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Dear Colleagues,

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

1. We refer to your revised draft list of key issues received on 8 September 2026, marked up against the draft enclosed with our letter of 20 August 2026. We have considered your amendments with counsel. This letter sets out our clients' response. A further revised draft incorporating the points below is enclosed (**Revised Draft**).

General

2. There is a good deal of common ground. Our clients accept the defined terms Digital Signs, Digital Advertising, IA Report and Standard Terms; the addition of separate issues identifying the fiduciary, contractual and common law duties relied on; the separation of the single affirmative defences issue into issues tracking the seven defences pleaded; and the treatment of contributory conduct under the heading of affirmative defences. Those changes are carried into the Revised Draft.

3. Three general points arise which explain most of the changes we have made.

4. First, your draft substitutes BDO Auckland for Mr Innes-Jones and Mr McKay throughout. Our clients accept BDO Auckland as a convenient reference to the second defendant. However, Mr Innes-Jones and Mr McKay are sued personally as well as being liable as partners, and whether they owed duties personally is itself in issue on the pleadings (statement of claim, paragraphs 8 and 56; statement of defence, paragraph 8). Where an issue concerns the conduct of one of them, the Revised Draft says so, and an issue directed to their personal duties has been added. The list should not be drafted so as to presuppose the answer to the second affirmative defence.

5. Second, the issues in your draft directed to the affirmative defences describe the Standard Terms as the standard terms of engagement between BDO Auckland and Digital Signs and Digital Advertising, and proceed as though it were common ground that those terms govern every matter complained of. It is not. The plaintiffs' position, pleaded at paragraphs 22, 78 and 80 of the reply, is that the continuing advisory

engagement performed by Mr Innes-Jones in 2020 was not subject to any written terms of engagement, and that Mr McKay's instruction to Mr Innes-Jones to cease providing those services was conduct outside the scope of the written engagements. The scope and application of the Standard Terms is therefore a threshold question which logically precedes the clause-by-clause issues. It has been added at the head of the affirmative defences section.

6. Third, several of the deletions remove from the list matters which are squarely pleaded and denied. A condensed list is a summary of the issues arising on the pleadings as they stand. It is not an occasion for either party to narrow the other's case. We address the individual deletions below.

Duty and the engagements

7. Continuing advisory engagement. We accept your reformulation of the first issue as a question whether Digital Signs and Digital Advertising engaged BDO Auckland in 2020 to provide advisory services on a continuing basis and, if so, on what terms. We have added that the engagement was performed through Mr Innes-Jones, and that the question includes whether the engagement was governed by any written terms of engagement. That is the point on which the parties are divided (reply, paragraph 22) and the issue should say so.

8. Instructions for the IA Report. Accepted, with the addition that the services were provided through Mr McKay. The question by whom BDO Auckland was instructed is retained.

9. Duties. We accept your three duty issues. We have added to the contractual duties issue an express reference to clauses 4.1 and 4.2 of the Standard Terms, which the plaintiffs allege were breached (reply, paragraph 71) and on which the defendants themselves rely (statement of defence, paragraph 71). We have also added an issue as to the personal duties of Mr Innes-Jones and Mr McKay, for the reason given in paragraph 4 above.

Breach

10. Conflict of interest and the instruction to cease advisory services. Your draft deletes the issue whether the acceptance and performance of the McKay engagement gave rise to a conflict of interest, alternatively a material threat to independence or objective judgement, at firm level, and on what authority Mr McKay instructed Mr Innes-Jones to cease providing advisory services. It substitutes a single question whether, if a fiduciary duty was owed, BDO Auckland breached it in accepting and completing the retainer for the IA Report. That is not accepted.

11. The conflict and the instruction to cease are the central factual controversies in this proceeding. They are pleaded at paragraphs 36, 37 and 43 of the statement of claim and as particulars of breach under each of the three causes of action (paragraphs 51(e), 58(a) to (e) and 72(a) to (e)). They are denied. They are not confined to the fiduciary cause of action. The same facts are pleaded as breaches of the tortious and contractual duties, including clause 4.1 of the Standard Terms. The cessation of advisory services is

pleaded as a breach in its own right, and as conduct falling outside the written engagements. Your formulation, limited to fiduciary duty and to accepting and completing the retainer, would leave those matters unstated. The Revised Draft reinstates them as two issues, the first directed to the conflict and its disclosure, the second to the instruction to cease and the authority for it, and retains your fiduciary breach question extended to those matters.

12. The IA Report. Your draft deletes the question whether the IA Report answered the instructions given, in particular as to the commercial viability of the business, leaving only whether the report was prepared to the required standard. Whether the report answered the question BNZ asked is distinct from the care with which it was prepared, and it is pleaded (statement of claim, paragraphs 40, 58(f) to (m) and 72(g) and (h)). The Revised Draft combines both elements in one issue, adopting your reference to the standard required by the contractual and tortious duties owed.

Causation

Alternative provider

13. .We accept the substance of your reformulation, which asks what an alternative provider exercising reasonable care and skill would have concluded, in place of the question whether the plaintiffs would have obtained a report from another provider. Two adjustments have been made. The alternative provider is described as free of conflict as well as competent, because that is the pleaded counterfactual (statement of claim, paragraph 62(d)). The reference to the IA Report has been replaced with a neutral description of an independent assessment for BNZ, since the content of a report by another provider is the very matter in issue.

Causation of loss

14. Your new issue asks whether, if the IA Report was not prepared to the standard of a reasonably competent accountant, that caused loss to the plaintiffs. Causation is not confined to the preparation of the report. The plaintiffs plead that each of the breaches, including the conflict and the withdrawal of advisory support, caused the loss (statement of claim, paragraphs 38 and 60 to 63). The Revised Draft frames the causation question by reference to any breach established under the breach issues.

BNZ

15. The issue whether the plaintiffs had a real and substantial chance of obtaining finance from BNZ and, if so, on what terms and at what level of facility, is agreed.

Other causes

16. Your draft deletes the issue whether, and to what extent, the curtailment or collapse of the business was caused by matters unconnected with the defendants’ conduct, including the matters pleaded at paragraph 96 of the statement of defence. The defendants deny causation, plead the matters at paragraph 96 as the financial position and management of the companies, and rely under the sixth affirmative defence on loss reasonably attributable to third parties. Whether the business would have failed in any

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event is a causation question on which both parties will call evidence, and it is distinct from the apportionment questions arising under the seventh affirmative defence. The issue is reinstated. If the defendants do not intend to contend that the business would have failed regardless of the IA Report, please say so and the issue can be removed.

Loss

17. Your draft deletes the loss issue and substitutes the words “issues to be identified once an amended pleading is filed identifying alleged heads of loss and quantum”. That is not accepted. The heads of loss are pleaded at paragraph 65 of the statement of claim and the basis of assessment at paragraphs 62 to 65. Quantum is to be assessed. As paragraph 66 records, a schedule of loss will be supplied following disclosure and expert accounting evidence, in accordance with the timetable. No amended pleading is required, and none has been sought by application. If the defendants consider that they require further particulars, the rules provide the means. The loss issue as drafted by the plaintiffs is reinstated. We are content for sub-issues on quantum to be added once the expert evidence has been exchanged.

Affirmative defences

18. Subject to the threshold issue described in paragraph 5 above, we accept your issues on the first, second, third, fourth and sixth affirmative defences as drafted, with the references to the Standard Terms made consistent.

19. On the fifth affirmative defence (clause 12.2), your issue asks only whether the claims are time barred. The plaintiffs plead that written notice of a claim was given within the two-year period (reply, paragraph 93(c)), and the work to which the claims relate, and the date of its completion, are in dispute. The Revised Draft records those two sub-issues.

20. Contributory conduct: the three issues are retained under the affirmative defences heading, as you propose.

Matters not in issue

21. It may assist the Court and the parties in preparing their evidence if the list also records matters understood not to be in issue. We have set out at the end of the Revised Draft six matters which, on the pleadings, we understand to be common ground. Please confirm that they are, or identify any which are not accepted.

Next steps

22. We would be grateful for your response to the Revised Draft by Thursday 24 September 2026. Where the parties are unable to agree the formulation of a particular issue, we propose that both formulations be recorded in the list placed before the Court at the judicial issues conference, so that the difference can be resolved there. Our clients’ rights are reserved.

Yours faithfully

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CC. Steve Keall, Barrister

Enclosure: Plaintiffs' revised draft list of key issues