopping trolleys. His activities appear to coincide with a cooling of relations between him and the Cabco Board. By this time Mr Bartlett's interest in the shares in Cabco had reduced to approximately ten per cent.

[21] In June 2008 Mr Bartlett proposed to the Board a management buy-out of at least aspects of the Cabco business including the rights to Mi-Kart and Mi-Search. The new buy-out company could then license the technology back to Cabco. The new company would effectively pay for the development of the new technology.

[22] Following the presentation of this idea to the Board, Mr Bartlett took steps to prepare promotional material for the proposed new company. He sought funding and sent the proposal to various advisers and intermediaries. He says that this was to openly pursue the buyout proposal.

[23] On 2 September 2008 Mr Bartlett formed the fourth defendant, Nvizion Group Limited ("Nvizion"). He was its sole shareholder and director, and it was to

carry on the business of developing and licensing electronic shopping trolleys. The third defendant, Alister Gates, who is the sole director of Kauri Point, is now also involved with Nvizion.

[24] On 22 September 2008 the Cabco Board made Mr Bartlett redundant. On Tuesday 23 September 2008 there was a Board meeting which Mr Bartlett attended. Mr Bartlett advised that he and Ms Barratt through their company Doug Bartlett Trust Limited intended to develop a new shopping trolley for the New Zealand market, and eventually license the technology. He stated that the new shopping trolley would not use any intellectual property belonging to Cabco and would not infringe a restraint of trade clause that was in his employment agreement, because the shopping trolley would only be marketed in New Zealand. Cabco was offered an investment opportunity in the new concern. The Board expressed its grave concern at such a development and said it would need to consider its position.

[25] Since redundancy Mr Bartlett has been actively seeking to develop a shopping trolley business from Nvizion, with the support of Ms Barratt and Mr Gates. He issued a document called "Touch point cart network" in October 2008, which proposed a shopping trolley idea similar to Mi-Kart. It contained some material exactly copied from the Cabco promotional documentation.

[26] Mr Bartlett remained a director of Cabco until shortly before the first day of hearing of the interim injunction application on 18 February 2009. Mr Bartlett acknowledges that he is now involved in creating his own shopping trolley venture. He is actively seeking investors. Cabco has produced material which indicates that Mr Bartlett and Nvizion plan to develop a venture which will compete with any Mi-Kart or Mi-Search venture that may be developed by Cabco.

[27] Mr Bartlett acknowledges that he is seeking to develop an electronic shopping trolley which would compete with the shopping trolley of Cabco and other shopping trolleys presently in use or to be developed. Mr Bartlett says that he advised Cabco of his plans and ideas between June and September 2008. Mr Bartlett states that the "generic electronic shopping cart" he is developing does not use the Mi-Kart brand name or handle, or the Mi-Search or TV kart technology. He asserts

that the generic electronic shopping cart he is developing is substantially similar to existing generic electronic shopping carts already in the market place and not owned by Cabco. He states that what he is developing utilises an existing electronic shopping trolley design that he has purchased from a third party. When he has a prototype he intends initially testing it in New Zealand. He says in his affidavits that the development process will take all of this year, and that Nvizion trolleys will not be marketed until early next year, at the earliest.

[28] Very detailed affidavits have been filed dealing with all these events. The exchanges have become heated. Mr Cook who is a director of Cabco and Collins asserted in an affidavit that Mr Bartlett had lied in stating that he had provided Cabco with an earlier version of the Nvizion investment document. Mr Bartlett has produced an email to Mr Gleeson of 11 December 2008 showing that in fact this document had been sent. Mr Cook has checked his records and accepts that he was in fact sent a version of the investment document, and has accepted that Mr Bartlett did not lie in his earlier affidavit.

The statement of claim

[29] The Cabco statement of claim alleges that Mr Bartlett has issued a prospectus for potential third party investors in respect of a shopping trolley venture with substantially similar core components to those of Cabco's, which infringed Cabco's intellectual property rights, particularly those relating to Mi-Kart and Mi-Search. It is alleged that Mr Bartlett sought to advance his personal business activity and interests, and that he charged personal expenditure to Cabco. It is said that he copied and removed works from Cabco. These allegations are put forward to support the first cause of action based on breach of fiduciary duty. The second cause of action is based on misuse of confidential information based on similar facts. The third cause of action alleges infringement of certain specific intellectual property rights, although these are only referred to very generally. The fourth cause of action alleges inducement of Mr Bartlett to breach his duties of good faith, fidelity, restraint and "intellectual property duty" by Ms Barratt, Mr Gates and Nvizion Group Limited. Finally, in the fifth cause of action it is alleged that all four defendants conspired to injure the plaintiff's business by unlawful means.

Approach to interim injunction

[30] The approach to interim injunction applications in New Zealand is now well settled. The Court first considers whether there is a serious question to be tried in respect of any of the causes of action pleaded or available to the plaintiff. The Court then goes on to consider whether the balance of convenience is in favour of the granting of an injunction, or against it. In considering the balance of convenience the Court will pay particular attention to the question of whether damages would be an adequate remedy. If damages would be an adequate remedy for the plaintiff, it will generally follow that the balance of convenience does not require any interim intervention by the Court. Finally, after considering matters under these heads the Court will on overview consider where the justice of the case lies. I will follow this approach in this decision.

Serious question to be tried

[31] No less than 19 affidavits involving hundreds of pages of exhibits, and 10 sets of submissions and memoranda have been filed. It is simply not possible in the course of an interim injunction decision to thoroughly traverse this material. It is important in considering this material to bear in mind that in this interim injunction proceeding the Court is not considering past wrongs, save as background. The fact that Mr Bartlett may have in 2008 breached his fiduciary obligations or misused confidential information and that Cabco is entitled to damages does not mean that an interim injunction should be granted now. The purpose of an interim injunction is to restrain a defendant from the alleged wrongdoing in the period between the granting of the injunction and the determination of the Court proceedings. The focus is on present or future conduct, rather than the past. However, proven breaches are relevant to provide background, and may show that breaches are presently occurring, or are likely in the future.

The past

[32] Mr Langton for Cabco submitted that the essence of the claim was that Mr Bartlett had breached his fiduciary duties. In terms of what has happened in the

past, serious questions have been raised as to Mr Bartlett's conduct as a director and employee. There is no doubt that he pursued shopping trolley development opportunities in New Zealand and the United States while employed by Cabco as a director. He had in February 2008 registered a patent in his own name. He appears to have sought the funds for his own shopping trolley ventures between April and August 2008. Between June and August 2008 he appears to have sought legal advice on his position in relation to Cabco's intellectual property. In August 2008 he appears to have used documents in which Cabco undoubtedly had copyright in his own documentation for a personal venture. He had discussions with third parties about his own venture throughout the period. He took steps in August 2008 to identify a name for his new venture. He has had email exchanges with persons that Cabco had been dealing with, which Cabco now says were for his personal benefit.

[33] These developments took place in the context of Cabco deciding to shelve its further developments of the Mi-Kart and Mi-Search concepts. There were some disclosures to Cabco. Mr Bartlett in his affidavits does not accept that he in any way breached his duties to Cabco in carrying out these various steps, save for his copying of some Cabco material. He says, in essence, that, Cabco having decided to shelve future development, he was seeking a way to do this himself, with Cabco's blessing. He has, by transferring the patent back to Cabco, appeared to acknowledge that he had no right to retain it.

[34] Mr Bartlett may well be able to establish at trial that he has done no wrong, and that given the putting of Mi-Kart and Mi-Search on hold, the closing of the New Zealand office, his pending redundancy, and his disclosures, he did not breach any fiduciary duty or duty of confidentiality. However, there is enough evidence of activities on his part which do not appear to have been in Cabco's interest during the course of his employment to show a serious question to be tried as to breach of fiduciary duty and misuse of confidential information.

The present and future

[35] The position is less clear in relation to Mr Bartlett's current activities. The essence of Cabco's claim as to the present situation is that Mr Bartlett is pursuing a

competitive threat to Cabco's "maturing business opportunity", and that there is a significant overlap between the Mi-Kart/Mi-Search intellectual property and that of Nvizion. In summary it is said the functional overlap between Cabco and Nvizion's venture includes:

- a) the ability to search by product;
- b) the ability to search by price;
- c) store/aisle mapping;
- d) shopping suggestions;
- e) recipes;
- f) meal suggestions;
- g) personal shopper profiles, including loyalty cards and shopping lists;
- h) product detection; and
- i) health information.

[36] Mr Bartlett acknowledges that there is a significant overlap between the customer services provided by the Cabco and Nvizion shopping trolley ventures, but states that the technical methods used are completely different. He says that all his general knowledge and expertise that he has developed over the last ten years, four years of which was before the formation of Cabco, is available to him now that he has been made redundant and is no longer a director. He accepts that he is not able to use Cabco technology or particular designs. He submits that he cannot be prevented from competing with Cabco in the market place using his knowledge of the industry generally, including knowledge he gained during the time he spent with Cabco. He submits that he can only be restricted in his activities to the extent that this is reasonable to protect Cabco's genuine proprietary interests.

[37] Mr Langton for Cabco in submitting that Mr Bartlett was committing an ongoing breach of fiduciary duty, relied in particular on the decisions of *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371, and *British Midland Tool Limited v Midland International Tooling Ltd* [2003] EWHC 466.

[38] It is necessary to consider some of the authorities referred to. In the leading case of *Canadian Aero Services Ltd v O'Malley* it was alleged that the defendants while directors and officers of the plaintiff had devoted effort and planning to develop a corporate opportunity for Canadian Aero. The particular opportunity in question was the topographical mapping and aerial photographing at parts of Guyana. The plaintiff had done a great deal of work in developing this project which was ongoing. The defendants were very actively involved in that process. The defendants then left the plaintiff and joined another competing company, Terra Surveys Limited. Terra Surveys Limited ultimately negotiated the relevant contract.

[39] It was stated at p 382:

An examination of the case law in this Court and in the Courts of other like jurisdictions on the fiduciary duties of directors and senior officers shows the pervasiveness of a strict ethic in this area of the law. In my opinion, this ethic disqualifies a director or senior officer from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is actively pursuing; *he is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired.*

(Emphasis added)

It was held that the defendants were in breach of their fiduciary duty. That duty could not be evaded merely because the project that the defendants became involved in after leaving the plaintiff varied in some details from the earlier project.

[40] It was stated, however, in *British Midland Tool Limited* that a director who resigned was free to set up his own company and to invite employees of his former employer to join him. A former employer cannot prevent a former employee simply from competing: *Stenhouse Australia Limited v Phillips* [1974] AC 391, 400. There is nothing stopping a former employee in the absence of a contractual constraint from contacting or even soliciting clients or customers of the former employer, providing there is no misuse of confidential information or exploitation of a maturing business opportunity.

[41] Mr Lloyd for the defendants relied on *Balston Limited v Headline Filters Limited* [1990] FSR 385. Falconer J determined that an intention by a director of a company to set up a business in competition with a company after his directorship had ceased was not to be regarded as a development which was in conflict with the director's fiduciary duty to the company. It was held at 412:

In my judgment an intention by a director of a company to set up business in competition with the company after his directorship has ceased is not to be regarded as a conflicting interest within the context of the principle, having regard to the rules of public policy as to restraint of trade, nor is the taking of any preliminary steps to investigate or forward that intention so long as there is no actual competitive activity, such as, for instance, competitive tendering or actual trading while he remains a director.

Mr Lloyd for Mr Bartlett placed considerable emphasis on this statement, which may be seen as something of a high-water mark in terms of the right of directors to develop their own business opportunities.

[42] A director has an obligation not to profit personally from his position as director and not to allow a conflict of interest to arise between his duty as a director and his own self interest: *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 at 166. Nor may a director take over less tangible property such as an existing agency: *Schilling v Kidd Garrett Limited* [1977] 1 NZLR 243. This includes a director taking over a specific business opportunity such as a chance to obtain an agency. A director of a company cannot while with the company develop a maturing business opportunity and then leave the company to take up the opportunity himself or herself.

[43] However, the use of mere knowledge and information obtained while an employee or director, as distinct from the adoption of a specific business opportunity, is not necessarily a breach of fiduciary duty. In *Pacifica Shipping Limited v Andersen* [1986] 2 NZLR 328 at 333-339, Davison CJ considered a position where a director became aware of a particular specific business opportunity, there a particular shipping agency with a particular vessel, and the director's resignation and exploitation of that opportunity. He distinguished this from what Barker J had described in *CBA Finance Holdings Ltd v Hawkins* (1984) 1 BCR 599, as a "global business opportunity where the defendant merely wished to take

advantage generally of the course of business being pursued by the plaintiff as distinct from a particular business or market opportunity under consideration.” An exploitation of a global business opportunity did not constitute a breach of fiduciary duty.

[44] These concepts were exhaustively examined by McGechan J in *Holden v Architectural Finishes Limited* (1996) 7 NZCLC 260,976, confirmed on appeal (*Architectural Finishes Limited v Holden* CA272/95 7 April 1997). The facts of that case were complex, and at issue was the taking of an opportunity to acquire various agencies, following the end of a directorship. In finding that there was no breach of fiduciary duty in relation to one aspect of the plaintiff’s behaviour McGechan J stated (at 261,030):

It is as well to keep principle in mind. The fiduciary obligation is designed to protect the company against exploitation. There will be no protection if a director can acquire truly confidential information, or learn of unique opportunity, resign and exploit. On the other hand, prohibitions must not be taken too far. *More general knowledge and skills acquired in the course of office, even if quite specialised, and the use of information and opportunities learned but in any event globally available, are not to be suppressed.* To do so would injure commerce, and with that the public interest. The dividing line at times is an exercise of judgment.

[Emphasis added]

[45] In relation to the claim that Mr Bartlett is breaching fiduciary duty, Cabco had put its plans to further develop Mi-Kart and Mi-Search on hold. It has no specific project on hand in relation to electronic shopping trolleys. It wishes to keep its options open to recommence developments in that area, but it was not on Mr Bartlett’s redundancy, and is still is not, pursuing this particular venture at the moment. Mr Bartlett did not resign but was required to leave. He has a great deal of expertise in relation to electronic shopping trolleys, and he worked in the area for approximately four years before his involvement with Cabco.

[46] Most importantly, the defendants, while seeking to develop an electronic shopping trolley and seeking finance and market opportunities in the area, are not pursuing any particular business opportunity established in the course of their previous employment. I distinguish between a specific business opportunity, such as the Guyana mapping opportunity in *Canadian Aero Services v O’Malley*, and the

opportunity to put into the marketplace a new product which may compete generally with that of the previous employer. In the latter situation which exists here, no opportunity unique to Cabco has been exploited. The deferment of a company's plans does not in itself entitle a director to usurp those plans or business opportunities flowing from them: *Pacifica Shipping Co. Ltd v Andersen* at 335. However, Cabco did not have a specific plan or business opportunity. What was deferred was a general project to enter into a marketplace with a specific product, rather than a particular opportunity.

[47] Given the limited nature of this interim injunction hearing it is not possible or indeed appropriate to express any conclusive view on whether Mr Bartlett's existing and proposed future activities constitute a breach of fiduciary duty. However, the indications summarised above indicate that a Court might well conclude that Mr Bartlett's activities are not breaches of fiduciary duty or misuse of confidential information. Mr Bartlett is using his general knowledge and skills to develop a business opportunity which is not at the moment in direct competition with any developments at Cabco. Cabco's possible intention to resume development of Mi-Kart and Mi-Search business opportunities is not a "maturing business opportunity" of the type envisaged in *Canadian Aero Services v O'Malley*.

[48] I do not express a conclusive view on this matter. By a narrow margin Cabco has passed the barrier of showing a serious question to be tried as to ongoing breaches of fiduciary duty and misuse of confidential information, but the case appears to be weak. The same observation applies to the rather vaguely worded third cause of action relating to "infringement of intellectual property rights".

[49] I do not ignore Mr Bartlett's apparent very late resignation as a director just before the interim injunction hearing, and the occasions when there has been some direct copying of Cabco material. These are not issues that relate to the wrongful taking of a maturing business opportunity, but rather to a poor understanding of fiduciary duties and the boundaries of copyright. They add little to the issue of whether ongoing breaches of fiduciary duty and misuse of confidential information are likely.

The fourth and fifth causes of action and the restraint of trade clause

[50] The plaintiff has accepted that the Court lacks jurisdiction to rule on a restraint of trade clause contained in an employment agreement, that being within the exclusive jurisdiction of the Employment Courts. Given that all parties have proceeded on this basis, there is no need for me to consider that issue.

[51] Nevertheless, the plaintiff sought to rely on a restraint of trade clause to pursue the two economic torts of inducement to breach contract and what was described as unlawful means of conspiracy. The argument was that Ms Barratt, Mr Gates and Nvizion had induced Mr Bartlett to breach his two year restraint of trade clause and that all four defendants in various combinations had conspired by unlawful means to harm Cabco. One of the unlawful means alleged was a breach of Mr Bartlett's two year restraint of trade. The argument for Cabco was that the Employment Court does not have jurisdiction to deal with general tort claims, only contract claims, relying on *BDN Grange Limited v Parker* [2006] 1 NZLR 353 at [65] and [66], and that the restraint of trade clause can be considered by this Court in the context of tort causes of action.

[52] In response the defendants say that there is no jurisdiction to consider even tort claims in this context. It is also submitted that the restraint of trade clause was unenforceable because of inadequate consideration, and because it was too widely drawn and was unreasonable. The defendants submit that given the fact that Cabco does not sell any shopping trolleys in New Zealand, the restraint of trade does not include the territory of New Zealand.

[53] The 2006 employment agreement between Cabco and Mr Bartlett was detailed and contained a specific term at clause 6 requiring Mr Bartlett to keep information confidential, and an acknowledgement at clause 7 that any work he produced in the course of his employment belonged to Cabco. Schedule 3 contained a restraint of trade clause, in which Mr Bartlett agreed that he would not at any time while connected with the company "and for a period of two calendar years after ceasing to be connected with the company":

1. Compete directly or indirectly with any business of the Company as carried on at the relevant date in any territory in which the Company carried on such business at the relevant date;
2. Solicit or endeavour to entice away from, or discourage from dealing with the Company, any person who was at any time during the period of one year proceeding [sic] the relevant date a supplier, customer or client of the Company;
3. Solicit or endeavour to entice away from, or discourage from being employed by the Company any individual who was at the relevant date an officer or employee of the Company.

[54] It is by no means clear that the plain words of this restraint of trade clause are being breached by any ongoing activity of Mr Bartlett and the other defendants at the present time. As already observed, the defendants are not trading and therefore not competing in the usual sense of the word either directly or indirectly with Cabco. They are not dealing with any suppliers, customers or clients of the company and are indeed prepared to undertake not to do so. There is no evidence of direct competition for investment funds, and in any event this would not be “business competition” of the type referred to in clause 1 of Schedule 3.

[55] There must also be a question as to whether the restraint of trade clause applies given that Mr Bartlett was made redundant and that Cabco does not appear to be trading in New Zealand.

[56] Unsurprisingly given the breadth of issues traversed, I did not receive any detailed submissions on these last two causes of action. The issues raised are complex, and there is a jurisdiction point as to whether even indirectly this Court should get involved in considering a restraint of trade clause.

[57] On the material before me I am not satisfied that there is a serious question to be tried as to there being present or ongoing torts committed by the defendants of inducement to breach contract and unlawful conspiracy. I do not consider it necessary to carry out any further analysis of the strength of any serious question to be tried here, because of the conclusion that I reach in the next section of this judgment, that the balance of convenience does not favour the making of any orders.

Balance of convenience

[58] It is necessary to consider the balance of convenience and the adequacy of damages as a remedy.

[59] The defendants are seeking to develop their own electronic shopping trolley venture. They are seeking finance to fund research and development. There is no immediate prospect of any products going to the market this year. There is no evidence that the defendants are tendering for contracts. There may be a store trial later in 2009, but it is not expected that the defendants will enter the electronic shopping trolley marketplace until early 2010 at the earliest.

[60] In the circumstances, there does not appear to be any urgent practical need for an injunction. Cabco is not further developing Mi-Kart and Mi-Search itself at present, and as a result is not seeking new marketing opportunities for shopping trolleys. The defendants are in a development phase and not challenging the plaintiff in the marketplace. The defendants' activities are not stopping Cabco from doing anything it wants to do or taking business away from Cabco.

[61] Mr Gleeson has sworn an affidavit for Cabco where he asserts that Nvizion's attempt to develop an electronic shopping trolley, and the awareness of this in the market, will affect Cabco's ability to attract investment capital. He referred to an "embryonic" move by Cabco to secure US\$23 million of capital. He says that the availability or expectation of another electronic shopping trolley venture is likely to detract from the attractiveness of Cabco's venture as an investment prospect, and also that confusion is a possibility given Mr Bartlett's presence in the market.

[62] This very general assertion, contained in an affidavit filed after the substantive hearing of the interim injunction application, does not carry the matter very much further. There is considerable evidence showing that the trolley market is highly competitive. There are other competitors in any event. While the presence of a high profile former employee may be inconvenient, the evidence does not show that any irreparable damage will be suffered by Cabco in the months immediately to come in its efforts to raise finance.

[63] It is open to Cabco to push the substantive proceedings and to seek a priority fixture. Indeed it is not beyond the realms of possibility that the substantive case could be heard late this year or early next year. In such circumstances it is difficult to see any practical need for restraining orders at this point in time, beyond those that will preclude any misuse of Cabco confidential material or other intellectual property.

[64] As to damages, the obvious observation is that at the present time, because it is not developing or trading in the Mi-Kart and Mi-Search areas, Cabco is not suffering any loss, despite the conduct complained of in the defendants developing their own trolley. It is not possible to see what damages the plaintiff will suffer between now and a trial, if that trial can be heard quickly.

[65] The application for interim injunction seeks an order stopping the defendants from pursuing any electronic shopping trolley venture which poses or may pose a “competitive threat to the plaintiff’s business”. The wording is imprecise. I have already set out my reasons for concluding that the defendants are not in present competition with Cabco. However, the very general wording of the proposed injunction could be construed as requiring a curtailment of the present activities of the defendants in developing their own shopping trolley. If that were so, the damage to the defendants would be immediate and serious. They would be stopped in their tracks from the development that they have been pursuing and investing in now for some time. Mr Bartlett personally would be prevented from working in an area in which he has a great deal of expertise. Everything would be put on hold for the months it would take to get a hearing. The effect of the loss of ability to carry on research and development work is something that could not be calculated with any precision. The effect on the personal career development of Mr Bartlett also could not be calculated. Nevertheless, the damage of such a restraint to the defendants would, I am sure, be considerable. It would not be possible to quantify it.

[66] I record that there has not been information provided which satisfies me that the defendants would be able to meet a large order for damages. There is, in contrast, evidence indicating that Cabco has assets, including intellectual property of considerable value, and the backing of very substantial shareholders. However, there

is also evidence that Cabco has been under some liquidity tension throughout 2008. Given my decision that Cabco is suffering no significant losses at the present time as a result of the defendants' activities, it is not necessary to take this issue any further.

[67] It is also relevant in considering the balance of convenience that despite some initial behaviour on the part of Mr Bartlett such as the copying of Cabco promotional material and his late resignation as a director, which indicates a lack of understanding by him of his obligations, he and the other defendants have now volunteered to consent to quite significant interim injunction orders. These will prohibit them from using any of Cabco's confidential information and will oblige them to destroy such information that they presently have, including various documents that have been specified. There is an undertaking not to infringe patents and copyright, and not to solicit Cabco staff and the major existing suppliers, customers or clients of Cabco, for one year from 1 September 2008. So, in relation to the supermarket customers, the terms of the proposed orders roughly reflect the terms of the restraint of trade clause.

[68] These concessions on the part of the defendants are, in my view, appropriate given the background already summarised. However, the fact that they will be in place is relevant to the balance of convenience, in that most of the relief originally sought by Cabco, save for a general prohibition on competitive activity, will be provided.

[69] I conclude that the balance of convenience by a considerable margin is weighted against the granting of the general injunction prohibiting competitive activity by the defendants. Any injunction which would have the effect of stopping Mr Bartlett and the defendants from continuing their development work would, if the plaintiff is ultimately unsuccessful, have had disastrous consequences for them. The same cannot be said for the consequences to Cabco, if the defendants are allowed to continue their present activities for the limited period of time prior to an early hearing.

Overall justice

[70] It is necessary to stand back and see where the overall justice lies. I do not consider that there is any great injustice to Cabco in having to wait for its fixture while the defendants continue their development of electronic shopping trolleys. If Cabco ultimately succeeds in its claim, that development work by the defendants will have been wasted, and Cabco's position will be secured from their competition. This position can be achieved without an interim injunction.

[71] As I have stated, the alternative of granting the full injunction sought and stopping all the defendants' work and leaving them in limbo while they await a fixture, could have very serious financial consequences for them which could not be adequately compensated in damages. The overall justice is clearly against the granting of an interim injunction.

[72] I pre-suppose a very diligent interlocutory process by the parties, and an application for a priority fixture. That will be a matter for the plaintiff to pursue.

Orders consented to by the defendants

[73] The defendants accept that certain draft orders can be made to protect the plaintiff's confidential information. The plaintiff does not accept that these draft orders go far enough, and has sought the general order referred to. For the reasons that I have set out I am not persuaded that it would be just to stop the defendants from pursuing any electronic shopping trolley venture which might be a competitive threat to Cabco's business.

[74] I do, however, think it is appropriate to make more limited orders of the type proposed by the defendants. Those orders reflect the fact that the defendants have at least had some of Cabco's confidential documents in their possession. They also reflect the defendants' acceptance that they should not solicit Cabco staff for a period, and should not seek to solicit business or custom from the plaintiff's active supermarket customers for the restraint of trade period.

Result

[75] The following interim injunction orders are made:

- a) The defendants will destroy any and all copies, both electronic and hardcopy, of any documentation relating to the plaintiff, Mi-Kart and Mi-Search (to the extent said documents have not already been destroyed or provided to the plaintiff), including but not limited to:
 - i) Business and marketing plans from 2003-2008;
 - ii) The “technology roadmap” prepared by Alister Gates in February 2008;
 - iii) The “technology roadmap” “re-worked” by Alister Gates and referred to in the email from Alister Gates to Doug Bartlett dated 20 August 2008;
 - iv) The Mi-Kart project scope document prepared in March 2007;
 - v) The plaintiff’s “Information Memorandum” prepared by ABN Ambro in February 2008;
 - vi) The Cabco Media Technologies management buyout promotional document prepared in July 2008; and
 - vii) The Touchpoint promotional document prepared in October 2008.
- b) The defendants will not infringe the plaintiff’s copyright in respect of any of the plaintiff’s documents, including but not limited to the documents listed in Order (a) above.

- c) The defendants will not infringe any of the plaintiff's trademarks or patents including in respect of Mi-Search, and with respect to the name and proprietary handle associated with Mi-Kart.
- d) The defendants will not take, utilise, promote or incorporate any confidential or proprietary information or intellectual property, specific to the plaintiff's business, including but not limited to:
 - i) Circuit board designs, prototypes, pcb layouts or designs or any trials of the same;
 - ii) Any specifications, plans or documents relating to the plaintiff's business operations;
 - iii) Any visual concepts, plans or created by the plaintiff;

except that nothing in this order shall prevent the defendants from using their general knowledge of the electronic shopping trolley industry (including knowledge acquired whilst associated with the plaintiff) to develop new ideas or generic ideas exploited by other companies in the electronic shopping trolley industry.

- e) The defendants will not solicit any persons who were Cabco staff as at 1 September 2008, for a period of one year from that date (being the date of termination of the employment of the first defendant by reason of redundancy).
- f) The defendants will not, except with the consent of the plaintiff, solicit the business or custom of the plaintiff's active supermarket customers, being: Mejers, Safeway, Krogers, Wal-Mart, K-Mart or Supervalve, for a period of one year from 1 September 2008.

[76] I decline to make the order sought at paragraph 1 of the amended application.

Costs

[77] Given the changes to both parties' positions through the course of the hearing and the fact that both parties have on an overview achieved some measure of success, I do not consider it appropriate to make a costs order at this point. Costs are reserved.

.....

Asher J