

27 May 2026

Steve Keall
Barrister
Auckland

Without prejudice save as to costs


Dear Steve

BDO Auckland / Digital Signs

1. We refer to your without prejudice email to Minter Ellison dated 18 May 2026 and attached draft statement of claim.
2. We act for BDO Auckland and the other intended defendants in relation to the claims notified in your draft statement of claim. We are familiar with the history. Your client will recall that we previously acted for Mr Innes-Jones and Mr McKay in response to his complaints to CAANZ.

Your client's claims

3. Your client threatens claims for breach of fiduciary duty, breach of a common law duty of care and breach of contract.
4. The claim for breach of fiduciary duty is hopeless. It overlooks that what you refer to in the draft statement of claim as the second retainer – Mr McKay's independent business review – was an engagement for Digital Signs Ltd and Digital Advertising Ltd, not for the BNZ. There was no conflict of interest arising from Mr Innes-Jones's earlier work for Digital Signs that made it a breach of fiduciary duty for BDO to act again for companies within the same group on the second retainer.
5. We acknowledge that the second retainer required Mr McKay to complete his review independently. This was a requirement of the BNZ in approving the engagement. Mr McKay complied with this requirement, as CAANZ recognised in its decision. Had he failed to do so any potential harm from that would have been to BNZ, not your client.
6. Your client's claim for breach of a common law duty of care and breach of contract is a standard professional negligence claim. The core allegation is that Mr McKay's assessment of your client's business was negligently wrong. Your client has never produced any evidence to support this claim. He could not do so. Mr McKay's assessment in his report was plainly correct. Among other things, Digital Signs had arrears with the IRD of approximately \$191k of PAYE and a payment plan that was



not being met, a telltale sign of cashflow problems and a potential signal of insolvency.


7. Our clients subsequently became aware – although your client did not disclose this to them at the time – that Digital Signs Ltd had in February 2020 failed in an application to set aside a statutory demand with the Judge stating that “*the clear background is the underlying insolvency of Digital Signs Ltd*”.¹
8. Our client understands that your client also approached at least eight other financiers to attempt to raise funds, without our clients’ involvement.² The attempts were unsuccessful.
9. A claim by your client would need to show not only that Mr McKay’s assessment was negligently wrong, but also that the BNZ or another financier would have been willing to lend. There is no support for this in the evidence. The BNZ officer concerned, Mr Kilmartin, was from ‘Strategic Business Services’, which is the BNZ team that deals with distressed or defaulting debtors. The idea that he was otherwise amenable to advancing large sums of money to your client is not credible. We refer to Mr Kilmartin’s 25 July 2023 email supplied as part of the CAANZ process.
10. A claim for loss would also rely on your client demonstrating that this lending would have been used to develop a valuable business. That seems unlikely given your client’s subsequent business travails. If he was going to develop a successful digital billboards business, he would have done so.
11. Any claim is also subject to the limitation of liability clauses in BDO’s 4 June 2020 engagement letter. Under clause 12.2, any claim had to be made within two years after completion of the work. It was not. Clause 12.1 excludes liability for, among other things, any income, profit, goodwill or other indirect or consequential loss and limits any residual liability to a maximum of four times the fee paid for the work.
12. Given all of the above, our clients view the threatened claims as wholly without merit.

Other matters

13. We are authorised to accept service of any court proceedings (and note from your client’s website that it appears the proceedings may already have been filed).

¹ *Digital Signs Ltd v Insight CA Ltd* [2020] NZHC 281.

² Ricoh Financial Services, TBK Capital, Kiwibank, GetCapital, ASB, Flexilease, Heartland, Avanti Finance. There were likely others.

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14. The correct defendant is BDO Auckland. The intended first defendant company is an internal services company that does not offer external advice. The engagement was with the firm, not with Mr Innes-Jones or Mr McKay personally.
 15. Any proceedings will need to be accompanied by the expanded initial disclosure, verified by affidavit, required by r 8.4 of the new High Court Rules. This should include all documents relating to your client's applications to other financiers and the file relating to the debt the subject of the statutory demand.
 16. Our clients will apply for security for costs before taking any other steps in the proceeding. As our clients understand it, the corporate plaintiffs are non-trading entities with no assets and Mr Jaques is personally insolvent and on the verge of bankruptcy. If your clients dispute this, please provide us with financial information to verify their positions.

Yours sincerely,



Martin Smith

Partner

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