In the High Court of New Zealand
Auckland Registry

CIV 2026-404-1264

I Te Kōti Matua O Aotearoa
Tāmaki Makaurau Rohe

Between **Digital Holdings (2017) Limited**, **Digital Signs (2017) Limited**, **Digital Advertising (2017) Limited** and **David Jaques**

Plaintiffs

And **BDO Auckland Limited**, **BDO Auckland**, **Nicholas Robert Innes-Jones** and **Andrew John McKay**

Defendants

STATEMENT OF DEFENCE

Dated 14 July 2026

GILBERT WALKER

PO Box 1595
Shortland Street
Auckland 1140
New Zealand
P +64 9 374 1100
E service@gilbertwalker.com

Solicitor acting:
M C Smith

STATEMENT OF DEFENCE

The defendants refer to the plaintiffs' statement of claim dated 18 May 2026 and (adopting headings and definitions without admission) by their solicitor say:

Parties

1. They admit paragraph 1 and say further that Mr Jaques was adjudicated bankrupt on 26 June 2026.

2. They admit paragraph 2.

3. They deny paragraph 3 and say further that:

   a. BDO Auckland Limited is an internal services company utilised by the second named defendant, BDO Auckland.

   b. BDO Auckland Limited does not provide professional accounting and advisory services using the name "BDO Auckland" or otherwise.

4. They admit paragraph 4.

5. They apprehend that they are not required to plead to paragraph 5.

6. They admit that at all relevant times, Mr Innes-Jones was a partner of the second defendant, and that the second defendant provided limited accounting and advisory services to the first to third-named plaintiffs (referred to as **Digital Holdings**, **Digital Signs** and **Digital Advertising** respectively). They say further that those services were limited to those described in the October 2019 Engagement and December 2019 Engagement as pleaded below at paragraph 10, and that Accounting Plus Solutions Limited was the usual accountant to these companies. Save as admitted, they deny paragraph 6.

7. They admit that at all relevant times, Mr McKay was a partner of the second defendant (**BDO Auckland**) and that Mr McKay, on behalf of BDO Auckland, undertook an independent business review for Digital Signs and Digital Advertising pursuant to the IA Engagement Letter as pleaded at paragraphs 30 and 32 below. Save as admitted, they deny paragraph 7.

8. They admit BDO Auckland is liable for the acts and omissions of Mr Innes-Jones and Mr McKay undertaken within the scope of their actual or apparent authority to act on behalf of BDO Auckland. They otherwise deny paragraph 8.

9. They apprehend that they are not required to plead to paragraph 9.

First retainer and advisory relationship

10. In relation to paragraph 10, they admit that:

    a. By a letter of engagement dated 29 October 2019 (which they rely on as if pleaded in full), Digital Signs engaged BDO Auckland to prepare consolidated integrated forecasts to 31 March 2021, including assumptions and sensitivity analysis (**October 2019 Engagement**).

    b. By a letter of engagement dated 5 December 2019 (which they rely on as if pleaded in full), Digital Advertising and Digital Holdings engaged BDO Auckland to prepare consolidated integrated forecasts to 31 March 2021, including assumptions and sensitivity analysis (**December 2019 Engagement**).

    c. BDO Auckland understood that the plaintiffs intended to rely on those forecasts to seek lending from the Bank of New Zealand (**BNZ**).

    d. BDO Auckland provided the services specified in the October 2019 Engagement and December 2019 Engagement letters and completed those engagements in December 2019 and February 2020 respectively.

    Save as admitted, they deny paragraph 10.

11. In relation to paragraph 11, they admit that the retainer was recorded in part in the December 2019 Engagement letter and repeat paragraph 10 above. They admit that BDO Auckland issued an invoice to Digital Signs dated 30 November 2019 for $7,500 plus GST and disbursements, and that this invoice related to the preparation of integrated forecasts for Digital Signs together with detailed assumptions. Save as admitted, they deny paragraph 11.

12. They admit that on or about 2 December 2019, BDO Auckland produced financial projections for the years ending 31 March 2020 and 31 March 2021 for Digital Signs (**Digital Signs Projections**). They rely on BDO Auckland's report producing the Digital Signs Projections as if pleaded in full and say further that:

    a. The Digital Signs Projections were produced subject to the October 2019 Engagement letter (which they rely on as if pleaded in full).

    b. The report containing the Digital Signs Projections recorded, inter alia:

i. The report was compiled on the basis of information provided to BDO Auckland by the director of Digital Signs, who was solely responsible for the information contained in the financial projections.

ii. Achievement of the financial projections was dependent upon future events of which the outcomes are uncertain. The actual results may therefore vary significantly from the financial projections and no warranty of accuracy or reliability can be given.

iii. BDO Auckland had not verified or validated the information supplied. BDO Auckland had neither reviewed nor audited the financial projections, nor assessed the propriety and consistent application of the accounting base and methods and the commercial assumptions on which the financial projections are prepared, and therefore expressed no opinion on those matters.

iv. Under the heading "Emphasis of Matter":

    1. The future revenue and profitability projections observed in the report include many future unsecured projects that the director of Digital Signs is expecting to secure. There is no guarantee that these projected unsecured jobs will be obtained by Digital Signs.

    2. The level of trading activity forecasted in the projections is significantly greater than the level that Digital Signs has previously traded at. The achievement of the financial projections is heavily dependent on whether Digital Signs is successful in obtaining these unsecured projects and the ability of Digital Signs to successfully operate at this increased trading level.

    3. The failure to meet one or both of these factors for which there is no guarantee of achievement will have a significant impact on the actual results that Digital Signs will achieve over the forecast period.

Save as admitted, they deny paragraph 12.

13. In respect of paragraph 13, they:

    a. repeat paragraph 12 above;

    b. deny that the projections recorded projected net profit after tax of $309,279 for the year ending 31 March 2021 and say further that the projections recorded projected net profit after tax of $309,271 for the year ending 31 March 2021; and

    c. otherwise admit paragraph 13.

14. In respect of paragraph 14, they:

    a. admit that in preparing the Digital Signs Projections BDO Auckland reviewed Digital Signs' revenue pipeline, prospective projects and capital requirements;

    b. repeat paragraph 12 above and say further that:

        i. the report was compiled on the basis of information provided to BDO Auckland by the director of Digital Signs, who was solely responsible for the information contained in the financial projections; and

        ii. the report was subject to the other qualifications and restrictions set out in paragraph 12 above, and as otherwise set out in the Digital Signs Projections report.

    Save as admitted, they deny paragraph 14.

15. They admit that BDO Auckland's work in relation to the Digital Signs Projections was not confined to arithmetical compilation and involved evaluative judgement. They repeat paragraphs 12 and 14 above. Save as admitted, they deny paragraph 15.

16. They deny paragraph 16.

17. They have insufficient knowledge and therefore deny paragraph 17.

18. They admit that, by email dated 25 February 2020, BDO Auckland provided Mr Jaques with a proposal to provide accounting and advisory services to Digital Signs and Digital Advertising, including end of year accounts, income tax returns, resolutions, monthly reviews of financial statements, preparation and/or review of 90 day cashflow position and attendance at board meetings when requested by Mr Jaques. They rely on that email as if pleaded in full and say further that:

a. This proposal was provided in response to a request from Mr Jaques for an estimate of the costs for these services.

b. Mr Jaques did not confirm this proposed engagement and it was never agreed or formalised or signed by Mr Jaques.

Save as admitted, they deny paragraph 18.

19. They deny paragraph 19 and repeat paragraph 18 above.

20. They admit paragraph 20, repeat paragraphs 18 and 19 above and say further that the plaintiffs ultimately did not engage BDO Auckland to provide compliance and tax services.

21. They admit paragraph 21, rely on BDO Auckland’s 20 May 2020 letter to Mr Jaques as if pleaded in full and say further that the plaintiffs did not accept the engagement proposed by BDO Auckland in that letter.

22. They deny paragraph 22.

Funding proposal and second retainer

23. They admit paragraph 23.

24. They admit that on or about May 2020, Halo Media Limited (in liquidation) (**Halo**) offered to sell two digital billboards to Digital Advertising for $301,000 plus GST and say further that by email dated 29 June 2020, Mr Jaques advised BDO Auckland that “The deal is confirmed and we’re just in the process of paying for it”. Save as admitted, they have insufficient knowledge and therefore deny paragraph 24.

25. They admit that on or about 18 May 2020, Digital Advertising obtained a valuation from SMEtric Consulting Group Limited for two billboards which provided a total depreciated value based on an economic life of 18 years for both billboards of $827,955. Save as admitted, they have insufficient knowledge and therefore deny paragraph 25.

26. They admit paragraph 26.

27. They admit paragraph 27 and say further that Mr Kilmartin worked for BNZ’s Strategic Business Services team, which becomes involved with companies that are distressed, insolvent, or where there are cashflow concerns.

28. They admit paragraph 28.

29. They deny paragraph 29.

30. They admit paragraph 30 and say further that:

    a. the terms of BDO Auckland's engagement to provide an independent assessment (which they rely on as if pleaded in full) were recorded in a letter of engagement dated 4 June 2020 between BDO Auckland and Digital Signs and Digital Advertising (**IA Engagement Letter** or **IA Engagement**);

    b. the IA Engagement Letter was signed by Mr Jaques on behalf of Digital Signs and Digital Advertising; and

    c. the IA Engagement Letter included BDO Auckland's Standard Terms and Conditions, annexed as Appendix A (**Standard Terms**).

31. They admit paragraph 31 and rely on the IA Engagement Letter as if pleaded in full.

32. They admit that the IA Engagement was again for Digital Signs and Digital Advertising and was again to be provided to BNZ, rely on the IA Engagement Letter as if pleaded in full, and say further that BDO Auckland's scope of work under this engagement:

    a. involved an independent review of the financial position of Digital Signs and Digital Advertising;

    b. included a review and analysis of the forecasts and proposals being prepared by the companies;

    c. did not include a review or analysis of the Digital Signs Projections; and

    d. unless BDO Auckland's instructions were later amended, the work BDO Auckland would undertake would be restricted to the matters outlined in the IA Engagement Letter.

    Save as admitted, they deny paragraph 32.

33. In respect of paragraph 33:

    a. They admit that before acceptance of the IA Engagement Letter, Mr McKay and Mr Innes-Jones communicated about the proposed engagement of BDO Auckland to provide an independent review of Digital Signs and Digital Advertising. They say further that those communications were limited to:

        i. Mr Innes-Jones providing Mr McKay with a description of the work BDO Auckland had previously undertaken for

Digital Signs and Digital Advertising, which was of a one-off nature and had been completed;

ii. Mr Innes-Jones explaining to Mr McKay that Digital Signs and Digital Advertising were looking at becoming clients of BDO Auckland, but this had not yet occurred, and BDO Auckland would not be preparing Digital Signs' and Digital Advertising's accounts to 31 March 2020;

iii. Mr Innes-Jones confirming to Mr McKay that BDO Auckland had not prepared the forecasts that were part of Digital Signs' and Digital Advertising's credit application to BNZ which would need to be reviewed by Mr McKay in preparing the independent business review report;

iv. Mr Innes-Jones advising Mr McKay that he was considering a role on the advisory board for Digital Signs and Digital Advertising, but had not confirmed that role; and

v. Mr McKay and Mr Innes-Jones agreeing that Mr Innes-Jones would go "on hold" whilst BDO Auckland completed the independent business review of Digital Signs and Digital Advertising.

b. They admit that after acceptance of the IA Engagement Letter, Mr McKay and Mr Innes-Jones communicated about the engagement and the plaintiffs' business, but say further that, during the course of BDO Auckland's engagement to provide the independent business review of Digital Signs and Digital Advertising, those communications were limited to administrative and logistical matters concerning the conduct of the independent review and did not involve any substantive discussion of the plaintiffs' financial position or business merits.

c. They admit that Mr Innes-Jones attended a meeting of the advisory board of Digital Signs and Digital Advertising on 11 June 2020 and that the business and BDO Auckland's review were discussed briefly at the meeting. They say further that the purpose of this meeting was as a "meet and greet" for the advisory board members and Mr Innes-Jones.

Particulars

Email: Mr Jaques to Mr Innes-Jones, 28 May 2020.

Save as admitted, they deny paragraph 33.

34. In respect of paragraph 34, they admit that BDO Auckland issued an invoice to Digital Signs on 29 June 2020 and say further that the attendances related to that invoice were:

    a. Client meetings: Meeting with Mr Jaques and Paul Kilmartin of the BNZ on 2 June 2020 and a meeting with Mr Jaques, Sarah Lochead-Macmillan and Ken Leeming on 11 June 2020; and

    b. Client correspondence: Phone calls and emails with Mr Jaques.

    Save as admitted, they deny paragraph 34.

35. They admit that between 8 June 2020 and 27 July 2020, Mr McKay raised concerns about the plaintiffs' business and accounting treatment. Save as admitted, they deny paragraph 35.

36. They admit that, on or about 12 June 2020, Mr McKay and Mr Innes-Jones had a telephone discussion in which Mr McKay reiterated to Mr Innes-Jones that he was to cease his involvement with Mr Jaques, and that following that discussion, Mr Innes-Jones did not undertake any substantive work for or instigate contact with the plaintiffs. Save as admitted, they deny paragraph 36.

37. They deny paragraph 37.

38. They deny paragraph 38.

McKay report and BNZ decision

39. In respect of paragraph 39, they admit that:

    a. Following BDO Auckland's review of Digital Signs' and Digital Advertising's financial position, on or about 27 August 2020, BDO Auckland issued a final draft independent assessment report (**IA Report**). They rely on that report as if pleaded in full.

    b. The IA Report concluded, amongst other things, that:

        i. all of the forecasts provided by Digital Signs and Digital Advertising for the purposes of the IA Report were in BDO Auckland's view overly optimistic given the financial position that they were trying to work from;

        ii. there were questions about the assets recorded on both companies' balance sheets and in addition Digital Signs had failed to meet a repayment plan with the Inland Revenue Department (**IRD**) for PAYE of $191,000;

iii. the companies could not sustain a level of debt of approximately $1 million;

iv. any additional lending was totally reliant on projected cash flows on a business model that had limited financial/trading data to project from;

v. based on the current financials the companies failed both the balance sheet and cash flow limbs of the solvency test;

vi. the companies' accounts payable in the general ledger was understated as a further $220k of creditors was not recorded in the accounts payable;

vii. adding further debt while providing cash would potentially make the problem worse;

viii. current debt and a lack of debtor payments was "seriously hampering" the business; and

ix. serious consideration should be given to obtaining equity or the sale of the business.

c. BDO Auckland first issued the IA Report to Mr Jaques, and then provided it to BNZ.

Save as admitted, they deny paragraph 39.

40. They deny paragraph 40.

41. They repeat paragraph 39 above, rely on the IA Report as if pleaded in full and otherwise deny paragraph 41.

42. They have insufficient knowledge and therefore deny paragraph 42.

Alleged conflict of interest

43. They admit that:

a. at the time BDO Auckland commenced the IA Engagement, BDO Auckland had previously completed the October 2019 Engagement and the December 2019 Engagement;

b. the IA Engagement required BDO Auckland to carry out an independent financial review of the Digital Signs and Digital Advertising business and report to them and BNZ; and

c. the IA Report was likely to materially influence BNZ's decision whether to provide, continue, or withdraw finance.

Save as admitted, they deny paragraph 43.

44. They admit that the IA Report suggested that the directors of Digital Signs and Digital Advertising seek legal advice regarding the companies' failure to meet both the balance sheet and cash flow limbs of the solvency test. Save as admitted, they deny paragraph 44.

45. They have insufficient knowledge and therefore deny paragraph 45.

46. They admit that BDO Auckland provided accountancy services to Lumo Digital Outdoor Limited and that BDO Auckland did not disclose that to the plaintiffs. They say further that BDO Auckland was not required to disclose that fact to the plaintiffs. Save as admitted, they deny paragraph 46.

47. They deny paragraph 47.

First cause of action: alleged breach of fiduciary duty

48. They apprehend that they are not required to plead to paragraph 48.

49. They deny paragraph 49.

50. They deny paragraph 50.

51. They deny paragraph 51.

52. They deny paragraph 52.

53. They deny paragraph 53, which is insufficiently particularised.

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

54. They apprehend that they are not required to plead to paragraph 54.

55. They admit that BDO Auckland owed Digital Signs and Digital Advertising duties to perform the October 2019 Engagement, December 2019 Engagement and IA Engagement with reasonable care and skill. Save as admitted, they deny paragraph 55.

56. They admit that the duties referred to in paragraph 55 of their statement of defence were owed by BDO Auckland to Digital Signs and Digital Advertising by reason of the October 2019 Engagement, December 2019 Engagement and IA Engagement letters. Save as admitted, they deny paragraph 56.

57. They repeat paragraph 55 above and admit that the duty owed by BDO Auckland to Digital Signs and Digital Advertising included the matters summarised at paragraphs (a) and (b). Save as admitted, they deny paragraph 57.

58. They deny paragraph 58.

59. They deny paragraph 59.

Loss and damage

60. They deny paragraph 60.

61. They deny paragraph 61.

62. They deny paragraph 62.

63. They deny paragraph 63.

64. They deny paragraph 64.

65. They deny paragraph 65.

66. They apprehend that they are not required to plead to paragraph 66.

67. They deny paragraph 67, which is insufficiently particularised.

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

68. They apprehend that they are not required to plead to paragraph 68.

69. They admit that BDO Auckland provided professional services to Digital Signs and Digital Advertising and say further that the scope of those professional services is as set out in the October 2019 Engagement, December 2019 Engagement and IA Engagement letters. Save as admitted, they deny paragraph 69.

70. They admit that it was an express or implied term of the contracts that BDO Auckland would perform its services under the October 2019 Engagement, December 2019 Engagement and IA Engagement letters with reasonable care and skill. Save as admitted, they deny paragraph 70.

71. They repeat paragraphs 55 and 57 and further admit that the express terms of the IA Engagement Letter provided that:

    a. BDO Auckland would advise Digital Signs and Digital Advertising if BDO Auckland became aware of any potential conflict of interest during the course of its engagement, and would work with Digital Signs and Digital Advertising to find a suitable solution (Standard Terms, cl. 4.1);

b. If a conflict were discovered, BDO Auckland may ask Digital Signs and Digital Advertising to consent in writing for BDO Auckland to act for Digital Signs and Digital Advertising, despite the conflict, or BDO Auckland may need to terminate its agreement with Digital Signs and Digital Advertising (Standard Terms, cl. 4.2); and

c. BDO Auckland will perform the engagements with reasonable care and skill (Standard Terms, cl. 12.1).

Save as admitted, they deny paragraph 71.

72. They deny paragraph 72.

73. They deny paragraph 73.

74. They deny paragraph 74, which is insufficiently particularised.

75. They deny paragraph 75.

First affirmative defence to first cause of action – exclusion of liability

76. The Standard Terms include provisions that:

a. BDO Auckland acknowledged that it would be liable to Digital Signs and Digital Advertising for losses, damages, costs or expenses ('losses') caused by its negligence or wilful default (cl. 12.1); and

b. Clause 12.1 is subject to the provision that BDO Auckland shall have no other liability of any nature, whether in contract, tort or otherwise, for any losses, whatsoever and howsoever caused, arising from or in any way connected with the engagement (cl. 12.1(a)).

77. The relief sought under the plaintiffs' first cause of action is equitable damages and/or compensation for breach of fiduciary duty.

78. The plaintiffs' first cause of action does not seek losses, damages, costs or expenses caused by negligence or wilful default.

79. Any liability of the defendants in respect of the first cause of action (which is denied) is excluded by cl. 12.1(a) of the Standard Terms.

80. Mr Innes-Jones, Mr McKay and BDO Auckland Limited are entitled to enforce cl. 12.1(a), including by virtue of clause 12.6 of the Standard Terms.

Second affirmative defence to all causes of action – agreement not to sue first, third and fourth named defendants

81. Clause 12.6 of the Standard Terms provides, inter alia, that Digital Signs and Digital Advertising will not bring any action against any of the "BDO Parties" (being BDO Auckland, all partners, employees and agents of BDO Auckland, along with any parties' successors and assignees) except for the specific entity that Digital Signs and Digital Advertising engaged.

82. BDO Auckland was the specific entity engaged by Digital Signs and Digital Advertising under the IA Engagement Letter.

83. BDO Auckland Limited, Mr Innes-Jones and Mr McKay were not engaged by Digital Signs and Digital Advertising under the IA Engagement Letter.

84. The claims against BDO Auckland Limited, Mr Innes-Jones and Mr McKay are barred by cl. 12.6 of the Standard Terms.

Third affirmative defence to all causes of action – liability cap

85. Even if they would otherwise be liable to the plaintiffs, which is denied, the liability of the defendants is capped at $103,168 under clause 12.1(d) of the Standard Terms because:

    a. By clause 12.1(d) of the Standard Terms, Digital Signs and Digital Advertising agreed the liability of the defendants was limited to four times the fees paid by Digital Signs and Digital Advertising:

    > **12. Limitation of Liability**
    >
    > 12.1 BDO will perform the engagement with reasonable care and skill and acknowledges that it will be liable to you for losses, damages, costs or expenses ('losses') caused by its negligence or wilful default, subject to the following provisions:
    >
    > [...]
    >
    > (d) The aggregate liability of BDO, whether to you or any third party, of whatever nature, whether in contract, tort or otherwise, for any losses (including interest) whatsoever and howsoever caused arising from or in any way connected with this engagement will be limited to the amount of direct damage, loss, expense or costs actually suffered by you as a result of the event that gave rise to the liability and the maximum amount of such liability will not exceed four times the fee paid for the particular

service giving rise to the claim. For the purposes of this clause, direct losses or damages excludes:

(i) Any losses or damages arising from delay, increase in operating costs, loss of profit, use, production, income, business data, contact or goodwill of any person;

(ii) Any indirect or consequential loss, and

(iii) Any loss resulting from liability to any third party.

b. The total fee paid to BDO Auckland under the IA Engagement was $25,792.00 plus GST.

c. Four times the fee paid by Digital Signs and Digital Advertising is $103,168.

d. The defendants' collective liability (if any) to Digital Signs and Digital Advertising is therefore capped at $103,168.

e. Mr Innes-Jones, Mr McKay and BDO Auckland Limited are entitled to enforce the liability cap in clause 12.1(d), including by virtue of clause 12.6 of the Standard Terms.

Fourth affirmative defence to all causes of action – exclusion for consequential and other losses

86. Subject to paragraph 85 above and as pleaded in that paragraph, by clauses 12.1 and 12.1(d) of the Standard Terms, Digital Signs, Digital Advertising and BDO Auckland agreed to limit the defendants' liability to the amount of direct damage, loss, expense or costs actually suffered by Digital Signs and Digital Advertising, with direct loss or damages excluding:

  a. any losses or damages arising from delay, increase in operating costs, loss of profit, use, production, income, business data, contact or goodwill of any person;

  b. any indirect or consequential loss, and

  c. any loss resulting from liability to any third party.

87. The relief sought by the plaintiffs under each cause of action includes, inter alia, unparticularised compensation and/or damages to be assessed.

88. To the extent any damages claimed by the plaintiffs (which is unparticularised) comprise:

a. any losses or damages arising from delay, increase in operating costs, loss of profit, use, production, income, business data, contact or goodwill of any person;

b. any indirect or consequential loss; and

c. any loss resulting from liability to any third party;

the plaintiffs' claim for those damages is excluded by cl. 12.1(d) of the Standard Terms.

89. The relief sought by the plaintiffs in respect of their second and third causes of action includes, inter alia, unparticularised consequential loss.

90. The plaintiffs' claims for consequential loss in respect of the second and third causes of action are excluded by cl. 12.1(d) of the Standard Terms.

91. Mr Innes-Jones, Mr McKay and BDO Auckland Limited are entitled to enforce cl. 12.1(d), including by virtue of clause 12.6 of the Standard Terms.

Fifth affirmative defence to all causes of action – limitation

92. The plaintiffs' claims are time barred by clause 12.2 of the Standard Terms because:

a. Clause 12.2 of the Standard Terms provides:

> Any claim against us must be made and notified to us in writing no later than two years after the date we complete the work to which the claim relates and which is covered by this Agreement.

b. BDO Auckland completed the work to which this claim relates on or about 27 August 2020 when it issued the IA Report.

c. The effect of clause 12.2 of the Standard Terms is therefore that the plaintiffs are time barred from bringing this proceeding.

d. Mr Innes-Jones, Mr McKay and BDO Auckland Limited are entitled to enforce the limitation clause in clause 12.2, including by virtue of clause 12.6 of the Standard Terms.

Sixth affirmative defence to all causes of action – proportionate liability

93. To the extent any damages claimed by the plaintiffs (which is unparticularised) exceed the part of any loss or damage BDO Auckland directly caused or contributed to, including taking into account any loss or damage that is reasonably attributable to any third party, the liability

of the defendants for that loss is excluded by clause 12.1(c) of the Standard Terms.

94. Mr Innes-Jones, Mr McKay and BDO Auckland Limited are entitled to enforce the liability cap in clause 12.1(c), including by virtue of clause 12.6 of the Engagement Letter.

Seventh affirmative defence to all causes of action – contributory negligence

95. If it is held with respect to any of the plaintiffs' causes of action that they suffered loss and that the defendants are liable for that loss (which is denied), then the defendants' liability should be reduced under section 3 of the Contributory Negligence Act 1947 and/or in equity to the extent that the plaintiffs contributed to their own loss on account of:

    a. The poor financial position and management of Digital Signs and Digital Advertising; and

    b. The failure or inability of the plaintiffs to obtain funding from BNZ or any other lenders, or to obtain sufficient capital to maintain or grow the business, due to the poor financial position and management of Digital Signs and Digital Advertising by Mr Jaques.

96. The poor financial position and management of Digital Signs and Digital Advertising included, inter alia:

    a. The accounting approach taken by Digital Advertising, including by treating the Wash Depot billboard as an asset worth approximately $408,000 when that asset did not exist.

    b. Digital Signs' decision to acquire the Halo billboards with no funding in place for that acquisition.

    c. The debt of approximately $191,000 owed by Digital Signs to the IRD in unpaid PAYE tax as at August 2020.

    d. The debt of approximately $29,000 owed by Digital Signs to the IRD for PAYE for Trade Creditors as at August 2020.

    e. Digital Signs' failure to meet a payment plan in place with the IRD in relation to unpaid PAYE tax.

    f. Digital Signs' treatment of $1.02 million in outstanding payments from debtors as an asset where there was a serious question as to whether this amount was collectable by Digital Signs.

g. The overstatement of revenue and assets in the financial records for Digital Signs.

h. Failure to secure sufficient projects to achieve Digital Signs' forecast sales.

i. Digital Signs' payments in arrears to creditors of approximately $219,000 in August 2020, which had not previously been recorded under current liabilities in the balance sheet, undermining the integrity of the company's general ledger.

j. Digital Signs' trading forecast as at August 2020 meant that it would exceed its overdraft limit with BNZ, even if additional short term working capital of $200,000 was provided by the BNZ as Digital Signs requested.

k. Digital Signs' inability, based on its financial position as at August 2020, to fund the installation of the Wash Depot billboard; and Digital Signs' use of funds intended for that purpose to instead meet the daily operational costs of the company.

l. The weak capital structure of Digital Signs, which was heavily funded by debt with minimal capital.

m. The insolvency of Digital Signs and Digital Advertising from both a balance sheet and a cash flow perspective.

n. Lack of credibility of financial records.

This document is filed by Martin Craig Smith, solicitor for the defendants, of the firm Gilbert Walker. The address for service of the defendants is at the offices of Gilbert Walker, Level 35, 48 Shortland Street, Auckland.

Documents for service on the defendants may be delivered to that address or may be:

a. posted to the solicitor at PO Box 1595, Shortland Street, Auckland 1140; or

b. emailed to the solicitor at service@gilbertwalker.com, martin.smith@gilbertwalker.com and sean.coupe@gilbertwalker.com.