Digital Signs v BDO Auckland

Statement of Claim – Statement of Defence

Statement of Claim	*Statement of Defence*	*Commentary*
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).	1. They admit paragraph 1 and say further that Mr Jaques was adjudicated bankrupt on 26 June 2026.	
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.	2. They admit paragraph	
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.	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. The second defendant, BDO Auckland, is a firm. At all material times it carried on business in Auckland as	4. They admit paragraph 4.	

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.	5. They apprehend that they are not required to plead to paragraph 5.	
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.	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.	There was no "October 2019" Engagement (this was only an email dated 29 October giving a fee indication for specified work). There was a formal Engagement (limited to doing the forecasts) dated 5 December 2019. There was no formal Engagement for all the work Nick did in 2020 (so these were professional services provided without the protection of formal Engagement T&Cs).
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.	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.	How can Andy do an "independent business review" of the business after Nick had completed cashflow forecasts and given advice on 'next steps' (implementation)? As you read on, BDO make a big fuss about being this "IA", but surely this can never be possible with an own client?

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.	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.	Nice admission. (Not that they can avoid making this concession from a legal point of view).
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.	9. They apprehend that they are not required to plead to paragraph 9.	
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.	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	Aside from the October/December dates BDO agree they were formally Engaged to prepare forecasts for BNZ. BDO cannot have it both ways – their formal Engagements expressly says they are only offering the services specified (ie, anything else they do either has to be under a separate Engagement, or they are providing those professional services on a casual basis, with no formal terms limiting it). BDO do not plead a 2020 Engagement for Innes-Jones to provide all the Advisory services he did (I think they deny he provided those services? Let's come to that a minute – he either did or he didn't, but either way he did so without formal T&Cs wrapped around them).

	letters and completed those engagements in December 2019 and February 2020 respectively. Save as admitted, they deny paragraph 10.	
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.	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.	It appears we're nearly on the completely same page here – Engagement, for Forecasts, with an Invoice for $7,500.00 + GST issued (which was paid). Let's see how long we stay on the same page?
12. On or about 2 December 2019 BDO produced financial projections for the plaintiffs' business.	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:	They admit producing the Financial Projections on 2 December 2019 now? In 10(d) they said this was February 2020?
	a. The Digital Signs Projections were produced subject to the October 2019 Engagement letter (which they rely on as if pleaded in full).	Sure
	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.	Sure
	ii. Achievement of the financial projections was dependent upon future events of which the outcomes are uncertain. The actual results may therefore vary significantly	Sure

	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.	Sure – they might not have formally reviewed the projections, but they had formed a view on whether they were realistic/achievable/correct (as they had weighted and balanced various entries to reflect this).
	iv. Under the heading “Emphasis of Matter”:	Sure
	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.	Sure
	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.	Sure
	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. 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.	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.	$8.00 out? Nice attention to detail.
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.	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.	Good (so far) Oh, now you say nothing you have written counts for anything (even though they new BNZ was going to rely on it)? Nick would not provide the Projections until he had sighted Supplier Invoices (to verify the COG side of the projections), and signed Purchase Contracts (to verify the income side), received proof of prior jobs completed successfully, etc. Where is all that mentioned in their pleading?
15. BDO's work was not confined to arithmetical compilation. It involved evaluative judgement as to	15. They admit that BDO Auckland's work in relation to the Digital Signs Projections was not confined to arithmetical compilation and	Nice admission! (We will cross-examine more on this in the hearing).

revenue prospects, risk adjustments, cash flows, governance, and the commercial viability of the business.	involved evaluative judgement. They repeat paragraphs 12 and 14 above. Save as admitted, they deny paragraph 15.	
16. BDO, acting through Innes-Jones, advised the plaintiffs that the business had significant trading merit.	16. They deny paragraph 16.	What? So you're saying Jaques completely dreamed up the figures of EBITDA in the \$5m - \$15m range and the multiple of 17? Sure – Jaques is an experienced accountant who knows what PE are looking for in deals, and that his business can get a 17 multiple (extremely high) even though all the data suggests premium billboard sites sit in the 12-14 range? You should not deny things that are glaringly and obviously true! (This is also true in Paul Kilmartin, BNZ proffering a \$10m facility when Jaques was only ever there asking for \$2m. There are some things that happen in a person's life, usually completely out of left-field, that are so radical and unexpected, that even in a coma you would not forget it!).
17. BNZ thereafter advanced funding of approximately \$200,000 to the plaintiffs' business in or about December 2019.	17. They have insufficient knowledge and therefore deny paragraph 17.	
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.	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:	So Nick never had a 2020 Engagement for anything? So everything/anything he did in 2020 was professional accounting services (Advisory) in the absence of formal terms? Yep – that's right.

	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. The plaintiffs accepted that proposal, and BDO commenced providing ongoing advisory services to the plaintiffs.	19. They deny paragraph 19 and repeat paragraph 18 above.	We did accept the proposal to do 90 day cashflow forecasting (as we were high-growth), attend the Board meetings, and be the accountant for IRD. There was no offer (or request) to provide 'Advisory' services (as we did not know this was a specific accounting service at the time), so Advisory was provided on an ad-hoc basis.
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.	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.	Both parties agreed BDO Auckland would provide compliance and tax services, but they are correct everything collapsed before this could begin.
21. On 20 May 2020 BDO issued further engagement documentation relating to tax return and secretarial services, although those services were not ultimately provided.	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.	Engagement #2 – the McKay Engagement. So you have #1 to Innes-Jones 5 December 2019, and this one, and that's it (in hindsight, lucky for us with what was about to unfold). (Remember this when you see their Affirmative Defences later.)
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,	22. They deny paragraph 22.	BDO are wrong to deny the Innes-Jones 'advisory' relationship. There are just too many emails and discussions (including with our other Board members Ken Leeming and Sarah Lockhead-MacMillan). If Innes-Jones was not providing professional advisory services in

internal information, and funding strategy.		2020, then what was he doing in our Board meeting? And what did his email, "I'll talk with Andy and see what he wants" mean? I supposed they had to plead a denial, but I would not have if I were them (too great a chance of it being proven later leading to them being discredited). Oh well, their choice.
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.	23. They admit paragraph 23.	
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.	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. 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.	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. By late May 2020 the plaintiffs' funding request was approximately $2 million.	26. They admit paragraph 26.	

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.	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.	If you aren't in a strong legal position then you try and distract from that by throwing mud. Did you notice they admitted: • The meeting took place at the BDO East Tamaki offices • Innes-Jones was present (the guy that was not providing any services in 2020? Were they just renting out their rooms for free?) • So Innes-Jones was present and listening while Jaques made out his case for a $2m facility? • So he was also present when Kilmartin said that he would not give $2m, but he would give $10m?! • So he would have been present when Jaques started frothing over that? • And he heard Kilmartin say he would get Jaques into town to 'meet some of the other guys'? • And of course, he heard Jaques raise the 'conflict of interest' aspect to Kilmartin, when Kilmartin asked for McKay to be the one to review things? • And to hear Kilmartin say, "Lucky you". • OK, I get it now, Innes-Jones as a Partner of BDO Auckland partnership, is not on the hook!
28. At that meeting BNZ indicated that it would require an independent financial report or independent business review in connection with the proposed lending.	28. They admit paragraph 28.	
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.	29. They deny paragraph 29.	Ha. (Suppose they had to? How can they say the business was always destined to failure if Innes-Jones wanted to sell it on a 17 multiple and 6 months later another independent and competent banker went from

		playing the 'sceptic' to showing off how he was going to give it $10m (instead of the $2m sought), and making the business a 'poster child' of BNZ (like Kiwibank was doing with the electric East West ferries at the time). Innes-Jones is a 'networker' profile that builds relationships and enjoys having satisfied and happy people all around him. He is not going to last more than 2 seconds on the stand until he breaks down in tears and tells the truth. Kilmartin is a little more hard-arsed, but even he is not going to lie. He understands the important of personal and brand integrity. BDO asked Kilmartin to provide an email when they responded to our professional standards complaint about them, and he did not come out with the unequivocal denial they're going to need (of such a memorable fact). Sure BNZ have thrown a bit of mud at us over time, and we've bitten back a bit, but overall we have found them to act very responsibly and we expect nothing less than this from them in the trial. Again, BDO should have stuck to the truth – this strategy is risky and it is going to back-fire.
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.	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	OK, here's the start of the fancy "IA" positioning. We might be a little thick, so we might have to wait until we see it unfold in the trial, but please explain to us again how McKay could be "independent" when we were existing BDO clients? This might've gone all right if McKay ratified Innes-Jones' work, but the moment the 2 of them started to get into an argument over GAAP of the reporting of the business position, wasn't there a clear conflict of

	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**).	interest that needed to be put to the client?
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.	31. They admit paragraph 31 and rely on the IA Engagement Letter as if pleaded in full.	We're glad they're relying on the entire thing as plead – it does not contain ANY clauses on how BDO will handle a conflict of interest.
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.	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.	SO: • Same companies • Same bank • More lending • Review of the financial position of the company? • Review of forecasts? What, like the ones Innes-Jones did forecasting a profit by 2021? • Didn't the BNZ want to know if they should lend money to this client? • If the client was currently in a poor financial position, was that going to change with the introduction of additional funding? • Could the client service a $10m facility? • If you introduced $10m of debit capital into this activity what would happen to it? • Was it a sunset or sunrise industry?

		• What were the other players doing in the market at the time? • What was the client's competitive position against them? • What was the specific proprietary IP the client keeps harping on about (resource consents like the one they've subsequently got on a non-notified basis on the Ellerslie, Auckland motorway, and the $1/ad model they say demonstrates the ability to earn circa 5 times more revenue (and with less costs) than the traditional 'rotation' model • Could someone please point out this material to me in McKay's 'independent' report on the business? • Oh, that's right, sorry, it's not there is it? • Basically a 'numbers only' assessment from someone that admitted to 'not really understanding the advertising industry' (not helpful if you put yourself forward to undertake an important task like this)
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.	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;	Here we go, (better read these bits slowly and carefully): • Admit, but 'before' 8 June 2020? • Limited to this? No discussion on the obvious conflict of interest in McKay purporting to review the viability of an existing BDO client?

	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;	(Anyone starting to smell a 'fudge' or 'spin' yet?)
	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;	What? There weren't any 2020 forecasts being put to the bank for the $2m was there? There was only ever the 2020-2021 forecasts done by Innes-Jones in December 2019?
	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	Innes-Jones TOLD McKay he was looking at coming onto the Digital Signs Board? And McKay still says he could not see any conflict in his role? Weird.
	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.	McKay and Innes-Jones might have agreed on this, but the client certainly did not! How can a client consent to something they've never been told about (just show us the email/letter if that is incorrect and all of this will go away, quick smart).
	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	Ha – now this is just porkies! On or about 11 or 12 June 2020 McKay got into an argument with Innes-Jones over the GAAP reporting of the client affairs and ORDERED Innes-Jones to cease providing any services (but Innes-Jones ignored him and kept providing the advisory services anyway). As I've said before, I would never plead as a black and white fact something that can so easily be

	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.	proven to be false later (just proves you are a liar, or incompetent). The black and white email trail (contemporaneous) proves all. "Briefly" – Oh, OK, that makes everything alright then? (NOT). Not sure why they're pleading it was a 'meet and greet' when it has already been found to not have been? Weird. Shall I list all our emails here?
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.	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.	So, Innes-Jones invoiced $3,260.25 for client meetings, the meeting at the BDO East Tamaki office with BNZ (to borrow $2m), and met with the Board (all with no formal Engagement), but the pleading is he was not providing professional accountancy services (subject to the Professional Competence and Ethics Rules? I hate being so thick – I really must go on TradeMe to see if I can buy some more brain cells?
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.	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.	They admit McKay raised concerns. They don't mention that McKay was wrong about the concerns he was purporting to raise?

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.	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.	**GET THIS:** McKay **ADMITS** instructing Innes-Jones to cease providing us professional accountancy advisory services! Where was his authority to do this? It was never raised/advised/communicated or requested from the client to approve, so it was **UNAUTHORISED**. Where in the formal Engagement of McKay did he have the right to interfere with the other services being provided by BDO Auckland? **NOWHERE.** Oh, the last bit is also a lie – Innes-Jones continued to provide substantive services, he just could not roll up his sleeves and do it properly (as he would have if PWC was doing the review) as McKay had clipped his wings. **This is SO wrong.**
37. The plaintiffs' informed consent was not sought or obtained before McKay instructed Innes-Jones to cease providing professional advisory services to the plaintiffs.	37. They deny paragraph 37.	Please just show us the paper trail and this will all go away. (Bookmark this page – it is not going away – they are lying through their teeth!).
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.	38. They deny paragraph 38.	McKay started off OK. He was asking questions about the business as he had no idea about the industry (we had to explain why Nike or Adidas would spend so much on advertising – the causal link between advertising spend and customer acquisition). He then started to get twitchy ("I'm a bit worried about putting BDO's name against this since it is such a new business, what if it all goes wrong? It could come back on us").

		BNZ had not asked BDO to give a cast-iron guarantee of success (that can never be given in business). They were just asked to confirm there was proper reporting in place, good governance, sufficient management expertise to deliver and cope with growth, just all the usual stuff (most of which McKay completely missed). Andy McKay is a very experienced Liquidator (he successfully argued director liability taking Dame Jenny Shipley all the way through to the Supreme Court in the Mainzeal case). It would be near-on impossible for someone so used to see even the best laid plans fail, ever form a view that a business might succeed.
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.	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	"financial position"? (sounds right, completely missing the 'business case') Here's the famous "IA" again 😊 Everything they forecast was overly optimistic (so now McKay is right and Innes-Jones is wrong?) And the Director has NO idea what he's talking about? Here's McKay being exceptionally unfair – yes the accounts recorded the "Wash Depot billboard" at $500k, and that billboard was not up (so did not 'exist', so McKay said that bit, and NEVER said the $516,000.00 had in fact been paid into the

	Revenue Department (**IRD**) for PAYE of $191,000;	business in cash (ie the deposit on the billboard was there). Why not just say this more correct position and recommend the Balance Sheet is updated accordingly? Oh, let me get this right, the business had IRD arrears, had an arrangement they were honouring, then COVID-19 came along and they were now in default, so we should throw the baby out with the bath water? Q: Wouldn't the company have completely cleared the IRD debt with the BNZ facility? Why didn't McKay model that? I can tell you what, if you want an accountant to help you sort out your less than perfect life, but where you're onto an excellent business idea, **DO NOT USE BDO!**
	iii. the companies could not sustain a level of debt of approximately $1 million;	The Wash Depot billboard was forecast to generate $1.1m/year. The lease was $70k/year. How much servicing does $1m of debt take (usually about $100k/year). I really must go and buy a calculator.
	iv. any additional lending was totally reliant on projected cash flows on a business model that had limited financial/trading data to project from;	Duh? Not sure about you, but if I'd developed the cure for cancer, had no long term trading history to point to, but nice forward growth, I'd invest in it! (Liquidator remember) Wonder what would have satisfied McKay? Nothing I imagine!
	v. based on the current financials the companies failed both the balance sheet and cash flow limbs of the solvency test;	The Supreme Court (Mainzeal) said that is not the test (otherwise we should all pack up and go home). You can be in the red, and not be trading recklessly, if you have a

	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.	*bona fide* way forward (Mainzeal did not). Yippee Ki Aye - $220k when the business was about to have a $10m facility? What? Aka 'lack of working capital' (wasn't the business applying to the bank for exactly that?) Yep that's what all good liquidators would do, bail and let the savvy business person who buys it make the super-natural profits.
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.	40. They deny paragraph 40.	This will come out under cross-examination. Our lawyers have a list of 100 good questions they will put to McKay. He can say, "Sorry, I did not assess that" to each one. (Innes-Jones would have an answer to each though, he had done his job properly).
41. The report included, among other things, criticisms or conclusions to the effect that:	41. They repeat paragraph 39 above, rely on the IA Report as if pleaded in full and otherwise deny paragraph 41.	
(a) no or no material value should be attributed to the Halo billboards and other company-owned billboard assets;		BIG mistake by McKay. McKay is used to publicly listed company accounts and said, "No accountant in their right mind would say [you can record the $600k discount on the Halo purchase on your Balance Sheet]". We paid Paul Moriarity, Forensic Accountant, to do a review of

		McKay's report. He said GAAP is clear (nice that this is a matter of fact and not subject to differing professional opinions) – privately held companies can record nearly anything they want in their Balance Sheet (para-phrased), providing there is notes there, as the reader can then make an informed decision as to whether they will accept that entry. Halo had spent $1.2m obtaining resource consent and installing 2 operational billboards (one opposite the Christchurch Casino and the other on Highbrook Drive, Auckland, being on the arterial route into East Tamaki and the only one in the region at the time) and we got to buy it for only $301,000.00. Not sure how you can say there is no value in 2 operational sites that only need to service $301k P&I over 5 years with everything else adding back to service OPEX?
(b) the Wash Depot billboard should not be treated as an asset;		But if it had been re-worded to properly reflect the asset position it would have been!
(c) there were serious doubts as to collectability of debtors;		
(d) historical revenue recognition and cash-flow forecasting were materially overstated or unreliable;		Not accepted, but even if you completely quashed the forecasts of Innes-Jones, and did the job again from fresh, digital billboards are inherently profitable so how can you say this business is a lemon?
(e) the plaintiffs' business and related entities were under-capitalised and effectively insolvent; and		Equity might be the safer way, but it is not the only way. The owners of the company approached the BNZ to borrow $2m against their rental properties. It was the bank that suggested the move to cashflow lending (and the increase to $10m). If you can borrow and end up owning the whole thing yourself, why would you take on an equity partner in the early days?

(f) legal advice should be taken in relation to reckless trading and insolvency issues.		Ha. It's a shame McKay is an accountant and not a lawyer (like the Director was at the time).
42. BNZ thereafter refused further lending and withdrew support from the plaintiffs' business, including by withdrawing or calling up existing facilities or support.	42. They have insufficient knowledge and therefore deny paragraph 42.	You're just being obtuse now. You damn well know your actions spooked the hell out of BNZ and they ran for the hills. BNZ put even authorised facilities into penalty interest immediately, calling them all in and asking us to go to a new bank (which we did not).
Matters giving rise to conflict of interest		
43. At all material times the defendants knew or ought to have known that:	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.	Good Required them to 'independent' NOW they admit it! SO: Was McKay independent of Innes-Jones? If he was, how was he able to direct Innes-Jones to cease acting without our authority or knowledge? Doesn't sound very independent.
(a) BDO had already advised the plaintiffs on projections, funding, cash flows, governance, strategy, and the commercial viability of the same business;		Yes
(b) Innes-Jones had acquired detailed knowledge of the plaintiffs' business and had		Absolutely

been acting as an adviser in relation to the plaintiffs' funding efforts and commercial growth;		He invited me to the Bernard Hickey Business Breakfast and confided how glad he was to have a director of my calibre to be able to invite to the BDO table (made them look good). Oh, what? Another fabrication by us? I should change jobs and start writing fairy tales for children.
(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;		Yes
(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;		Absolutely
(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;		Absolutely (notice how they don't plead to each of these points?)
(f) the plaintiffs relied on BDO, Innes-Jones, and McKay to identify and avoid that conflict or threat to independence;		Yes
(g) the plaintiffs relied on Innes-Jones' detailed knowledge and continuing advisory support in responding to accounting, funding, and business-viability issues; and		Yes. After McKay said we had a good business, but if it was up to him, we should 'scale back and just go slowly' I sought a meeting with him to go over it.

		It was supposed to be 1 hour long, McKay kept throwing fancy liquidator 'what if' points at me (proves my point that this was his problem), sure I was able to demonstrate they were each rubbish (so he threw his hands up after 30 minutes and said he would support the $2m), but imagine how I would have gone if I had a proper accountant supporting me in that meeting? It was a waste of my time at the end of the day. That meeting was on Friday 24 July 2020. By the Monday (27 July 2020) McKay changed his mind back to no support again. (Making this all up again?)
(h) the report would materially influence BNZ's decision whether to provide, continue, or withdraw finance.		They've admitted they knew this (43(c))
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.	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.	You should have admitted it was unnecessarily critical (the Wash Depot example shows that).
45. The McKay report had a blighting effect on the plaintiffs' ability to approach other entities for investment.	45. They have insufficient knowledge and therefore deny paragraph 45.	Oh, come on! You know that's what we're here for!
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.	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.	**BDO plead they DO NOT have to tell you they are also helping your biggest competitor dominate your market sector.** **I would not use them if I were you.** I wonder if BDO International treat their clients this way, or if it's only NZ?

	Save as admitted, they deny paragraph 46.	
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.	47. They deny paragraph 47.	ABSOLUTELY! If PWC had been doing the review, Innes-Jones would have been able to stand his ground, and advocate for the obvious strength of the business. Innes-Jones is well-experienced at growing SME across multiple market sectors and taking them to a PE or IPO exit. He know what he is doing and would have easily won at this task. Why do you think he got SO excited to have the opportunity to assist the business to grow, then exit it?!
First cause of action: breach of fiduciary duty		
48. The plaintiffs repeat paragraphs 1 to 46 above.	48. They apprehend that they are not required to plead to paragraph 48.	
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.	49. They deny paragraph 49.	**This one concerns us the most!** **Despite the finding of the CAANZ Standards Committee BDO DENY they operated in a conflict of interest.** The last time (entry into the Police) I had my IQ tested it said I had a brain in there. The test might be wrong though I suppose.
50. The relationship was fiduciary in nature. BDO owed duties:	50. They deny paragraph 50.	WHAT? You would have thought that to be a member of CAANZ, and/or to be a partner in BDO, you would have read and understood the CAANZ Code of Ethics & Professional Standards for Members

		(Have a read of section 210 and in particular 210.8). A tradesperson does not owe you any duty of loyalty, but your lawyer and accountant do. **Did you know this is the way BDO regard their obligations to their clients?**
(a) not to place itself in a position where its duties to the plaintiffs conflicted with its own interests or with another inconsistent role;		Yep
(b) not to accept or continue an inconsistent retainer without the plaintiffs' fully informed consent;		Yep (they're denying this remember)
(c) not to use information or position acquired through the advisory retainer against the plaintiffs in connection with the second retainer; and		Yep
(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.		Yes
51. BDO breached the duties pleaded at paragraph 49 by:	51. They deny paragraph 51.	**Incredible**
(a) accepting and continuing the second retainer without the plaintiffs' fully informed consent;		Yes!
(b) placing itself in a position of conflict between its advisory role for the plaintiffs and its purportedly independent review role for BNZ;		Yes

(c) failing adequately to disclose, manage, or avoid that conflict or material threat to independence;		Yes!
(d) using, or placing itself in a position where it might use, information and position acquired through the advisory relationship adversely to the plaintiffs;		Yep
(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		**ABSOLUTELY**
(f) issuing or permitting the issue of a materially adverse report in circumstances where BDO was conflicted or not independent.		Yes
52. By reason of the breaches pleaded above, the plaintiffs suffered loss and damage.	52. They deny paragraph 52.	What?
53. On this cause of action, the plaintiffs claim equitable compensation or, where available, damages, to be assessed.	53. They deny paragraph 53, which is insufficiently particularised.	Don't worry – it's coming!
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.	54. They apprehend that they are not required to plead to paragraph 54.	
55. The defendants owed the plaintiffs duties to exercise reasonable skill and care in accepting, continuing, and performing accounting,	55. They admit that BDO Auckland owed Digital Signs and Digital Advertising duties to perform the October 2019 Engagement, December 2019 Engagement and	(This is the start of the 'negligence' claim)

advisory, review, and reporting services in relation to the plaintiffs' business and funding application.	IA Engagement with reasonable care and skill. Save as admitted, they deny paragraph 55.	McKay was wrong notwithstanding he should not have been writing the report at all.
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.	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.	Carefully worded denial eh?
57. The duties included duties:	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.	
(a) to take reasonable care to identify, evaluate, disclose, and manage any material conflict of interest or material threat to independence or objective judgement;		Blanket denial to this obligation
(b) not to accept or continue an engagement requiring independence if the defendants could not act objectively and independently;		And this one
(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;		And this

(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		And this
(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.		And this
58. The defendants breached the duties pleaded at paragraphs 54 to 56.	58. They deny paragraph 58.	BDO did not breach anything. They shone like a sparkling star the whole way through. This is how they will treat you, if you try and complain about them.
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;		Denied
(b) failed adequately, or at all, to disclose that conflict or material threat to the plaintiffs;		Denied
(c) failed to decline or withdraw from the second retainer when the conflict or material threat to independence could not be adequately managed;		Denied – McKay just bossed Innes-Jones out of the picture and never gave client authority one thought!
(d) failed to establish or maintain effective safeguards between Innes-		Denied

Jones and McKay and within BDO;		
(e) caused or permitted McKay to instruct Innes-Jones to cease providing advisory support to the plaintiffs;		Denied
(f) failed to take proper account of available information concerning the plaintiffs' historical performance, revenue pipeline, assets, projects, and projected revenues;		Denied
(g) failed properly to consider the commercial economics, carrying value, and cash-flow contribution of the Halo billboards and related projects;		Denied
(h) failed properly to consider whether a funding proposal structured around the Halo and Wash Depot opportunities was viable;		Denied
(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;		Denied (see how simply you can just deny all the bit that really get you in trouble?). Oh well, we'll just prove each at trial.
(j) failed properly to assess the plaintiffs' ability to obtain resource consents for digital billboards;		This one is significant. At present we are the ONLY ones that can get a resource consent to operate a digital billboard on a NZ motorway (after NZTA slammed the lid down when the Thorndon one snuck through). Why didn't McKay mention this in his report? This alone is more than enough justification to continue.
(k) failed properly to assess the revenue implications of the plaintiffs' operating model, including their		We were doing $15,158.21 + GST/month ($181,898.48 + GST/year) on the Hoyts, Wairau site (even though it is on a third tier road

proposed or proprietary low-cost advertising model;		behind each of Wairau and Target roads). The operator that took over when we lost it (like-for-like site) dropped to circa $2,500/month in sales. Where is the ‘5 times’ income from the $1/ad model mentioned in the McKay report that BDO are adamant was not prepared negligently? That’s right – NOWHERE!
(l) adopted or expressed unduly adverse positions on debtors, revenue recognition, cash flow, solvency, and reckless trading without adequate analysis or balance; and		True
(m) produced or permitted a report which did not fairly or competently present the plaintiffs’ position to BNZ.		Absolutely
59. By reason of the breaches pleaded above, the plaintiffs suffered the loss and damage pleaded below.	59. They deny paragraph 59.	Ha
Loss and damage		
60. As a result of the defendants’ breaches, BNZ refused further finance to the plaintiffs’ business and withdrew support from it.	60. They deny paragraph 60.	Deny, deny, deny
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.	61. They deny paragraph 61.	Deny, deny, deny
62. In the counterfactual world where the defendants complied with their duties:	62. They deny paragraph 62.	(They have to deny this)

(a) BDO would have declined or ceased the second retainer;		Absolutely
(b) BDO would have disclosed and managed the conflict or material threat to independence, including by obtaining the plaintiffs' fully informed consent where required;		For sure
(c) BDO would have put in place effective safeguards and produced a genuinely independent and competent report;		Yes
(d) the plaintiffs would have obtained an unconflicted independent report from another provider; and		Absolutely (and one that was not a liquidator – these people cannot objectively assess the viability of a new venture).
(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.		No doubt about it (and Innes-Jones is going to prove this point for us when he appears on the stand to give evidence. If they don't call him we will be).
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.	63. They deny paragraph 63.	(They have to deny this also)
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.	64. They deny paragraph 64.	Yes
65. The plaintiffs' loss and damage include:	65. They deny paragraph 65.	

(a) loss of the chance of obtaining bank finance from BNZ;		Yes – to everything (our lawyers have done a very good job setting out these pleadings)
(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.	66. They apprehend that they are not required to plead to paragraph 66.	

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.	67. They deny paragraph 67, which is insufficiently particularised.	
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.	68. They apprehend that they are not required to plead to paragraph 68.	
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.	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.	(Breach of contract – sounds similar to negligence but there is a different legal approach).
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.	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.	Good
71. It was further an express or implied term of the contract or contracts, alternatively a term implied by law, that BDO would:	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	What? You would advise us of any conflict? But you never did! Does this mean you are in breach of your own contract?

	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.	
(a) carry out adequate firm-wide conflict checking and engagement acceptance or continuance procedures;		(They never did this)
(b) disclose to the plaintiffs any material conflict of interest or material threat to independence or objectivity;		Not sure what you think, but after advising BDO of our proprietary IP in detail I was VERY pissed to learn they were also the accountants and deal advisors (subsequent acquisition of Globox)! **Did BDO deliberately sink us to clear the way for Lumo to progress?**
(c) not accept or continue an engagement requiring independence if BDO could not provide that independence;		Absolutely. McKay could only ever have accepted the Engagement if he was going to agree with Innes-Jones. If he ever formed a different view, this would create a clear conflict between the 2 partners of the same firm regarding the same client, and the provisions of the CAANZ Code of Conduct would apply (ask the client if one or both were to cease acting). The failure to do this caused catastrophic harm (McKay was free

		to go off on a rampage and write and any dribble he wanted).
(d) implement effective safeguards if the engagement was capable of continuing consistently with professional independence;		Of course
(e) prepare any report undertaken for BNZ with reasonable professional skill, care, objectivity, and independence;		Absolutely (was not done)
(f) not hold out any report as independent if BDO was not in a position to provide a genuinely independent report; and		Absolutely
(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.		**Absolutely**
72. BDO breached the terms pleaded at paragraphs 70 and 71.	72. They deny paragraph 72.	Deny, deny, deny (no wonder they have constantly refused to attend mediation with us).
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;		Denied
(b) failed to disclose that conflict or material threat adequately or at all;		Denied
(c) failed to decline or withdraw from the second retainer;		Denied
(d) failed to establish or maintain effective safeguards between Innes-		Denied – come on!

Jones and McKay and within BDO;		
(e) caused or permitted McKay to instruct Innes-Jones to cease providing advisory support to the plaintiffs;		Same
(f) presented or permitted the report to be presented as independent when BDO was not in a position to provide a genuinely independent report;		Same
(g) prepared or permitted the report negligently and without adequate balance, objectivity, or proper professional care; and		Ditto
(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.		Ditto
73. By reason of the breaches pleaded above, the plaintiffs have suffered loss and damage.	73. They deny paragraph 73.	Deny, deny, deny
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.	74. They deny paragraph 74, which is insufficiently particularised.	Ha
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	75. They deny paragraph 75.	You can't deny this – it is a right at law.

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.		
	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)).	Our lawyers will handle this. It would be pretty strange to allow a professional body to contract out of any liability, so that they can then deliberately sink one of their own clients, and walk away completely Scott-free? There are some things it is unlawful to contract into/out of (you can contract to being punched in a boxing ring, but not where that results in your death).
	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	Why BDO Auckland Limited? That party is not listed on any paperwork?

	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.	Another one for the lawyers.
	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.	We would not have had an issue identifying the correct defendant if BDO had not been so oblique in their paperwork (only a trading name appears and there is no reference to there being a partnership and the list of partners does not appear to be publicly available. Another layer of protection from liability? Sneaky.
	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	Do what you like to your clients and only refund 4 x fees? That sounds ethical and fair.

	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,	

	(i) ...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.	Our lawyers can argue what was under contract and what conduct is captured by that. We are satisfied that Innes-Jones was not under express contract terms for his entire involvement in 2020 (so only implied terms), and McKay CERTAINLY was not contracted to withhold Innes-Jones from us.

	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	What do you call our email of 8:01am, 25 July 2022, giving formal written notification of a pending claim (as per clause 12.2)?

	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 that loss is excluded by clause 12.1(c) of the Standard Terms.	Don't worry – BDO caused 100% of the loss! (BNZ did not contribute – any bank would react in that manner when faced with the inaccurate and unbalanced report of McKay).
	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:	Nice try

	a. The poor financial position and management of Digital Signs and Digital Advertising; and	What? You can't work with a weak client then blame the fallout on them being weak later?
	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.	When COVID hit most banks released a policy refusing to take on any new clients (if your own bank was rejecting you then they certainly did not want you). This was a 'once in a lifetime' opportunity (to get funding from BNZ). Once lost, then there was not much that could be done to create a second opportunity at such short notice (though we certainly did try very hard).
	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.	Ha The physical billboard might not have 'existed' (as in 'installed in place') but $516,000.00 had been paid in cash for it. You'd think as accountants BDO could have explained that clearly without the completely unnecessary suggestion of a fraud by listing a substantial asset that does not even exist!
	b. Digital Signs' decision to acquire the Halo billboards with no funding in place for that acquisition.	Yeah right, you don't say yes to a great opportunity, then go and find the funding?
	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.	Oh please! We know it is common-place for high-growth, under-capitalised business to treat IRD as a bank (when they shouldn't), in the hope/belief it will all work out when their 'ship comes in'.
	e. Digital Signs' failure to meet a payment plan in place with the IRD in relation to unpaid PAYE tax.	Even despite all of this IRD has not taken action against the company and an informal arrangement is being honoured religiously. If that can be happening even after all of what BDO have done to throw a spanner in the works, it was clearly

		not as 'out of control' as McKay would like to have you believe.
	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.	But most of the debtors were inter-related companies? Why not write them off and convert them to equity? Either way, what not mention this option in your Report?
	g. The overstatement of revenue and assets in the financial records for Digital Signs.	The previous accountant was supposed to complete the 2020 books for BDO to start compliance from 1 April. COVID put a spanner in that. Why not say there were only 'Management Accounts' in place (and that it is common for these to shift significantly when a CPA does finals?
	h. Failure to secure sufficient projects to achieve Digital Signs' forecast sales.	It's out fault Go Rentals cancelled a \$1.8m + GST confirmed order when COVID hit their business? What you think Working Capital is for if it is not to bridge events like this? Where is the mention of our 50/50 revenue split contracts that while they give us lower income, we do not hold any liability for outgoings or minimum performance levels? Just all completely missing from the McKay report.
	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.	The company did not operate a Purchase Order system and simply paid all their accounts as they fell due. If you had asked better questions would you not have known this? (Or weren't you interested, once you'd made up your mind to just sink it, and possibly do Lumo a favour?).
	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.	When did COVID hit? April? What do you think happens when the Go Rentals deposit does not come in, but the outgoing keep going out (staff were paid 100% during the 2 x Auckland COVID lockdowns and no-one was reduced to 80%).
	k. Digital Signs' inability, based on its financial position as at	Why did you not model how the company would have performed

	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.	(with completing the Wash Depot installation and sorting IRD) instead of just throwing mud? Is BDO capable of helping clients that need proactive advice, or do you only help the 'no-brainer' cases?
	l. The weak capital structure of Digital Signs, which was heavily funded by debt with minimal capital.	This is actually smart (if you can get away with it).
	m. The insolvency of Digital Signs and Digital Advertising from both a balance sheet and a cash flow perspective.	We already know this is not the correct measure.
	n. Lack of credibility of financial records.	But wouldn't the Management Accounts have become credible if the Bank had provided working capital and either the previous accountants or BDO completed them? The issue is not how bad the current position was. The issue was 'was this a viable business if debt capital was introduced' (or was equity the only option). We all know what the trial is going to show.