

19 June 2026

Gilbert Walker Lawyers
PO Box 1595, Shortland Street
Auckland 1140

E-mail: martin.smith@gilbertwalker.com; sean.coupe@gilbertwalker.com

Dear Colleagues,

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

1. We refer to your letter dated 11 June 2026. We respond to the matters you raise below. Our clients maintain each of their causes of action, and nothing in your letter causes them to reconsider their position on the merits of the pleaded claims.

The merits of the claims

2. We do not accept your contention that the claims lack merit. Your letter asserts conclusions that are not capable of resolution on the correspondence and that will be contested at trial if they cannot be agreed.

Breach of fiduciary duty

3. Your analysis at paragraphs 3 and 4 misstates the basis of the claim. The fact that Digital Signs Limited and Digital Advertising Limited engaged BDO, and that Mr Jaques signed the terms of engagement, does not address the conflict. It establishes the relationship from which BDO's duties of loyalty and good faith arose. The conflict pleaded is that BDO had previously acted for the companies and then undertook the independent business review in circumstances where its independence and undivided loyalty to the companies were compromised. We point to one factual matter that illustrates this basic idea. At the end of 2019, BDO produced financial forecasts which later would have formed part of the material considered by Mr McKay. BDO was, in effect, checking its own work.
4. The fiduciary claim is not redundant. It is not correct that it adds nothing, or that it cannot succeed separately from the negligence claim. Breach of fiduciary duty gives rise to distinct equitable remedies, including equitable compensation, an account of profits and forfeiture of fees, and is governed by causation and remoteness principles that could be more favourable to our clients than those applying in negligence. Importantly, a breach of fiduciary duty, and any deliberate or reckless conduct, is unlikely on its proper construction to fall within BDO's limitation of liability clause. The

fiduciary claim is therefore of independent practical significance and will not be withdrawn.

Negligence

5. Your letter does not address the substance of the negligence claim; it asserts only that Mr McKay's assessment was correct. That is a contested-merits contention. The pleaded negligence concerns the manner in which the independent business review was prepared. The existence of IRD arrears and a missed payment plan does not establish that the review was prepared with reasonable care. A reasonably competent reviewer would have assessed whether those liabilities were capable of being managed within a viable restructuring and continued funding. Whether BDO met the standard of a reasonably competent practitioner is a matter for expert evidence at trial.

Causation and loss

6. Your causation argument applies the wrong standard and, in any event, raises questions of fact. This is a loss of a chance claim. Our clients are not required to prove on the balance of probabilities that BNZ would have continued to fund the companies. They need establish only that there was a real and substantial, as opposed to a speculative, chance that it would have done so but for BDO's report, with the value of that chance to be assessed accordingly. The 25 July 2023 email from Mr Kilmartin is a single document whose weight is a matter for trial and which does not foreclose that inquiry. The companies' subsequent inability to obtain funding elsewhere is consistent with, not contrary to, the loss caused by an adverse and negligent review and the withdrawal of BNZ's support. These are quintessentially trial issues.

Limitation of liability

7. The construction, scope and enforceability of BDO's limitation clauses are genuinely in issue and are not suitable for determination now. *CBL Insurance Ltd (in liq) v Harris* turned on its own facts and clause and does not determine the position here. In any event, even on BDO's own case the cap leaves a live claim, and it does not touch the equitable claims.

The correct defendant

8. Our clients are willing to discuss this further. They propose approaching the topic on the basis that if there were a discontinuance now, but they determined later that one of the parties discontinued-against was a correct defendant, that defendant forebear from pleading limitation as a defence. That would need to be formally agreed now. We ask you to give that further thought.

Initial disclosure

9. We do not accept that our clients' initial disclosure is materially deficient. We respond to your specific complaints below, and our clients will, consistent with the duty to co-operate, take a practical approach to resolving any genuine issue.
10. *Scope of disclosure.* Initial disclosure under r 8.4 is confined to the documents referred to in the pleading, the principal documents used to prepare it, the principal

documents the party intends to rely on, and adverse documents identified on a reasonable check. It is not an at-large discovery obligation. Our clients do not accept that every document touching those topics is disclosable at the initial stage regardless of relevance, and they reserve their position on documents that are properly the subject of later disclosure or of evidence. If BDO identifies the specific documents it says are missing and explains the basis on which they are said to be disclosable, our clients will respond appropriately.

11. *The affidavit.* We understand the form you are referring to is G37. Use of that form is not mandatory. We regard the substance of the wording of the affidavit to be sufficient. The amendments to the rules were a conscious attempt to move away a prescriptive approach. The initial disclosure made largely contains documents already provided to BDO. We refer to proposed approach above to address any issues.
12. *Listing and exchange protocol.* It is acknowledged that the schedule does not comply with this protocol. This is a matter of form that will be addressed in due course. It should not affect the timing of any steps taken by BDO in the proceeding.
13. *Effect on timetable.* There is no proper basis to reserve on the date for filing the statement of defence. The matters you raise do not prevent BDO from pleading to the statement of claim. The rules require interlocutory complaints of this kind to be raised and resolved promptly and proportionately, not used to defer the defence. If there are specific documents BDO genuinely requires in order to plead, it should identify them and our clients will give them priority. Deferral of the statement of defence does not seem to be consistent with BDO's assertion that the claim has no merit at all. It must have formed that view based on the materials presently available to it.
14. Our clients will provide any agreed further disclosure within a reasonable timeframe to be discussed, but they do not accept the unilateral 26 June 2026 deadline as a precondition to the filing of a statement of defence.

Security for costs

15. Our clients do not accept that an order for security for costs is appropriate, for the reasons given in our earlier correspondence. Without admission, and in the interests of avoiding an unnecessary interlocutory application, our clients are prepared to provide security in the amount of \$30,000 for the initial stages of the proceeding through to the judicial issues conference. Your breakdown includes an interlocutory hearing. Bringing such an application does not appear to be justified and so in our assessment should not form part of a breakdown for the purposes of security for costs. That is factored into the plaintiffs' proposed amount.

Redacted documents

16. We enclose copies of documents 55 and 70 unredacted.

Next steps

17. For the reasons given, our clients maintain that a statement of defence should be filed within the time limit in the High Court Rules. Broadly speaking, our hope and

expectation is that we can resolve any procedural issues co-operatively. Filing an interlocutory application at this stage should be a last resort.

18. Mr Jaques is overseas between 21 June and 4 July. He is contactable.

Yours faithfully

COWAN LAW



Doug Cowan

Partner

Direct line: 09 320 4616

Mobile: 021 414 693

Email: doug.cowan@cowanlaw.co.nz

CC: Steve Keall, Barrister