

11 June 2026

Cowan Law  
Level 1, 10 Heather Street  
Parnell  
Auckland 1052

For: Doug Cowan


Dear Mr Cowan,

**CIV-2026-404-1264 Digital Holdings (2017) Limited & Ors v BDO Auckland Limited & Ors**

1. We refer to your letter dated 29 May 2026.

**The claims lack merit**

2. The plaintiffs' claims entirely lack merit. Your letter does not adequately address fundamental weaknesses in their case. Our clients will address these points in substance in due course, but make the following brief points.
3. The cause of action for breach of fiduciary duty is misconceived. No such breach exists in circumstances where BDO's earlier work was for the same companies as BDO's independent business review, which is alleged to give rise to the breach. It was Digital Signs Limited and Digital Advertising Limited, not BNZ, that engaged BDO to conduct the independent business review, as confirmed by BDO's terms of engagement which were signed by Mr Jaques. That letter confirms that BDO was instructed by your clients to undertake an independent review. Nothing in your letter overcomes this fundamental difficulty.
4. The fiduciary duty claim and the conflict claims more generally in any event do not lead to a damages claim unless it can be shown that Mr McKay's report was negligently prepared and caused the plaintiffs loss. They cannot succeed separately from the negligence claim in relation to Mr McKay's report. They therefore add nothing and should be removed.
5. Your letter does not address the substance of the claim in negligence, which is unsurprising given there is no tenable basis for it. It is clear Mr McKay's assessment was correct given the financial difficulties facing the companies which included,



amongst other things, their failure to meet a payment plan with the IRD, which was owed approximately \$191k in outstanding PAYE.

6. There is also no prospect of your clients establishing that any breach by BDO (there was none) caused them loss. It is not credible on the facts (including by reference to Mr Kilmartin's 25 July 2023 email supplied as part of the CAANZ process) to suggest that there was a real and substantial chance that the BNZ would have lent your clients the required funds given their financial position or that with such funding your clients would have developed a valuable business. This is reinforced by your clients' failure to obtain lending elsewhere and their failure subsequently to develop any valuable business.
7. Your letter simply asserts that the construction, scope and enforceability of BDO's limitation of liability clauses are in issue, but does not attempt to explain why they would not be enforceable. Clauses of this type are routinely enforced<sup>1</sup> and will operate in this instance to limit any liability BDO may have to, at its outer limit, four times the fee paid for the work. The invoice for the independent business review was \$25,792 plus GST.<sup>2</sup>

#### **The correct defendant**

8. We confirm the correct defendant is BDO Auckland. The first defendant (BDO Auckland Limited) is an internal services company that does not provide external advice. The engagement was with the firm, not with Mr Innes-Jones or Mr McKay personally. The claims against the defendants other than BDO Auckland should be discontinued.


#### **Initial disclosure**

9. Your clients' initial disclosure is defective in several material respects.
10. First, your letter states the "IRD arrears, the 2020 set-aside application, and approaches to other financiers, are matters of context that will be dealt with in evidence". Your letter also states, "Any approaches to alternative funders after BNZ withdrew its support are consistent with mitigation, not inconsistent with the claim."
11. It is clear from the statement of claim and these comments that documents concerning these matters are documents on which your clients intend to rely at trial. They must be provided in initial disclosure under r 8.4(1)(b). They are also "adverse documents" and required to be disclosed under r 8.4(1)(c). These documents could have been identified by a "reasonable check" as your letter demonstrates that your

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<sup>1</sup> E.g. *CBL Insurance Limited (in liquidation) v Harris* [2021] NZHC 1393 at [118].

<sup>2</sup> Invoice 116283 dated 31 August 2020.



clients are aware of them. However, no disclosure has been provided of these documents. Nor has disclosure been provided relating to a further statutory demand and PLA notice issued your clients in 2020 (which are disclosable for the same reasons). Complete disclosure of documents related to these matters is required.

12. Second, Mr Jaques' affidavit providing initial disclosure does not meet the requirements of the Rules. In particular:
  - a. No statement is made that Mr Jaques understands the plaintiffs' obligations under r 8.4 (r 8.15(2)(b)) (cf. clause 4 of form G7).
  - b. No particulars have been given of the steps taken to check for the existence of adverse documents as required by r 8.15(2)(c). The assertion that to the best of Mr Jaques' knowledge, "after due inquiry", the list of documents is complete, is inadequate (cf. clause 5A of form G7).
  - c. No description has been given of any documents in which privilege or confidentiality is claimed, nor the ground on which any such claim is based (r 8.15(2)(d)). Redactions have been made to certain documents providing in initial disclosure, but no basis for those redactions has been identified (e.g. documents numbered 055 and 070). There does not appear to us to be any basis for the redactions.
  - d. No description of any documents known to the plaintiffs but not in their control has been provided (r 8.15(2)(e)).
  - e. In virtually every respect, the schedule to the affidavit does not comply with the listing and exchange protocol in part 2 of schedule 9 to the Rules (required by r 8.27(2)). The schedule does not list document IDs in the required format, nor does it list document types, authors, recipients, or parent document IDs.
  - f. The initial disclosure includes bulk PDFs containing multiple documents (e.g. documents 020, 024, 026, 028), in one instance running to 293 pages (document 026). The Rules require that emails, attachments and documents must be listed separately (cl. 6-11, listing and exchange protocol).
13. Our clients require the plaintiffs to provide complete and compliant initial disclosure. That disclosure must include documents related to the plaintiffs' IRD arrears, all statutory demands and PLA notices (and related court applications) and all approaches to other financiers. Those documents are disclosable under r 8.4(1). An affidavit which meets the requirements of rr 8.15 and 8.16 must also be provided and



all documents must be listed and provided in accordance with the listing and exchange protocol.

14. The plaintiffs were required to serve compliant initial disclosure alongside their statement of claim (r 8.4(1)). Their failure to do so may hinder the preparation of our clients' defence. Accordingly, our clients reserve their position in relation to the due date for filing their statement of defence and require the plaintiffs to provide complete initial disclosure no later than 26 June 2026. They will make an interlocutory application for further disclosure if the plaintiffs do not remedy these failures.


### **Security for costs**

15. Our clients understand that the corporate plaintiffs are non-trading entities and Mr Jaques is personally insolvent and on the verge of bankruptcy. The Court of Appeal recently upheld a judgment against Mr Jaques for \$456,000 plus interest and indemnity costs.<sup>3</sup> There is reason to believe that the plaintiffs will be unable to pay the defendants' costs if the plaintiffs are unsuccessful in this proceeding. The defendants therefore require the plaintiffs to provide security for costs.
16. Your letter asserts that BDO caused the plaintiffs' impecuniosity. That position is without merit. The plaintiffs have the onus of showing that, but for the defendants' conduct, the plaintiffs would have been financially secure. Merely arguing that the plaintiffs' claim, if successful, shows they suffered losses caused by the defendants, does not discharge that onus. There must be a reasonable probability, established by persuasive evidence, that the defendant caused the impecuniosity.<sup>4</sup>
17. There is no such evidence. Speculation by the plaintiffs that, had BNZ lent the companies funds, they would have gone on to be financially secure falls well short of the required standard. That speculation lacks any basis in fact given, amongst other things, the companies' poor financial position. It also ignores that Mr Jaques' liability to Wilson Parking arises from a separate loan entered into in 2024, well after BDO issued its independent business review report in 2020. Mr Jaques' inability to pay arises independently of the claim he now makes against BDO. The lack of merit in the plaintiffs' allegations also supports the need for security for costs.
18. Our clients require that the plaintiffs provide security in the amount of \$51,150 as security for the costs of the initial stages of the proceeding. This is the amount of scale costs for the likely steps in the proceeding through to the judicial issues conference on a 2B basis, as set out in the schedule to this letter. Further security will be required if this matter proceeds beyond the judicial issues conference, including

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<sup>3</sup> *Jaques v Wilson Parking New Zealand Limited* [2026] NZCA 129.

<sup>4</sup> To these points, see *Sim's Court Practice* at [HCR5.45.8(g)] and *McGechan on Procedure* at [HCR5.45.03(3)].



security for the costs of any expert witness(es) the defendants may brief. Security should be provided by way of cash deposited in a solicitor's trust account, not to be disbursed without the defendants' consent.

19. Our clients are confident a court will order security for costs. Our clients will make an interlocutory application if the plaintiffs do not agree to provide security.

**Conclusion**

20. For the reasons outlined above, please confirm that:
- a. The plaintiffs will discontinue their claims against BDO Auckland Limited, Mr McKay and Mr Innes-Jones;
  - b. The plaintiffs will provide complete and compliant initial disclosure, including a revised affidavit from Mr Jaques and disclosure of all documents described above, no later than 26 June 2026; and
  - c. The plaintiffs agree to provide security for costs of \$51,150 for the initial stages in the proceeding through to the judicial issues conference. Please confirm this amount will be paid into trust no later than 26 June 2026.

Yours faithfully,



**Martin Smith / Sean Coupe**

Partner / Associate

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**Schedule: Security for costs**

#	Step	Days (Band B)
2	Commencement of defence by defendant	2
9A	Preparation for judicial issues conference	2
9B	Preparation of position paper and bundle for judicial issues conference	2
9C	Appearance at judicial issues conference	0.5
20	Affidavit of initial disclosure	1.5
21	Inspection of documents	1.5
21A	Preparation of factual witness statements	2
21B	Preparation of draft chronology	0.8
22	Filing interlocutory application	0.6
24	Preparation of written submissions	1.5
25	Preparation by applicant of bundle for hearing	0.6
26	Appearance at hearing of defended application by principal counsel	0.5
	<b>Total days</b>	15.5
	<b>Daily rate (category 2)</b>	\$3,300
	<b>Total</b>	\$51,150