GILBERT WALKER

26 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 19 June 2026.

There is no merit in the plaintiffs' claims

2. Nothing in your letter changes our clients' view that the plaintiffs' claims have no merit. We do not see value in continuing to debate this at length in correspondence, but make the following observations (which are not a comprehensive list of the flaws in the plaintiffs' claims):

   a. Your letter highlights that there is no basis for the breach of fiduciary duty claim. The assertion that BDO Auckland previously acted for the companies and then undertook an independent business review (for those same companies) in circumstances where its independence and loyalty were compromised has no foundation. The only point you have relied on is that BDO Auckland's earlier forecasts "would have formed part of the material considered by Mr McKay". That statement is incorrect. The material reviewed by BDO Auckland for its independent review did not include its earlier work for the plaintiffs. There is no basis to claim BDO Auckland's independence and loyalty were compromised and the fiduciary duty claim will fail.

   b. Your letter makes general statements of law concerning the remedies for breach of fiduciary duty, but does not attempt to explain why this would lead to a damages claim even if it cannot be shown that BDO Auckland's independent review was negligent. The fiduciary duty claim cannot, in these circumstances, result in any damages claim distinct from that which would arise under the negligence claim. Your assertion that the fiduciary duty claim would not be covered by the limitations of liability in BDO Auckland's terms is not explained and is irreconcilable with the plain words of those clauses, which do limit liability for this claim.

c. Our letter referred to the companies' outstanding debt to the IRD and unmet payment plan as examples of the companies' poor financial position and poor management. They are telling examples. However, there is a litany of other deficiencies in the companies' financial position and management, as outlined in BDO Auckland's report, which justified its conclusions. In light of those deficiencies, it is not credible to suggest that BDO Auckland's report was negligent.

d. We do not understand your assertion that our letter applies the wrong standard in relation to loss of a chance. The only standard referred to in our letter is "a real and substantial chance". That is the same standard as referred to in your letters of 29 May 2026 and 19 June 2026.

e. "A real or substantial chance" is not a low standard as your letters appear to suggest. Instead, this standard highlights another difficulty with your clients' claim. There is no evidence that there was a real or substantial chance of your clients obtaining funding at the levels claimed or at all. All the evidence points to the contrary. The suggestion that the companies' inability to obtain funding elsewhere is consistent with their negligence claim is unsound: the fact that a number of other lenders declined to lend to the companies reinforces the point that they could not obtain funding.

f. You have now sent two letters asserting that the application of the limitations of liability in BDO Auckland's terms are in issue without attempting to explain why they do not apply. The limitations plainly apply to these claims, including the breach of fiduciary duty claim.

The correct defendant

3. Our clients have already explained who the correct defendant is. This is also clear from the engagement letters and should have been identified by the plaintiffs at the outset.

4. Further, Digital Signs Limited and Digital Advertising Limited agreed not to bring any action against certain parties, except for the specific entity they engaged for this assignment. This was part of BDO Auckland's engagement terms.[1] That entity was BDO Auckland. The plaintiffs are therefore barred from bringing a claim against Mr

[1] Clause 12.6, Standard Terms and Conditions – Engagement Letter dated 4 June 2020.

McKay, Mr Innes-Jones or BDO Auckland Limited. In any event, it adds nothing to the plaintiffs' claim to add these defendants alongside BDO Auckland.

5. The claims against the defendants other than BDO Auckland should be discontinued immediately. Our clients do not agree to the conditions your clients suggest for their doing so. Our clients may apply to strike out these parties as defendants and will seek costs on that application if no discontinuance is filed.

Initial disclosure

6. Your letter misunderstands the plaintiffs' disclosure obligations and does not adequately address the material deficiencies in their disclosure.

Scope of disclosure

7. Your letter suggests that BDO should identify specific documents it says are missing and explain the basis on which they are said to be disclosable. That is a backwards approach which ignores the plaintiffs' disclosure obligations. The plaintiffs cannot pick and choose what to disclose and then require the defendants to identify further specific documents they require. Rule 8.4 requires the plaintiffs to disclose "<u>all</u> documents referred to in [their] pleading", "<u>any</u> additional principal documents" and "<u>all</u> adverse documents" (emphasis added). It is unreasonable to require the defendants to identify "specific documents" for the obvious reason that, in most cases, the defendants do not know what specific documents exist and can only describe the documents required to be disclosed by reference to categories.

8. Our letter of 11 June 2026 identified categories of documents which the plaintiffs were required but have failed to disclose under r 8.4, being:

   a. documents relating to the plaintiffs' IRD arrears, the 2020 set-aside application and approaches to other financiers; and

   b. the further statutory demand and PLA notice issued to your clients in 2020.

9. We repeat that these documents are required to be disclosed under r 8.4(1)(b) because it is apparent from the plaintiffs' statement of claim and your letter of 29 May 2026[2] that they are documents on which your clients intend to rely at trial. They are also "adverse documents" that the plaintiffs are required to disclose under r 8.4(1)(c).

[2] Including the statements in that letter that the "IRD arrears, the 2020 set-aside application, and approaches to other financiers, are matters of context that will be dealt with in evidence" and, "Any approaches to alternative funders after BNZ withdrew its support are consistent with mitigation, not inconsistent with the claim."

10. Our clients accept that it is unlikely that every document touching these topics will be disclosable. However, there has been a wholesale failure by the plaintiffs to provide disclosure of any documents within these categories. Documents in these categories exist, are known to the plaintiffs (including because some are mentioned in your letters) and would have been identified by a reasonable check. They ought to have been disclosed under r 8.4.

Deficient affidavit for disclosure

11. Our previous letter cited a specific rule for each deficiency identified in Mr Jaques' affidavit for disclosure (see paragraph 12). We referred to form G37 to illustrate those deficiencies. Instead of addressing each deficiency, your letter relies on the point that the use of form G37 is not mandatory. That does not advance matters given the failure to address the specific deficiencies we have identified, and given that form G37 merely reflects the requirements of r 8.15 in any event.

12. We do not accept that the substance of the wording of the affidavit is sufficient. Mr Jaques does not state, expressly or in substance, that he understands the discovery obligations under r 8.4. That is required by r 8.15(2)(b). Nor does he give any particulars (expressly or in substance) of the steps taken to check for the existence of adverse documents. This is required by r 8.15(2)(c).

13. These are straightforward statements that are required by the Rules to be included in any affidavit for disclosure. Mr Jaques' failure to provide this information by way of affidavit and his failure to confirm that a corrective affidavit will be provided only heightens our clients' concerns about the plaintiffs' failure to understand and comply with their disclosure obligations.

14. Your letter states that the initial disclosure provided largely comprises documents already provided to BDO Auckland. It is no exception to the requirements of r 8.15 that the initial disclosure includes documents previously provided to the other party. This statement also emphasises the limited nature of the initial disclosure provided.

Listing and exchange

15. Your letter confirms that the plaintiffs will remedy their failure to comply with the listing and exchange protocol. Please confirm that, as well as rectifying the form of listing of documents, the plaintiffs will:

    a. Provide descriptions of any documents in which the plaintiffs claim privilege or confidentiality, including the ground on which any such claim is based (r 8.15(2)(d)).

b. Provide descriptions of any documents known to the plaintiffs but not in their control (r 8.15(2)(e)).

c. List and provide copies of all individual documents, rather than providing bulk PDFs (cl. 6-11, listing and exchange protocol).

Timeframe to provide complete disclosure and affidavit of documents

16. The High Court Rules 2016 require initial disclosure to be completed and provided at the time of the plaintiffs' statement of claim (r 8.4(1)). Your clients are in default in that obligation. Despite acknowledging some deficiencies, they have not confirmed when compliant disclosure will be provided (other than "in due course").

17. Our clients require these defaults to be remedied promptly. The purpose of providing up-front initial disclosure is to enable the parties to consider the claims, promptly make any interlocutory applications and advance the proceeding. Our clients are restricted in their ability to take those steps until your clients provide compliant initial disclosure. Your clients have already had several weeks since receiving our letter to take corrective steps.

18. In light of this, our clients require that the plaintiffs provide, no later than 10 July 2026:

    a. Disclosure in accordance with r 8.4 of:

        i. All documents relating to the plaintiffs' IRD arrears, the 2020 set-aside application and approaches to other financiers.

        ii. All documents relating to the statutory demand and PLA notice issued to your clients in 2020.

    b. An affidavit of documents which:

        i. Provides the confirmation required by r 8.15(2)(b) that Mr Jaques understands the plaintiffs' discovery obligations under r 8.4.

        ii. Gives particulars of the steps taken to check for the existence of adverse documents as required by r 8.15(2)(c).

        iii. Complies with the listing and exchange protocol, including by complying with each of the requirements identified at paragraph 12 of our letter of 11 June 2026.

19. If complete disclosure is not provided by 10 July 2026, our clients will apply for further disclosure and will seek costs on that application.

Security for costs

20. Our clients maintain that an order for security for costs is appropriate. That order would include an allowance for an interlocutory application, which is an ordinary step in a civil proceeding and a step which may be required in this proceeding to address, amongst other things, the plaintiffs' incomplete disclosure and the naming of Mr Innes-Jones, Mr McKay and BDO Auckland Limited as defendants.

21. Notwithstanding this, our clients accept the plaintiffs' offer to provide security for costs of $30,000 for the initial stages of the proceeding through to the judicial issues conference. Please confirm when this amount has been received into your trust account, and that you undertake to hold the funds as security for any costs orders that may be made in favour of the defendants and not to disburse the funds without the defendants' consent or court order. Our clients reserve the right to make an application for security for costs if this security is not provided on these terms by 10 July 2026.

Conclusion

22. For the reasons set out above, please confirm that:

    a. The plaintiffs will discontinue their claims against BDO Auckland Limited, Mr McKay and Mr Innes-Jones immediately.

    b. The plaintiffs will provide complete and compliant initial disclosure as set out at paragraph 18 above, no later than 10 July 2026.

    c. The plaintiffs will pay $30,000 into your trust account as security for the defendants' costs, and that you undertake not to disburse the funds without the defendants' consent. Please confirm no later than 10 July 2026 that you have received the funds on this basis.

Yours faithfully,

Martin Smith / Sean Coupe
Partner / Associate

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