

29 May 2026

By email

Gilbert Walker
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For: Martin Smith

E-mail: martin.smith@gilbertwalker.com

Dear Martin,

BDO Auckland / Digital Signs

1. We are the solicitors for the plaintiffs. Mr Keall is instructed as counsel. Nothing in this letter is to be read as a concession, and our clients' position and rights are fully reserved.
2. Proceedings have been filed in the High Court at Auckland under proceeding reference CIV 2026-404-001264. We understand that you are authorised to accept service and will arrange service on that basis today, by email.
3. This letter contains commentary on the pleaded claim and addresses other matters.

The claim in breach of fiduciary duty

4. The claim is that BDO, having acted as the plaintiffs' adviser under the first retainer and the continuing advisory relationship, and having in that capacity acquired a detailed understanding of the business, then accepted and performed a retainer that required it to produce a review which BNZ would treat as independent, concerning the same business and substantially the same funding relationship. A duty of loyalty owed to an existing advisory client is not discharged by observing that the later engagement was contracted with a company within the same group.
5. The requirement that Mr McKay act independently does not answer the difficulty; it illustrates it. A firm cannot at the same time owe undivided loyalty to its advisory client and discharge a mandate that calls for genuine independence in a matter adverse to that client's interests, absent the client's fully informed consent. No such consent was sought or given. A distinct element of the claim is the instruction to Mr Innes-Jones to cease working with the plaintiffs, given without their knowledge or consent.
6. The CAANZ decision does not determine this proceeding. It was made in a professional disciplinary context. The contention that any want of independence would have

caused harm only to BNZ overlooks that the evident purpose and effect of the report was to influence BNZ's decision concerning our clients, who were directly and foreseeably affected by it.

The claims in negligence and contract

7. These are, in substance, professional negligence claims. Whether Mr McKay's assessment was wrong, and negligently so, is the central factual question in the proceeding. It will be addressed by evidence, including expert accounting evidence, in the ordinary course.
8. IRD arrears, the 2020 set-aside application, and approaches to other financiers, are matters of context that will be dealt with in evidence. They do not establish either that the business was not viable or that the adverse conclusions in the report were justified. The observations in *Digital Signs Ltd v Insight CA Ltd* [2020] NZHC 281 were made on an interlocutory application and were not a determination of solvency for the purposes relevant to this proceeding. Any approaches to alternative funders after BNZ withdrew its support are consistent with mitigation, not inconsistent with the claim.

Causation and loss

9. Our clients' pleaded case on causation is, in part, a loss of a chance case. It does not require proof that BNZ would certainly have lent, but that there was a real and substantial chance of funding on terms sufficient to allow the business to continue and develop. The pleaded facts include BNZ's indication that it was prepared to consider a materially larger facility subject to a favourable independent review.
10. The plaintiffs' subsequent difficulties are themselves substantially the consequence of the loss of funding and support that the report brought about. It does not assist the defendants to rely on a state of affairs which the conduct complained of helped to create.

The engagement letter and the limitation of liability clauses

11. The engagement letter of 4 June 2020 governs the second retainer. It does not govern the first retainer, the continuing advisory relationship, nor the duties in equity and in tort that arise from them, and it is not accepted that its terms answer the claims as a whole.
12. We refer to clauses 12.1 and 12.2 of BDO's terms. The construction, scope, and enforceability of those clauses are in issue, including their application to a claim founded on breach of fiduciary duty and on the manner in which the conflict was created and handled, and including the question of their reasonableness. The two-year period in clause 12.2, the date of completion of the relevant work, and the operation of the clause against the claims as pleaded, are in dispute.

The defendants

13. The plaintiffs have pleaded against the first and second defendants in the alternative because the entity that held the relevant retainer is not, on the documents presently available to them, completely clear. Provided there is clear, open, agreement that the second-named defendant is the correct defendant, then it is likely our clients will

agree to discontinue the claims against the other named defendants. Ideally, that would be accomplished before the time to file a statement of defence arises.

Initial disclosure and further documents

14. Our clients will comply with their initial disclosure obligations under the High Court Rules, and the documents accompanying the proceeding are those the rules require. That said, our clients would prefer to avoid an unnecessary interlocutory application. We will address the topic of discovery with you further after service of the proceedings, on an open basis, to endeavour to agree what if any further documents should be provided.

Security for costs

15. It is not accepted that security for costs is required because of the evidence that BDO caused the impecuniosity in question. That said, our client is willing to have a reasonable discussion about it. Steve Keall will contact you directly to raise that topic.
16. Our clients remain willing to engage in sensible discussion about the issues in the proceeding, and we would be happy to discuss a timetable and any steps that might narrow the matters in dispute. Our clients' rights are fully reserved. This is an open letter.

Yours faithfully
COWAN LAW



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