

In the High Court of New
Zealand
Auckland Registry
I te Kōti Matua o Aotearoa
Tamaki Makaurau Rohe

CIV 2026-404 _____

BETWEEN

DIGITAL HOLDINGS (2017) LIMITED, a duly incorporated company whose registered office is at 266 Waiuku Road, Rd 3, Pukekohe, 2678, **DIGITAL SIGNS (2017) LIMITED**, a duly incorporated company whose registered office is at 266 Waiuku Road, Rd 3, Pukekohe, 2678, **DIGITAL ADVERTISING (2017) LIMITED**, a duly incorporated company whose registered office is at 266 Waiuku Road, Rd 3, Pukekohe, 2678, **DAVID JAQUES** of Auckland, company director

PLAINTIFFS

AND

BDO AUCKLAND LIMITED, a duly incorporated company whose registered office is at Level 4, BDO Centre, 4 Graham Street, Auckland, 1010, **BDO AUCKLAND** (trading as a firm and/or partnership) having its registered office and/or principal place of business at Level 4, BDO Centre, 4 Graham Street, Auckland, 1010, **NICHOLAS ROBERT INNES-JONES**, of Auckland, director and chartered accountant, **ANDREW JOHN MCKAY**, of Auckland, director and chartered accountant

DEFENDANTS

STATEMENT OF CLAIM

Solicitor of record:

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STATEMENT OF CLAIM

The plaintiffs by their solicitor say:

Parties

1. The plaintiffs are Digital Holdings (2017) Limited, Digital Signs (2017) Limited trading as Digital Signs, Digital Advertising (2017) Limited, and David Jaques, an individual. At material times he was the principal person representing the second-named and third-named co-plaintiffs in their dealings with the defendants and with Bank of New Zealand (BNZ).
2. At all material times the second and third named co-plaintiffs carried on business importing, installing, owning, and operating digital display units used as signs and billboards, and obtaining and maintaining resource consents for billboard sites.
3. The first defendant, BDO Auckland Limited, is a New Zealand company. At all material times it carried on business in Auckland as, or as part of, a professional accounting and advisory practice using the name BDO Auckland.
4. The second defendant, BDO Auckland, is a firm. At all material times it carried on business in Auckland as a professional accounting and advisory practice.
5. The plaintiffs plead against the first and second defendants in the alternative to the extent the relevant retainer, advisory relationship, firm relationship, or professional practice was undertaken by one rather than the other. The first and second defendants are together referred to in this statement of claim as BDO.
6. The third defendant, Nicholas (Nick) Innes-Jones, was at all material times a partner, principal, employee, or agent of BDO. He acted for BDO in relation to the plaintiffs and their business.

7. The fourth defendant, Andrew McKay, was at all material times a partner, principal, employee, or agent of BDO. He acted for BDO in relation to the plaintiffs and their business.
8. BDO is liable for the acts and omissions of Innes-Jones and McKay undertaken within the scope of their actual or apparent authority. Innes-Jones and McKay are also sued personally to the extent they each owed and breached duties of care to the plaintiffs.
9. This proceeding arises out of the defendants' acceptance and performance of two incompatible professional mandates concerning the plaintiffs' business and its application to BNZ for finance in 2019 and 2020.

First retainer and advisory relationship

10. In late 2019 the plaintiffs retained BDO, acting through Innes-Jones, to prepare financial projections and related advisory material for presentation to BNZ in support of funding.
11. The retainer was recorded in an engagement letter dated 5 December 2019 and related invoices, including an invoice dated 13 November 2019 for preparation of integrated forecasts for Digital Signs (2017) Limited in the sum of \$7,500 plus GST.
12. On or about 2 December 2019 BDO produced financial projections for the plaintiffs' business.
13. Those projections recorded, among other things, projected net profit after tax of \$309,279 and EBITDA of \$419,116 for the year ending 31 March 2021, and projected net assets of \$131,884 as at 31 March 2021.
14. In preparing the projections, BDO reviewed the plaintiffs' business model, revenue pipeline, prospective projects, capital requirements, governance, and risks. BDO thereby acquired a detailed understanding of the plaintiffs' business.

15. BDO's work was not confined to arithmetical compilation. It involved evaluative judgement as to revenue prospects, risk adjustments, cash flows, governance, and the commercial viability of the business.
16. BDO, acting through Innes-Jones, advised the plaintiffs that the business had significant trading merit.
17. BNZ thereafter advanced funding of approximately \$200,000 to the plaintiffs' business in or about December 2019.
18. On or about 25 February 2020, and subsequently in March 2020, BDO proposed to provide ongoing accounting and advisory services to the plaintiffs, including monthly review of financial data, 90-day cash-flow work, and participation at board or advisory board level.
19. The plaintiffs accepted that proposal, and BDO commenced providing ongoing advisory services to the plaintiffs.
20. On 8 May 2020 BDO's East Tamaki office became the registered office of the companies making up the plaintiffs' business, in anticipation of BDO providing compliance and tax services.
21. On 20 May 2020 BDO issued further engagement documentation relating to tax return and secretarial services, although those services were not ultimately provided.
22. By reason of the matters pleaded in paragraphs 10 to 21, BDO had a continuing advisory relationship with the plaintiffs and had acquired detailed knowledge of the plaintiffs' business, finances, prospects, internal information, and funding strategy.

Funding proposal and second retainer

23. In April and May 2020, after the onset of COVID-19 disruption, the plaintiffs sought further funding from BNZ.
24. At or about the same time, the plaintiffs had the opportunity to acquire two operational digital billboards from Halo for \$301,000 plus GST, which the plaintiffs regarded as commercially valuable assets.

25. At or about the same time, the plaintiffs obtained an independent valuation of the two operational Halo billboards in the amount of \$827,955 plus GST.
26. By late May 2020 the plaintiffs' funding request was approximately \$2 million.
27. On 2 June 2020 a meeting took place at BDO East Tamaki with BNZ. It was attended by Paul Kilmartin for BNZ, David Jaques for the plaintiffs' business, and Innes-Jones for BDO.
28. At that meeting BNZ indicated that it would require an independent financial report or independent business review in connection with the proposed lending.
29. Further, BNZ indicated that it was prepared to consider, or provide, a materially larger facility of up to \$10 million, subject to a favourable independent review or approval from McKay.
30. BNZ proposed that the review work be undertaken by McKay of BDO. The plaintiffs engaged, or accepted the engagement of, BDO and McKay to carry out that assessment.
31. On 4 June 2020 BDO, acting through McKay, sent terms of engagement for the independent report or review. Those terms were signed on behalf of the plaintiffs.
32. The second retainer concerned the same business, the same funding relationship with BNZ, and substantially the same subject matter as the first retainer and advisory relationship, albeit in the context of a further or revised funding request following COVID-19 disruption.
33. Before and after acceptance of the second retainer, Innes-Jones and McKay communicated about the engagement and the plaintiffs' business. On 11 June 2020 Innes-Jones also attended an advisory board meeting concerning the business, including the funding process and McKay's review.

34. On 29 June 2020 BDO invoiced the plaintiffs for work including the BNZ meeting of 2 June 2020, the advisory board meeting of 11 June 2020, and related work.
35. Between 8 June and 27 July 2020 McKay raised concerns about the plaintiffs' business and accounting treatment, including the treatment and value of the Halo billboards, and shifted from indicating support for funding at one level to declining to support any lending.
36. On or about 11 or 12 June 2020 McKay and Innes-Jones held a telephone discussion concerning the multiple engagements BDO had with the plaintiffs. During or following that discussion, McKay instructed Innes-Jones to cease providing services to the plaintiffs, and Innes-Jones did so.
37. The plaintiffs' informed consent was not sought or obtained before McKay instructed Innes-Jones to cease providing professional advisory services to the plaintiffs.
38. As a result, the plaintiffs lost the ongoing support of Innes-Jones in responding to accounting and business-viability issues raised by McKay in the review.

McKay report and BNZ decision

39. On or about 26 August 2020 BDO, acting through McKay, issued a report described as a draft, but treated by BNZ and the parties as operative for the funding decision. The report was materially adverse to the plaintiffs' funding application and business.
40. The report was materially inaccurate, and failed to assess fairly the commercial viability of the plaintiffs' business, including the barriers to entry and competitive advantages associated with digital billboard sites, resource consents, and the plaintiffs' operating model.
41. The report included, among other things, criticisms or conclusions to the effect that:

- (a) no or no material value should be attributed to the Halo billboards and other company-owned billboard assets;
- (b) the Wash Depot billboard should not be treated as an asset;
- (c) there were serious doubts as to collectability of debtors;
- (d) historical revenue recognition and cash-flow forecasting were materially overstated or unreliable;
- (e) the plaintiffs' business and related entities were under-capitalised and effectively insolvent; and
- (f) legal advice should be taken in relation to reckless trading and insolvency issues.

42. BNZ thereafter refused further lending and withdrew support from the plaintiffs' business, including by withdrawing or calling up existing facilities or support.

Matters giving rise to conflict of interest

43. At all material times the defendants knew or ought to have known that:

- (a) BDO had already advised the plaintiffs on projections, funding, cash flows, governance, strategy, and the commercial viability of the same business;
- (b) Innes-Jones had acquired detailed knowledge of the plaintiffs' business and had been acting as an adviser in relation to the plaintiffs' funding efforts and commercial growth;
- (c) the second retainer required BDO and McKay to present themselves as independent reviewers for BNZ in respect of the same business and substantially the same funding proposal or funding relationship;
- (d) acceptance and performance of the second retainer gave rise to a material conflict of interest, alternatively a material threat to independence and objective judgement, at firm level;

- (e) if BDO or McKay formed accounting or commercial views materially adverse to the plaintiffs, and inconsistent with BDO's existing advisory relationship, that conflict or difference should have been disclosed;
- (f) the plaintiffs relied on BDO, Innes-Jones, and McKay to identify and avoid that conflict or threat to independence;
- (g) the plaintiffs relied on Innes-Jones' detailed knowledge and continuing advisory support in responding to accounting, funding, and business-viability issues; and
- (h) the report would materially influence BNZ's decision whether to provide, continue, or withdraw finance.

44. The McKay report contained material inaccuracies. It also contained statements that were unnecessarily critical, for example, saying that the directors should take legal advice, carrying with it the implication they had breached their duties as directors.
45. The McKay report had a blighting effect on the plaintiffs' ability to approach other entities for investment.
46. Further or alternatively, at material times BDO acted as registered office, accountants, or business advisers for Lumo Digital Outdoor Limited, which was a competitor of the plaintiffs. BDO did not disclose that relationship to the plaintiffs.
47. If BDO had complied with its legal responsibilities, then McKay would never have been appointed and he would never have produced the (materially incorrect, unnecessarily adverse) McKay report. In those circumstances, the plaintiffs plead that another suitable candidate would have been approached; the report would have been positive; the plaintiffs would have received the contemplated investment from a bank; and that the business would have gone on to be very profitable.

First cause of action: breach of fiduciary duty

48. The plaintiffs repeat paragraphs 1 to 46 above.
49. By reason of the advisory relationship pleaded above, BDO undertook to act for or on behalf of the plaintiffs in circumstances giving rise to duties of loyalty in relation to the first retainer and the ongoing advisory role.
50. The relationship was fiduciary in nature. BDO owed duties:
- (a) not to place itself in a position where its duties to the plaintiffs conflicted with its own interests or with another inconsistent role;
 - (b) not to accept or continue an inconsistent retainer without the plaintiffs' fully informed consent;
 - (c) not to use information or position acquired through the advisory retainer against the plaintiffs in connection with the second retainer; and
 - (d) not to use its position in the second retainer to interfere with, undermine, or terminate the professional advisory services being provided to the plaintiffs through Innes-Jones, without the plaintiffs' fully informed consent.
51. BDO breached the duties pleaded at paragraph 49 by:
- (a) accepting and continuing the second retainer without the plaintiffs' fully informed consent;
 - (b) placing itself in a position of conflict between its advisory role for the plaintiffs and its purportedly independent review role for BNZ;
 - (c) failing adequately to disclose, manage, or avoid that conflict or material threat to independence;
 - (d) using, or placing itself in a position where it might use, information and position acquired through the advisory relationship adversely to the plaintiffs;

(e) causing or permitting McKay to instruct Innes-Jones to cease providing advisory support to the plaintiffs without the plaintiffs' knowledge or informed consent; and

(f) issuing or permitting the issue of a materially adverse report in circumstances where BDO was conflicted or not independent.

52. By reason of the breaches pleaded above, the plaintiffs suffered loss and damage.

53. On this cause of action, the plaintiffs claim equitable compensation or, where available, damages, to be assessed.

Relief sought

- Equitable damages and/or compensation;
- Interest
- Costs.

Second cause of action: breach of common law duty of care

54. The plaintiffs repeat paragraphs 1 to 46 above.

55. The defendants owed the plaintiffs duties to exercise reasonable skill and care in accepting, continuing, and performing accounting, advisory, review, and reporting services in relation to the plaintiffs' business and funding application.

56. Those duties were owed by BDO by reason of the retainers and advisory relationship, and by Innes-Jones and McKay by reason of their assumption of responsibility for professional services concerning the plaintiffs' business, their knowledge that the plaintiffs would rely on those services, and their knowledge that BNZ would rely on the report in making funding decisions affecting the plaintiffs.

57. The duties included duties:

- (a) to take reasonable care to identify, evaluate, disclose, and manage any material conflict of interest or material threat to independence or objective judgement;
- (b) not to accept or continue an engagement requiring independence if the defendants could not act objectively and independently;
- (c) to prepare any report intended for BNZ with reasonable professional skill and care, and in a manner that was fair, balanced, objective, and genuinely independent;
- (d) not to withdraw or impair the plaintiffs' continuing advisory support without reasonable notice, proper basis, and informed consent where that withdrawal or impairment created foreseeable risk of harm to the plaintiffs; and
- (e) to avoid causing foreseeable economic loss to the plaintiffs by providing a conflicted, non-independent, or negligent report in circumstances where the defendants knew the report would materially influence BNZ's lending decision.

58. The defendants breached the duties pleaded at paragraphs 54 to 56.

Particulars of breach include that the defendants:

- (a) accepted and continued the second retainer notwithstanding the conflict or material threat to independence created by the first retainer and ongoing advisory relationship;
- (b) failed adequately, or at all, to disclose that conflict or material threat to the plaintiffs;
- (c) failed to decline or withdraw from the second retainer when the conflict or material threat to independence could not be adequately managed;
- (d) failed to establish or maintain effective safeguards between Innes-Jones and McKay and within BDO;

- (e) caused or permitted McKay to instruct Innes-Jones to cease providing advisory support to the plaintiffs;
- (f) failed to take proper account of available information concerning the plaintiffs' historical performance, revenue pipeline, assets, projects, and projected revenues;
- (g) failed properly to consider the commercial economics, carrying value, and cash-flow contribution of the Halo billboards and related projects;
- (h) failed properly to consider whether a funding proposal structured around the Halo and Wash Depot opportunities was viable;
- (i) failed properly to assess the barriers to entry associated with installing and operating digital billboards, and the competitive advantage associated with scarce suitable sites and cost-effective leases;
- (j) failed properly to assess the plaintiffs' ability to obtain resource consents for digital billboards;
- (k) failed properly to assess the revenue implications of the plaintiffs' operating model, including their proposed or proprietary low-cost advertising model;
- (l) adopted or expressed unduly adverse positions on debtors, revenue recognition, cash flow, solvency, and reckless trading without adequate analysis or balance; and
- (m) produced or permitted a report which did not fairly or competently present the plaintiffs' position to BNZ.

59. By reason of the breaches pleaded above, the plaintiffs suffered the loss and damage pleaded below.

Loss and damage

60. As a result of the defendants' breaches, BNZ refused further finance to the plaintiffs' business and withdrew support from it.

61. Following BNZ's withdrawal of support, the plaintiffs' business was unable to continue in the manner previously contemplated and suffered serious business disruption, curtailment, and loss.
62. In the counterfactual world where the defendants complied with their duties:
 - (a) BDO would have declined or ceased the second retainer;
 - (b) BDO would have disclosed and managed the conflict or material threat to independence, including by obtaining the plaintiffs' fully informed consent where required;
 - (c) BDO would have put in place effective safeguards and produced a genuinely independent and competent report;
 - (d) the plaintiffs would have obtained an unconflicted independent report from another provider; and
 - (e) the plaintiffs had a real and substantial chance of obtaining BNZ finance, including the proposed facility of up to \$10 million or such other facility as BNZ would have approved.
63. In any of those counterfactual scenarios, the plaintiffs had a real and substantial chance, alternatively a probability, of obtaining finance from BNZ on terms sufficient to permit the continuation and development of the plaintiffs' business, including the Halo acquisition and related opportunities.
64. The plaintiffs thereby lost the chance to obtain that finance and the business value, earnings, and commercial opportunity that would or might have followed from it.
65. The plaintiffs' loss and damage include:
 - (a) loss of the chance of obtaining bank finance from BNZ;
 - (b) loss of the chance to acquire, retain, or develop commercially valuable billboard assets and projects, including the Halo opportunity;

- (c) loss of profits, EBITDA, business value, or other commercial opportunity, assessed on a loss-of-chance basis and/or on a conventional but-for basis as the evidence permits;
- (d) wasted expenditure, professional fees, financing costs, and transaction costs incurred in pursuing the funding and related projects;
- (e) loss associated with business disruption and the collapse or curtailment of operations following BNZ's withdrawal of support;
- (f) loss suffered by David Jaques personally arising from his role in, investment in, or personal support for the business, including any personal funding exposure or liability, particulars of which will be provided; and
- (g) other consequential losses to be particularised.

66. The heads of loss pleaded above are claimed in the alternative where necessary and not so as to permit double recovery. Further particulars and any schedule of loss will be supplied following disclosure and expert accounting evidence.

67. On this cause of action, the plaintiffs claim damages in negligence, including damages for loss of a commercial opportunity and consequential loss, to be assessed.

Relief sought

- Damages
- Interest
- Costs.

Third cause of action: breach of contract against BDO—breach of contract

68. The plaintiffs repeat paragraphs 1 to 46 above.

69. By reason of the first retainer, the ongoing advisory relationship, and the second retainer, BDO provided professional services to the plaintiffs pursuant to one or more contracts, whether written, oral, or implied from conduct.

70. It was an express or implied term of the contract or contracts, alternatively a term implied by law, that BDO would exercise reasonable skill and care in accepting, continuing, and performing its professional services for the plaintiffs.

71. It was further an express or implied term of the contract or contracts, alternatively a term implied by law, that BDO would:

- (a) carry out adequate firm-wide conflict checking and engagement acceptance or continuance procedures;
- (b) disclose to the plaintiffs any material conflict of interest or material threat to independence or objectivity;
- (c) not accept or continue an engagement requiring independence if BDO could not provide that independence;
- (d) implement effective safeguards if the engagement was capable of continuing consistently with professional independence;
- (e) prepare any report undertaken for BNZ with reasonable professional skill, care, objectivity, and independence;
- (f) not hold out any report as independent if BDO was not in a position to provide a genuinely independent report; and
- (g) not use the second retainer to undermine or terminate the continuing advisory services BDO was providing to the plaintiffs without proper basis and informed consent.

72. BDO breached the terms pleaded at paragraphs 70 and 71.

Particulars of breach include that BDO:

- (a) accepted and continued the second retainer notwithstanding the conflict or material threat to independence created by the first retainer and the ongoing advisory relationship;
- (b) failed to disclose that conflict or material threat adequately or at all;
- (c) failed to decline or withdraw from the second retainer;
- (d) failed to establish or maintain effective safeguards between Innes-Jones and McKay and within BDO;
- (e) caused or permitted McKay to instruct Innes-Jones to cease providing advisory support to the plaintiffs;
- (f) presented or permitted the report to be presented as independent when BDO was not in a position to provide a genuinely independent report;
- (g) prepared or permitted the report negligently and without adequate balance, objectivity, or proper professional care; and
- (h) failed properly to assess the value, utility, and cash-flow contribution of the Halo billboards and other company-owned billboard assets, the viability of the plaintiffs' business model, and the basis for any conclusions as to insolvency, under-capitalisation, and reckless trading.

73. By reason of the breaches pleaded above, the plaintiffs have suffered loss and damage.

74. On this cause of action, the plaintiffs claim damages for breach of contract, including damages for loss of a commercial opportunity and consequential loss, to be assessed, referring to the loss and damage pleaded above.

75. The plaintiffs claim interest under section 10 of the Interest on Money Claims Act 2016, calculated at the applicable statutory rate from time to time, from the date or dates on which the relevant amounts are found to

have been quantified, alternatively under section 18 of that Act at such rate and from such earlier date as the Court considers just, until payment.

Relief sought

- Damages
- Interest
- Costs.

This **STATEMENT OF CLAIM** is filed by **DOUGLAS AUSTIN COWAN**, solicitor for the plaintiffs, of the firm Cowan Law, Level 1, 10 Heather Street, Parnell, Auckland. Documents for service may be left at that address or served by email using the following email addresses:

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