

DISPUTES TRIBUNAL

Spats Ltd v Ora Marlborough Ltd

CIV-2012-006-000150

Transcript of Evidence

MS TUNNICLIFFE / MR D ANDERSON

I just want to check the names of the parties here and just so that I've got the correct addresses. So for Spats Ltd your name ... Donald Anderson.

And are you a director Mr Anderson ... That's correct.

120 Shandon Road, RD 6, Waihopai Valley ... Currently resides in Melbourne but that's the registered address of the company.

MS TUNNICLIFFE / MR T ANDERSON

Ok I'm asking for the company because the company's the application. Yes ok. Who's with you today, your name ... I'm Tim Anderson.

Are you a director ... Yes.

MS TUNNICLIFFE / MR HEARD

And for Ora Marlborough Ltd who have we got ... Mark Heard.

Are you a director Mr Heard ... Yes.

And we've got 130 Morgans Road, RD 3 ... That's the company address, that's not my personal address.

MS TUNNICLIFFE / MS HEARD

Ok that's fine, it's the company address that we're after. Ok so your name ... Phyllis Heard.

How do you spell Phyllis ... P H Y L L I S.

Are you a director ... No. I'm a spokesperson.

MS TUNNICLIFFE / MS WILKINSON

And your name ... Fran Wilkinson.

And are you a director ... No.

MS TUNNICLIFFE / MS HEARD

Ok well the people representing the companies are directors or management people in those kind of roles. I don't know whether Ms Heard if you're a spokesperson what particular role you hold with the company so are you able to enlighten me what role you hold with the company ... Yes. I'm a business strategist I think.

And are you paid by the company ... No. None of us are paid.

MS TUNNICLIFFE / MS WILKINSON

Ms Wilkinson what's your ... I'm the accountant.

Ok. All right. So Mr Heard just as a director I just want to check with you. The roles for people in the Tribunal are as a party. Now you're the party because you're the director of Ora Marlborough Ltd. The other roles for people are silent support roles or witnesses, people who wait outside and who'll come in and give evidence as a witness. But I think Mrs Heard's role is somewhere in between all of those. Is that right. Are you wanting her to speak instead of you ... She's the sole speaker as far as we're concerned.

So you're wanting Phyllis Heard to represent Ora Marlborough Ltd and it seems like from some of the documents I've seen that Mrs Heard has been fairly well involved particularly in the initial stages with being the contact person for Spats. All right. Ok so Mr Heard you're expecting to give some evidence if asked.

Well you certainly will need to give evidence about your own involvement anyway. Now and are you expecting Ms Wilkinson to give some evidence in respect of the accounts. Well as she's the accountant I'm assuming she'll be giving evidence about

your accounts. But I may be wrong. So you're thinking she'll give some evidence ...
Yes.

MS TUNNICLIFFE / MS WILKINSON

All right. I'm going to treat you as a witness Ms Wilkinson because you aren't the spokesperson, the business strategist, you aren't the person that Spats initially dealt with as far as I can see you are the director of the company so I'm going to ask you to wait outside as a witness and we'll call you should we need you. Now it could be a long hearing so I hope you've got something to read because it might be a while before we call you because there's quite a lot of evidence to go through. So we'll call you when we need you but I will hear from the parties first of all ... I'm not happy about being put outside.

Well that's the role for a witness and you've heard me say that a party is represented by a representative here today which are the directors of parties. They automatically represent the company because they are the spokespeople as it were for the company. They are the directors. **What I'm told is and I can see from the information that Phyllis Heard is actually the person who's been largely involved particularly in the initial dealings with Mr Anderson and that she's going to represent the company by doing the speaking.** So the only other role for you is a witness or a silent support. So you choose which one it'll be one or the other. As silent support you can remain in the room but I won't hear from you or if you're going to give evidence ... Oh well I'll be silent support then.

MS TUNNICLIFFE / MR HEARD

Ok. Fine. Is that what you choose Mr Heard ... (inaudible).

MS TUNNICLIFFE / MS WILKINSON

Now you, as the role of a supporter is not to talk to me or to the other parties directly. So you don't take any direct part in the case and if you did I would intervene and ask you to stop because you've chosen your role. Ok. The company's chosen its role. If however there is something you think they've forgotten, the others who you're here supporting have forgotten you might remind them, quietly remind them, but you musn't take. It has to be an unobtrusive role not an overt role. That's all, it's just a little background role to help and assist support I think, but not to take any part. The reason witnesses wait outside is so their evidence isn't influenced by what will be

heard. Also in cases of this nature where there is clearly. I've been through the documents on file and I can see it's begun to turn fairly acrimonious and I don't want the room stacked with people who are just going to join in the fray all right. So that's another reason why witnesses have to wait outside but it's a reason why I will have chosen a support role you will remain silent. You won't engage with me or the other party because if it starts to get out of hand it's hard enough controlling four people let alone five. Ok.

MS TUNNICLIFFE / MR D ANDERSON

All right just in terms of the process today. The claim that's been lodged by Spats Ltd against Ora Marlborough Ltd can be heard today. There is a claim that Ora Marlborough Ltd have lodged back against Spats Ltd and that was lodged with the Tribunal on the 13th of August 2012 now party to a case, the other party to the case Spats Ltd is entitled to ten days notice of the hearing of a claim against it and Spats Ltd has not had the ten days notice. Now Spats Ltd can waive its right to ten days notice of the claim and allow it to go ahead today if there's time because the original time scheduled was for the individual claim. But I understand and I just want to check with both Mr Andersons and I'll have to call you Don and Tim to make the difference I think. I understand from the Tribunal clerk in the office that she's had a telephone call from somebody who said they didn't waive that notice period so that will have to become on another day. **So we'll hear the counterclaim**... That's correct. Sorry if I misunderstood. I'm happy for them both to be heard today if there's time.

Oh ok. I understood the message was ... I obviously had to respond with the documentation of issues raised and the (inaudible).

The counterclaim ... On the condition if I could bring that which I have. I have done so. So if we have time I could probably.

So you're prepared to go ahead today ... Yes.

MS TUNNICLIFFE / MR T ANDERSON

With the counterclaim as long as there's time. Thank you. That's not the message I got. So I'm glad I clarified that. All right. Do you agree with that Tim ... Yes. I think it would be nice to get the whole thing settled today.

It will yes. All right. Even if we start on the counterclaim as well as hearing your claim, we start on the counterclaim because some of the issues are so intertwined it might be difficult to separate them and we may have to go into the documents that have been prepared by Ora. I think for their counterclaim but those documents may be relevant to your claim anyway. I think they're pretty well intertwined but even if we start on the counterclaim and run out of time or you realise that because you haven't had enough time you have overlooked bringing some evidence that you might normally have brought we will adjourn. So we'll make sure that you're not disadvantaged by allowing the second claim to go ahead today. All right. Now we've got to start somewhere so I'm going to start with the original claim that was filed and hear from Don and Tim first of all. So I have had a quick look through, actually more than a quick look because there was a lot to go through. I spent quite a bit of time yesterday evening going through the file seeing what was there and to get a grip on what this is about. But nevertheless the responsibility lies with Spats Ltd to, well both parties to give their own evidence to the Tribunal here today but the onus lies with the applicant in each of the claims to prove their claim so the onus lies with Spats in relation to your claim to prove it. So you need to go through and tell me what you want to say about your claim. It might be that you just read through what you've written here or it might be that you speak to it or read it and add to it. You can do it how you like and then refer me to the particular documents as you go. You don't need to respond to the claim against you. Initially all you're doing is telling me about your claim. Then I'm going to hear from Ora Marlborough Ltd responding to the claim against that company and it may be that you can't respond without leading into your own claim, we'll just see. I'm not sure yet how we can quite manage it but certainly you'll be responding to the claim against you and then probably leading into your claim and then I will go back to Tim and Don for a response to your claim. So you'll get a chance to respond to their claim but not till after they've introduced it. All right at some point in all of this either after the first claim or after we've heard evidence on both of the claims I will summarise what the issues are that I think need to be decided by the Tribunal or agreed by yourselves. All right. So those issues I'll probably write them up on the whiteboard here and I'll also write up the relevant law that I'll be applying to those issues. After that there will be a chance for you to say anything else that you want to comment on what each other have said and cross talk and ask questions of each other around those issues so that you can ensure that you understand the other person's point of view fully and that you've got all the information possible from each other and presented to me on each of those issues.

If you are able to agree as to how these claims should end you can agree on either some or all of the issues that are in dispute. If you are able to agree on some of those issues I'll write down what you've agreed to and you're bound by that agreement. If you can't reach an agreement on any of the issues or all of them, I will make the decision. So it's going to end in either of two ways either you agree how it's going to end and you're in control of the outcome, that outcome is enforceable and it's binding. Or I'm going to make the decision and if you leave it to me to make the decision it will be based on those issues that have been identified on the whiteboard and in accordance with the law that I've outlined there. So you'll have a clear understanding of what the task is for me if you haven't agreed what my job's going to be you'll know it by the end of the hearing. Ok.

MS TUNNICLIFFE / MR D ANDERSON

The floor is yours Don or Tim ... I'm going to start. I'm just going to read the documentation I've prepared if that's all right. I have got copies here for everyone if they'd like to. Unfortunately I've only brought one copy for Ora today. I didn't realise other people were coming.

I'll hand out the copies so that we've all got the same copy and we can work our way through it. So which is a copy for me. So these are two identical ... Yes.

Right ... Before I start how would you like to be addressed.

Well my name's Janette Tunncliffe. You can call me Janette or Ms Tunncliffe whichever you choose ... This claim is a claim for debt. The debt arises from a contract to provide a website. The respondent labours under two principal difficulties. That the terms and conditions were incorporated by reference and as Judge Harvey the writer of internet.law.nz has styled it by adhesion. The respondent signed documentation which gave clear unequivocal notice the terms were being incorporated by adhesure. Spats Ltd was dealing with an incorporated company and it is reasonable to assume if not expect that directors were competent to be so in contact with other parties on a commercial basis. A dispute of fact is raised about the availability of the terms and conditions appearing on the website. The respondent says that they were not there as at 6 October 2010 whereas in fact they were but the respondent is ignorant of the fact of how the website was updated and maintained. The respondent's bundle of documents contains a myriad of wild and

illogical accusations which are not central to the plan in the contract. Much of what passes for argument is merely personal abuse and derogatory comments. There are on many occasions a complete disconnect between the document referred to and comments about it. For example the allocation of document three simply does not reconcile the facts of email that purports to rest on. This was a contract where too people were involved and it appears to have been internal conflicts with the reps and other members. That leads to the statements made in (inaudible) 2010 being now construed as something else in 2012. The clearest and egregious example of this is an email from Mr Heard appearing in the bundle at document SF email number 47. Would you like me to show that to you now or would you like me to just.

I think I know which email you refer to ... Where impliability is accepted but (inaudible) 2011 is now subject to (inaudible) in 2012 which was that this was just a matter of priority. Simply put the effects of Spats claim on the example has no credibility. Likewise the counterclaim simply does not bear a second glance.

Having said that I just want to check what do you mean by SF number 47 that will help me ... Ok sorry. It's spinal folder SF.

47. I'll just make sure I've got the right one. I'm not sure which one you're referring to ... So it actually says it's an email from Mr Heard. It says thanks for your very lengthy reply. You're absolutely right to want to accept no responsibility the fault is all ours.

Yes ... That appears to be the problem. You will pay the services to date. We intend to hire another website company.

Ok ... The claim. My claim is a contract for monies paid for work and associating costs that have been incurred by the actions of the respondent. I've incurred legal fees to deal with the respondent and its rambling replies to me. Much has been debated on the terms and conditions being incorporated. But it's clear that the respondent is on actual notice as to the (inaudible). That notice states that all work will be carried out on Spats' terms and conditions available on the website. The respondent at document SF email number 50. That's just the section down here. It's highlighted. It's in the bottom paragraph. It states that Logic did not sign on what is

to be displayed on the Spats website. We trust they are one and the same. But the signed document for preliminary work which is what they've admitted to 53.

Just a moment. I can't see where you are on document 50 which is an email dated the 6th of February ... Sorry. It's the second line up from the bottom of the first email on the page. And it starts halfway along.

Yep. On what is displayed on the Spats ... We trust they are one and the same.

Yep ... And on email 53. The second to bottom. Ora have stated can we please have the terms and conditions on the full contract we signed as they will only send signatures on what appears to be a document of preliminary work only. This is not what was requested so. The documentation which.

Sorry where does it say preliminary work only ... It's the second sentence from the bottom.

Which starts ... Document for preliminary work only.

Are you on email number 53 ... Email 53 yes.

The last line of that is I will be seeking damages and reimbursement for airfares to attend hearing in New Zealand. Is that the one you're on ... The copy I've got here. No sorry the very bottom of the page.

Oh below that. Dear Don and Mr Hill ... Yes.

Ok right thank you. Yep ... So this was the questionnaire which they received and signed. Two copies returned to me. It says on page 13 of each of them all work will be carried out under terms and conditions of Spats Ltd available at www.spats.co.nz.

And who signed each of these. Mr Heard signed one, is that or P Heard signed one. Wilkinson ok ... Mr Wilkinson is the other director of Ora. Work was then carried out without (inaudible) and it is only when a claim is now raised that spurious offences are raised. The (inaudible) sets out my claim and I will talk to each of the paragraphs

in order and refer to the document evidence (inaudible) each paragraph of the formal claim to prove my case.

And that's what you've already submitted is it ... Yes.

Ok. Ok so we're now moving on to that document details of claim attached to your. Is that the one. Starts in or about April 2010 ... That's correct.

Ok ... In or about April 2010 Spats Ltd, Spats was approached by a director of Ora Marlborough Ltd which I hereafter call Ora, (inaudible) to create a website with the commerce capability. Spats agreed to make a website for Ora and prepared a proposal. On about 29th of May 2010 a meeting took place at Rohai cafe to advance the website design and Spats Ltd has presented a slideshow proposal.

MS TUNNICLIFFE / MRS HEARD

So who was at that meeting from Ora ... All of us.

I'm not talking to you, I'm talking to the applicant. He has to prove his claim.

MS TUNNICLIFFE / MR D ANDERSON

Those present today in addition Mr Wilkinson. I meant to put from Ora.

Ok so Fran and Mr Wilkinson. Plus Don ... I have brought my laptop with me today. I have the entire proposal slideshow if you would like to see it. It will take additional time to set up but it is here. I also have all the emails if you would need to see any of those.

Yes ... And I also have the initial work that I did on what's called a local host. So I built the website on a laptop first before it went on line. So that way I go rid of any of the bugs and things that needed to be addressed with implementing various things, modules. But it is not the entire website. It is simply an example and it gives you an example of the front end of the website, that's what a viewer would see when they look at it and the back end which is where the administrator controls (inaudible) add content, runs a block from. (inaudible). So the issue was discussed at the meeting. Spats Ltd processed the (inaudible) was explained and all content was to be uploaded to Google docs. Pitfalls were explained referencing Spats and the terms

and conditions. That Spats would only deal with one person from Ora excluding contributors to the website as provided for in the questionnaire. That Ora would need to provide all deliverables six weeks before the project was to be completed to enable Spats sufficient time for development. Paid in full was due six weeks after starting and or the website was put on line whichever occurred first. It was envisaged that the website would be a dynamic content management system commonly referred to as a CMS website rather than a static website. So they (inaudible) carried out content and put in management themselves. (inaudible) the accepted CMS by Ora. Ora was to receive a discount of \$4,000 if they supplied all images and content for the website.

Hang on. It says Ora was to receive a discounted of \$4,000. A discount or a discounted price ... Discount. It's a discounted price.

So they would pay \$4,000 ... The original price for doing the content management system (inaudible) was \$7,500.

Yes ... Discussion had taken place Ora were prepared to go with (inaudible) website and so we talked about how to advance that. They proposed that Mrs Heard was able to do the work as far as uploading, doing blogging, social media campaigns. And so in the discussion I agreed to discount the price by \$4,000 if she was going to do that, fulfil that role.

Ok ... So Ora would receive a discount for \$4,000 if they supplied all images and content for the website and managed the content themselves. This would require a single person from Ora and Ora designated Mrs Heard who is a published author. The standard price was \$7,500 for a CMS making the project price \$3,500 for web development. So just so that it's clear what web development is. The web development is building the system that allows people to then run the website. Generally that includes doing the template, doing a layout for the website. But it's not the person whose responsible for uploading content. That's a completely separate role. And that is the role that was understood and Mrs Heard agreed to do and that's why there's a big disconnect in price. Ora did not wish to have the maintenance contract where a fixed rate is set for the maintenance and upgrades. As in the requirement for a CMS website. So at that point in time I made it very clear that if you go for a standard website you can't make those alterations yourself. You then

have to pay a developer to upload that content onto the website for you. My charge out rate for that is \$120 per hour so. So often by making a bigger capital investment initially in a project for a website and going to a dynamic website, you then can save money long term by being able to upgrade, change your own prices, change your own content on your website. So it's a decision that the client has to make. Once you go and develop one you can't go back to the other without completely making a new website or cut and pasting the content in. But not the same. What you see on a website whether it is dynamic or HTML or PHP, we're talking about completely different systems. So that's the way they are rendered to a viewer. A maintenance contract with a content management system, the software that is provided by (inaudible) software such as (inaudible) Wordpress is software that if you have the technology and ability that you can set it up on the computer so that it can develop and run a website on line. It's not on one computer. There is a database. There is the back end and there's the front end. So there's also the DNS (inaudible) service. So there's a registering of the domains. So we're talking about a lot of computers. We're not talking about just sitting on one computer. The reason I can show you a copy of the website on the laptop is I run it's called a virtual environment. These different things are set up so that I can do development work. The website itself doesn't sit on one computer anywhere. It's actually on several in a different hosting company. So with a content management system websites are prone to hackers. It's harder to crack a static code of HTML than it is to crack a (inaudible) contact management website. So the people that produce in this case the general software, roll out upgrades which they advise people to upgrade. Sometimes you can just simply add a little bit of code and the upgrade then is just. There's not a lot of work to do. Other times it needs the entire reconfiguring of the website and uploading everything again and that can happen, it's probably happened I think I've listed it a couple of times here with (inaudible). So if someone gets a maintenance contract what they agree to is they agree to pay just a set fee every month.

But they did not. They did not want to have a maintenance contract ... That's right.

Ok ... So if you pay say \$120 a month I might do no work for the client that month. However, if the website has to be upgraded the only amount they pay for that month is \$120 per month. Although that's fixed price for the month is \$120. That's the fixed price. So clients sometimes want to have the (inaudible) fixed upgrade prices per month. Might be \$1200 a year but they know they won't have to pay anything more.

If for example an upgrade requires the complete reuploading of a website and basically redevelopment of it, it might take. Well one case here there was a PHB upgrade that I spent three days working on. Solidly. So three days at \$120 an hour you realise that can become very expensive to pay on an hourly basis for upgrades. But that is the option that Ora decided. They didn't want to. So on this bundle of documents.

Yes ... Which is a counterclaim.

Yes ... On page 28. As you see there's portions of (inaudible), it's not the entire slideshow. There's the title of the slideshow which says Ora (inaudible) proposal. And in the bottom one, left hand side, there's other considerations.

Which says most websites are ancillary is that what you're saying. Oh left, left hand side ok. (inaudible) yes ... So I explained.

So this is a dump of what you were showing to them ... Yes.

Yes ... So at that time I explained to them the need for a maintenance budget and in a similar manner that I've just done. That's (inaudible) \$120 per hour, any additional work outside of the scope of the project development, including but not limited to, chasing up content for clients and upgrades and maintenance of software and hardware. On the 4th of June 2010.

Can I just stop you there ... Certainly.

So this is the meeting where the contract was outlined ... Yes.

And was there acceptance at that point or did acceptance come later ... Yes.

So that contract was accepted at that meeting ... To be fair here, they wanted to talk amongst themselves. So we decided on the scope of what was going to, what I would do for them. And it was done in a manner which was well that's what we'll do. We'd like to have a talk about it and get back to you.

Ok. All right. Was the information that you've got here in numbers one to twelve particulars which you say is the contract I think ...Yes.

Was that converted to writing ... No. Not all of it. The things we talked about through the presentation as they went through. So the presentation took over an hour and when, for example here was the price structure, so I explained what you'd get for a \$1500 webstie. It would be standard static website. \$1500 to \$3,000 (inaudible) and went through and explained that it was (inaudible).

Carry on then. I just wanted to check where we were up to at that point. So the next thing is the 4th of June ... On 4th of June 2010 Ora representative Mr Heard requested to Spats that the website development go ahead.

How did he do that verbally or by an email ... He did it by email. And if you go to that bundle of documents again at the, on page 23. And the top one says.

We're going ahead with the ... Just confirming we're going ahead with the website. You as our consultant. I think we were to expect something from you to send through to us involving some forms and questionnaires. Regards Mark Heard.

MS HEARD

I can't hear that.

MS TUNNICLIFFE / MS HEARD

Page 23 if you look in the bundle you'll be able to read it for yourself ... Oh.

It's dated the 4th of June. It's on page 23 of the bundle submitted by Mr Andersons times two and it's at the top. So it's from Mark Heard to Don, just confirming we're going ahead with the website. You as our consultant. I think we were to expect something you were to send through to us involving some forms and questionnaires.

MS TUNNICLIFFE / MR D ANDERSON

Yes ... That email is omitted from this bundle of documents. If it is there I can't find it. Certainly not chronologically.

Ok ... On or about 8th of June 2010 Spats sent out to the director of Ora in a questionnaire form which included a statement, all work will be carried out under the terms and conditions of Spats Ltd. This then required a signed acknowledgement which Ora provided. On page 23 is my reply to Mr Heard.

Ok so he's saying I was hoping you had the attached questionnaire online ... Yes. Further and Ora have receipt of form which were these.

Ok ... So they were blank. They were to fill them in and they then returned them to me by post. And I've already pointed out where they were signed and where it says about the terms and conditions.

Ok so you sent that back on the 4th of June ... No sorry. I'm just saying the series of events.

Well the email says from Don Spats date 4th of June ... Yes. Yes.

I was hoping you have the questionnaire on line. I will send you ... (inaudible). That's the 4th of June. This is the series of emails.

So when did they have access to their questionnaire and how ... That was emailed to them I believe on the 8th of June so we've got the 4th of June. I don't believe the fact that they got the questionnaire is disputed.

No but I was just wondering how they got it ... I emailed it to them.

And when and there's no copy of that email ... I'll just check for you. I believe. In reply to that email the 4th of June, that's when I sent them back. So I believe it was on or about the 8th of June that they received it.

Ok. Yes ... So the questionnaires for the signed acknowledgements were returned to Spats Ltd. These were returned to Spats signed and dated the 19th of June and 26th of June. So for simplicity's sake I have accepted that the returned questionnaire signed by the directors of the company form the contract from the 26th of June. I could argue that an (inaudible) had been accepted by the email of the 4th of June, but for simplicity I just had gone with the signing of the documents. So the start of the

project happened when the 4th of June. I realise things might get a little bit complicated about dates but I started working and preparing things from when I was told that the go ahead was on the 4th of June. The standard terms and conditions of Spats Ltd were incorporated into the contract by (inaudible) and Ora Corporation by the evidence of the signed acknowledgement. The standard terms are those that had been printed off and submitted. So I don't know.

We'll go through that where necessary. But can I just ask who the questionnaire was sent to. How many people it was sent to or who was supposed to receive it ... It was sent to the Heards residence, their email address which is Awatere River, the email address and the Wilkinson's email address which is efwilkinson@xtra.co.nz.

Ok so why did you send it to those two particular places ... They both were directors. They were both people who had been at the Raupo meeting and they had wanted to both take active roles in development of the website. At the Raupo meeting I made it clear I don't build websites by Committee. I would only be responsible for one person from Ora. Ora accepted at that meeting that that would be Mr Heard. So as far as the dispute here, I'm only expected to deal with Mr Heard. Mrs Heard was just simply providing the content and likewise I will accept that I had to deal with the accountant Mrs Wilkinson but those are of my choosing. The person who I am responsible to at Ora is Mr Heard.

Ok thanks ... So at all material times and for practical purpose the terms and conditions were available for viewing on Spats Ltd's website. The question (inaudible) were on line. Additionally Ora had been notified that Spats Ltd had standard terms on at least two previous occasions. At the Combined Clubs of Marlborough and at the Raupo Cafe. So in the first meeting where I had which was perhaps assumed (inaudible) Mr Heard I said that I ran a company that developed websites. I explained to him the problem of getting content out of clients and that I therefore require all the content before I start doing the development. And that I had standard terms. He said to me it had to be done professionally. I said yes I have standard terms and conditions. So I would agree that it wasn't a formal meeting as per se but it certainly was a meeting where it was discussed. On the back of page 23.

Your 23 ... Yes. I make mention of actually finishing my own website and that was implying that the website was (inaudible).

I don't have anything on the back of page 23 ... Not the back. The next number down on page 23.

Hi Don today we printed this ... Up from that. Hi Mark my apologies, I've been trying to finish all of my website. So I think it's been clear that I've been working on the website and that that was done at that time. So terms and conditions. The content provided inter alia for the price of \$3,500 plus GST with a deposit of \$1500 plus GST payable on confirmation of the project. So I've put down here 4th of June was when Mr Heard said I could go ahead. Go ahead with the website as the developer.

That term of the contract where is it recorded ... Written down on the contract.

Yes ... I'd say in emails.

So is it somewhere in the emails, that the price. Before the contract is entered into at the time you're forming the contract, the price will be \$3,500 plus GST with a deposit of \$1500 ... Yes. That is recorded throughout. And that doesn't seem to be in dispute. There's also an email here where.

But I'm just wanting to know the terms of the contract are formed prior to the contract being entered into. They have to be agreed prior to be a term of the contract ... Right.

So the only agreement prior as I understand it from you was the verbal agreement at the meeting. Is that right ... At Raupo café yes.

Subsequently it's been referred to and in terms of the formation of the contract prior to the 4th of June it was mentioned at the cafe (inaudible) ... It was done in a very friendly manner and at that time I think everyone was getting on very well. The.

Which can be one of the problems ... Yes. Yes. So what actually sort of happened was well yes it sounds like we'll go ahead with that but we'd just like to talk amongst ourselves and get back to you. So basically that's how it evolved.

But when they got back to you ... Yes.

There was no writing down. Ok these are the terms we've agreed to. This is what was said at the cafe to make sure there can be no misunderstanding. So that wasn't done ... No.

Ok thank you. Right ... It is referred to in several emails and.

Later on ... Later on and even in here it's quite clear at. So email number 31 in the spiral bound folder. Ora (inaudible) we had agreed to pay \$3,500 plus GST.

Where is that. You might have it highlighted in yours but I don't in mine because I haven't got my bundle from you ... No this is in the spiral bound file.

Yes ... They have highlighted here. The first attempt to end our relationship we had agreed to pay \$3,500 plus GST.

Right ok ... There is a further email on the spiral folder email number 20.

Yes ... Dated the 29th of October 2010. Where I've said my proposal for the (inaudible) website was \$3,500 plus GST. Ora (inaudible). I have not heard back about purchasing the (inaudible) we only agreed to put the (inaudible) the website will be finished properly. So I think that it's fair to say that there was the agreed price of \$3,500.

Ok thanks ... That there was only a single contact person for Spats to deal with. Which has neither been disputed which is Mr Heard. Ora was to provide, despatch all written content, photographs and graphics. The website development was a six week project which required Ora to complete deliverables and contributions to be provided prerequisite to the website being effected and scheduled by Spats Ltd. Interest on invoices that were not paid on time and other penalties could be imposed as per Spats terms and conditions. So at the meeting I made it very clear that through experience a lot of people want to have websites. A lot of people want to save money by doing things themselves. These are generally people who are pretty busy and while they can often have the best of intentions they don't actually do things

to the schedule of the development process, they do things when they can fit them in in their own timeframe. Professional companies have employees who they say this will be done by that date and it gets done. People who are hard working like the Heards are obviously running a vineyard, running an olive grove, they've got the kids and they do all sorts of things in the community. So they're busy people. So I made it very clear at the time that if they wanted to provide the content, they had to produce everything. I don't do it in dribs and drabs. I wanted everything put on Google docs and from there when it's what's called proof of content. Everything's all together we then build the website. A rate of \$120 per hour could be charged for any additional work outside of the web development or the scope of project. So if I chase clients and I spend three hours on the phone to a client and they're saying oh no I've got to get to you next Tuesday or that's all billable as time for me. That's time that I could be doing something else. So that is on top of any development price and particularly in this case because of course it's been discounted so heavily. So turn the page starting at 10. The website was to be a contact management system whereby Ora could manage and update the website with Ora designating Mrs Heard to carry out this function. Consideration for the (inaudible) website was some \$3,500 plus disbursement, plus GST but not limited to this amount as other budgeted items would need to be included for upgrades, marketing, photography and the like and if I just refer you back to that slideshow.

The slideshow proposal clearly states \$5000 min

23 ... Where I talked about those 28.

Page 28 ... Yes. We've seen it before where I broke up those things to say that the importance of having budgets each of those things and I said for example that if you're getting a website for \$3,500 then the (inaudible) that you would spent \$3,500 on professional photography for the website. You don't get a \$3,500 website and spent \$1500 or the equivalent sum on photography. So I tried to be very clear to say that these are all things that have to be taken into account. Ok 12. In providing the website Spats Ltd as agent for Ora would enter into contracts with certain providers for such things as domain names, hosting and software and as necessary make sure that registration and updates occurred for the same as well as system upgrades for plug ins, modules and applications such as the (inaudible) Paypal, (inaudible) PHB, BSP, (inaudible) Gava and (inaudible). Breach of contract. On or about 7th of July the (inaudible) would not upload documents and graphics to Google doc site which was (inaudible) system (inaudible) website. This material would then be incorporated

into the (inaudible) as per schedule on Google docs. One of the purposes of using Google docs was inter alia to allow for the work to be monitored and managed by Spats. The use of the Google docs was approval of content for which Ora failed to meet the timeframes to provide the prerequisite to (inaudible) written documents of progress by the scheduled date of the 22nd of July 2010.

So when you say they would not did they refuse to ... There's some emails that we'll come to. It wasn't that they straight out refused it was obviously that there was an issue with connection speed from the Heard's to do with docs. I address this later on but just for simplicity's sake.

Yes ... I believe it was that they didn't have Broadband or their Broadband wasn't working correctly because when I did it at my end on anyone else's computer it went perfectly. So the logical assumption is that the problem was with the internet connection. We went on a phone conversation. I talked Mrs Heard through what she had to do with Google docs. She'd logged on to Google docs. She has access. She's put some content on Google docs but not all of it so she didn't actually access it.

So the scheduled date of the 22nd of July that you refer to in clause 14 ... Yes.

Is that six weeks ... No. That is the date that I allowed for the process of six weeks of the bill. The day that I required the content on the 22nd of July.

Well where is the six week period recorded in the contract ... This is where it gets a little bit ambiguous and I'll be.

So the six week wasn't recorded contractually. It was discussed at the meeting ... Six weeks is in here. It says the takes about six weeks.

It's in the questionnaire is it ... It's in the questionnaire I believe. If it's not in there it's definitely in the terms and conditions, saying it will take approximately six weeks. It is the figure I gave them at the meeting. And it is the universal timeframe I give all clients. It's not just an arbitrary figure that I've said in this one instance.

So you say that to all your clients. Six weeks get me the content ... Yes. Sorry that's not just the content.

That's the deliverable ... That's the time from when the client says they're ready to go to when the website should be on line.

Ok ... So when the client is writing the content themselves, I'm working on a local host environment, the website. So I'm not sitting around doing nothing waiting for them, I'm doing other work working on the website. But I need all content to know that all the content's going to be done before I start because a lot of people have the best of intentions as I said and what they say is I will get it to you on Tuesday so I start working on the website on the Monday. Tuesday comes and goes, Easter Friday and so I say we'll do it over the weekend for you. So that's a whole week and I'm working on their project that A, the end keeps on getting pushed out and B, I otherwise don't get paid for if they don't provide all the content in the website progresses.

Surely the work that you do wouldn't be wasted because once the content ... No it's not. What I'm saying is if I engage in a contract for six weeks, I work for that client for six weeks.

Ok ... I put off other. In this case I put off two other websites so that I could start on Ora's straight away. So that's money I lost on account of it.

Ok ... Ora was in breach of its obligation on the contract by not providing (inaudible) in addition not finding the redevelopment process and (inaudible) prescribed by Spats. The consequence of Ora's inactivity and delay was to preclude Spats from meeting its timeframe stipulated by the contract. Now when I talk about the six weeks period, that I would have had the website. But at the meeting itself at the Raupo cafe, the date that the website was to be on line was September. I understood it was going to be the 1st of September. Mr Heard had an email to Ora has referred it to being the end of September but either way that's well past six weeks from the 26th of June or the 4th of June.

But it was what you were suggesting was the 1st of September ... That was the date that they had told me that they wanted to be online by and that happened at the

Raupo meeting. On or about the 20th of September 2010 Ora director Mr Heard contacted Spats Ltd and asked for special consideration to get the website on line on an urgent basis at which point the deposit had not been paid. The total \$3,500 was due and Mr Heard was reminded of Spats Ltd's terms and conditions. And that's section 7 project in process. That discussion prior to that date had been quite amicable between us and I'm sure that the person I spoke to will have a right to reply to this. But I was finding that the material was not being provided to me in the format and timeframes provided and I'd said to Mr Heard that that was unacceptable and that there was no way I was going to be able to get a website on line until the content or the images was provided.

And was this communication by email or by phone ... This was by phone.

So he rang you. When you say Mr Heard contacted you ... I can't honestly remember who rang whom but.

So it was by phone ... But it was by phone.

And on the phone he made an admission that Ora couldn't pay in full is that what you're saying ... That's correct.

Ok ... Bearing in mind that we're now 20th of September. The project was started in June and I hadn't even received a deposit. Mr Heard (inaudible) well we're good for it we've just got to get the money in from the other shareholders and sell some olive oil and because of the connection with my parents being involved I proceeded along those lines. As the contact person it was Mr Heard's responsibility to see that Ora met its obligations. Spats stated that it would not continue with the operation of Ora so I made it quite clear at the time I did not use the term repudiation of contract. But I said that Ora had breached their contract and that term. That regardless, that even if I stop right now Ora still owes me \$3,500. So what are you going to do are you going to get the contact and the answer was if I'd please get something on line to get him out of the hot spot he was in. In response Mr Heard made a special urgent request of Spats for it to put sufficient content on line to make the front page look finished and include any comments. Any comments would be configured and photographs photoshopped to make a suitable product images. To give you an example of the images that were provided to me, if you refer to page 29. The two bottom pictures

are pictures that were provided to me I believe at that date. I thought they were unacceptable for a website. I explained to Mr Heard that the image of here had their laundry in the background and I thought that was unacceptable for a website.

Yep ... And that the photographs were supposed to be provided to me in a format that I would agree to them going on line in the website. As the project manager I am the person who puts together the website. I am the person who says that's acceptable, that's not. So if that image needed to be photoshopped that would be an additional fee.

Ok. So in response. So I'm just trying to figure out what you and Mr Heard are agreeing. So he made an urgent request to Spats to put sufficient content on line to make the front page look finished and included E commerce ... Yes.

Would be configured and photos photoshopped. So who was going to do the photoshopping ... I believe this is where the disconnect happened. I agreed with Mr Heard that I would help him because Mrs Heard hadn't done any uploading. She hadn't provided the content, she hadn't got to the stage of her.

Yeah but what did you agree to do not what she hadn't done ... I'd put something on line and in that instance I agreed that they could send me the content required for me to do that. The front page of the website. The pictures of the olive oil that I'd need to put something on line.

And they'd normally put that on themselves ... Yes. And this is where I believe the disconnect has happened again where Ora have assumed because I agreed to do that that from thereon in I would do the outlaying and content for them or whatever they requested of me.

Ok ... And that was not the case. And I believe I made that very clear at the time.

Ok and during this phone call you're saying that you agreed that you would invoice them for \$2,500 ... Yes.

Plus GST ... Yes.

And a balance of \$1,000 would be paid when Ora had sold some of its olive oil. So that was all going on in this phone call. All right. So then ... So on or about the 1st of October 2010 the website was on line. The back end i.e. the software and hardware (inaudible) CMS was fully operational and E com's account through Paypal was activated on the 4th of October. Transactions followed in the second week of October and sales were generated through promotion of the website by online advertising. So what had happened has been and will be referred to later on, is that Ora went ahead and booked the radio advertising. I don't know what dates it started or what dates it finished but from what I understood that they had made an ad. Coincidentally with a friend of ours in Wellington and that referenced the website. There was no point having ads talking about the website when the website wasn't on line.

And through the radio advertising some sales were made using paper ... Yes. Either directly or indirectly. I've also provided some Google ads that I didn't charge Ora for. And that was as I said to Mark I was happy to do that. I used some credit I had with some other companies to run the ads for Ora. At that stage it was understood that I was in charge of the marketing for the website. I'm not talking about the company. I'm not talking about their brochures. I'm not talking about their events, I'm talking about simply the website and Mrs Heard was going to persist with that in promoting the website through social media and she in saying that she specifically mentioned Facebook and Twitter. So as the project manager it's logical that I am the person who organises that.

Yes ... So at 20. From October 2010 contact was provided in a haphazard and piecemeal fashion which was contrary to the terms of the contract and contrary to the representations from Ora in urgent (inaudible). Urgent assistance was given conditionally that Ora would assist in the performance of the contract by meeting its obligations. So that it would have a properly completed website. I had said to Mr Heard that there is no point in just having a website on line and I referred him back at the time to the billboard analogy which was in the proposal. That you can spend several thousand dollars painting a billboard and then if it's so far back from the road no one sees it, it's not working for you. You need to have traffic to see the website for it to actually become financially viable for you and to do that you need to get people to the website. To do that we needed to run an email campaign and other

types of promotions, Google ads, Facebook ads to generate traffic to the website if the website was going to succeed.

Yep ... 21. Ora diverged on the agreed marketing of the website and did not follow Spats' advice. The social media campaign had not been affected by Mrs Heard who because she had (inaudible).

That should be as ... Yes. She had undertaken to (inaudible). Nor was Ora developing database list of email addresses to notify potential customers that the website was on line. The reason stated for the failure of the time was that the Heards were busy and Mr Heard was putting energy into traditional methods of sales and thus he did not help finish the website or help establish Ora's online presence. Ora was not providing the website in a manner that would see it succeed. 23. Other members of Ora raised concerns with Mr Heard because the website had been, the method shareholders had agreed to sell Ora's olive oil. Returned questionnaires from Ora stated that there would only be web based articles. Ora also responded to the questionnaire. How was the website supposed to help your business replying by direct selling to the customer no middleman.

So where would I see that there was only going to be website sales ... Held for website sales.

It says site goals. How is your site supposed to help your business by direct selling to the customer, no middleman. Is that what you mean ... There will be that.

Are you saying that there's something where it says they will not be sold other. The product will not be sold other than via the web ... Yes.

There's somewhere in this ... Yes.

All right thank you. I just won't find it now but we'll just highlight it. The others I'm sure will be able to find it ... Yes.

If they disagree ... This (inaudible) was also reported in the Marlborough Express on the 13th of October 2010. The company's olive oil sold via its website Ora olive oil dot co dot nz because it can be sold cheaper this way than through a supermarket

the shareholders say. The price of Ora's olive oil was significantly higher on the website than it was being sold through the combined rural traders, CRT, the market Mr Heard was developing contrary to Ora's contract with Spats. So I think this is very important. People buy things on line because they can buy them direct and at a cheaper price. If you're selling your olive oil at a more expensive price on line who's going to want to go to the website.

But marketing of the olive oil is not your issue is it ... No.

Ok so that's their problem ... Yes. I'm just trying to explain that where obviously disconnects have occurred.

Yes. So you disagreed with their marketing strategy but it wasn't your job to disagree with them. You might point it out but ... But there was a breach for them to sell olive oil than any other method. The business methodology was to sell it on line.

Yes but you can't make them only sell their oil on line ... Yes I agree with that. I'm just pointing it out.

So even though they might have departed rather than breached. I think departed from the way they told you they were going to market it but that's their right. They can do what they like ... But if they do that's repudiating the agreement that we had.

I'm not sure about that. I'm not sure about that because you didn't have an agreement to market their olive oil, you had an agreement to design a website for them ... Yes I understand that.

So you didn't have an agreement to sell the olive oil so I don't agree with you ... Well I was, I was facilitating them through commerce.

You might have been facilitating the sale of their olive oil but you were not in charge of selling their olive oil ... That's correct.

Ok ... On or about the 28th of October 2010 Mrs Wilkinson a partner of an Ora director contacted Spats Ltd for details of additional costs for the website project. At the point when the request for an indication of further costs was made Ora had

negligently or intentionally omitted (inaudible) fail to provide all the content in the form of photographs and written text to the website which was in the month that followed requests to get the website on line.

Did Mrs Wilkinson ring you or email you ... I believe she emailed.

Emailed ... Yes.

And what was the additional cost. Was she responding to an invoice ... No. She emailed myself and wanted to know what additional costs would be.

So at that stage had any additional costs been charged ... No. I had not charged them any additional costs. I hadn't charged them for work that I'd done, that Mrs Heard was supposed to have done. I hadn't charged them anything for the photoshopping. I hadn't charged them anything for the extra time they'd taken in getting the website on line and dealing with them. Any of those additional expenses.

But you had charged for the \$2,500 by then had you ... I'd sent them. No I hadn't even sent them the. I don't even think at that stage I'd sent them the account it would be very close to that time when I had got the original invoice statement.

So I'm just wondering what might have prompted her (inaudible) ... Well I'll come to that.

Ok thanks yes ... The 28. This was 20 weeks from the start date of the project and 14 weeks from when Mrs Heard said I am ready to go. Spats development involvement was to have a six week. Spats development involvement was to have been the six weeks and that's just development. That's not the hosting, it's simply the. This period was achievable by Spats and based on development and business goals a six week solution being a process-centric approach not a client-centric approach. That's adopted and reflected in the questionnaire and it is incumbent on the client to supply the process which Ora failed to do but blamed Spats for. So it's made quite clear, if the client doesn't provide me with all the content within six weeks it's quite obvious that I'm not going to have a website on in that six week period. The rule is that in the terms, that if a client is late providing the content the deadline for putting something on line gets pushed out by the equivalent amount. So it is

(inaudible) Ora was not ready when it asked Spats to begin the project. Spats subsequently was unable to work on their project on other projects costing Spats thousands of dollars because Ora had not completed its business strategy including its logos, images, brochures and the prerequisite of written material for the website. Ora had misrepresented themselves, their business strategy and abilities. It clearly stated in the questionnaire a website is often seen as a way to instant wealth and prosperity. Or a panacea for a failing business. Success usually takes time and results from good planning from the start. A website is not a business strategy it is part of it. I don't want to start developing a site for a client if the business strategy hasn't been completed. The uploading and editing of web pages was the responsibility of Ora which it failed to do. Ora further failed to operate in getting the project on track when Spats made it clear Ora was breaching its contract and that goes back to the conversation I had with Mr Heard on or about the 22nd. Ora did not provide written consent for budgets as required by Spats for deliverables which Ora had neglected to supply such as photographs. Instead Ora ambiguously dictated how the project would be finished after having failed to meet its obligations. Ora was trying to not actually move the goalpost ignoring the terms and processes in place and made many erroneous assumptions as set out in the correspondence. Ora failed to do daily updating as requested and Spats was asked to load content which was the responsibility of Ora. Ora had also asked what the daily (inaudible) hence content (inaudible) the inclusion of (inaudible) software integrated into the website.

And you're saying that's more than you originally going to do ... No I'm not saying it's more. But I'm saying that I spent time putting it in especially for them to do it.

But this was all part of what you were going to do ... Yep. So it's the nuts and bolts. It's the mechanics that facilitates the website.

Yep. So you're just demonstrating to me that you were doing what you said you would do ... Yes.

Ora failed to do daily updating. What was the daily updating that they agreed to do ... In the questionnaire they have replied that on page 13 yes daily upgrades. I believe it's supposed to be daily updates.

On page 13 ... Of the questionnaire signed by Mrs Heard.

Ok well there were two questionnaires. So which one forms the contract is the question I've got to say to you. I mean I've got an issue and we'll go into that. I think you're proceeding on the basis that the questionnaire actually forms terms and conditions as well ... Yes. *They are not materially different*

But when you've got two questionnaires filled out separately by two different people saying two different things, which one are you going to choose ... Well that's a problem that we have to address.

That's right and I think it's a problem for you because the question for me to decide is whether or not the questionnaire could be considered terms and conditions of contract. Yes ok ... It was made clear at the Raupo meeting that from years of experience clients rarely provide deliverables on time without professional help such as copy editors and photographers. Clients seldom use all the functionality asked for in a website. I think I've covered this already. Where clients are pretty good at the start and then things start to become a bit.

Yes time consuming or difficult ... Yes. It's an isolated incident. Repudiation on the contract. On or about the 11th of July 2011 Mrs Fran Wilkinson a non director of Ora, purported to terminate the contract which was a repudiation of the contract and the promises made by Mr Heard in getting the website on line urgently. I have to make that quite clear.

That was in an email was it ... Yes. I have to make that quite clear that I was ready to walk away on 20th of September. Mr Heard made promises that the website would be finished properly and I said at the time if you set up at the very start and you roll a website out in stages that's different from having a panic rush job where you suddenly put a stage on line and I said at the time that I have never had a client whom I've allowed to put up an earlier stage that wasn't a planned stage, finish a website properly. It's never happened.

So because of promises made ... That if I put it on line he would bring Mrs Heard into line and they would provide the content and follow the processes I put in place.

Well what you're saying is that in your terms and conditions that the termination has to be advised to you 40 days before the rollover date which would be the 1st of January ... That's correct. Now that gets a little bit confusing because.

But that means that the domain's still going on into February. Nothing's going to change that, nothing's going to align that ... That's right. But the rollover date is terminology that's also used for renewing of domains.

Right ok. But nothing's going to change that difference between those two dates ... No.

So if somebody advises you 40 days before the 1st of January next year that they want to terminate, they can terminate ... Yes.

And the domain's going to roll on ... No. The domains have to be renewed and I'll give you an example of that.

Yes but would the domain, it's been paid for till the end of February the domain so it's going to stay there isn't it ... Yes. Yes. The DMS with the registrar stays there. A lot of domains you can't change them. You can't change them to another company. Can't reassign them with a month before they're renewed and that's to stop people at the last minute dashing off and renewing it with another registrar company at a cheaper rate. So that's another reason why you've got to. I have just had to because of what Ora have said about wanting those domains back I have had to pay again just the other day, for those domains to be renewed again. So I've spent more money to retain those domains so that at the end of this meeting if Ora decides they want them. They go into no man's land and it becomes really expensive to try and get them back if you haven't. Is that clear.

Yes you can try and wipe it off. Good luck it doesn't often work. Thank you. That's good enough. Thank you ... So I'm up to about 38. Read your reply. Consequence of (inaudible) Spats had an obligation as an agent for Ora (inaudible) domain registration, posting updates, updating the CMS software as provided for. These are necessary (inaudible) technical aspects of having committed to them do not follow for vacillation or repudiation once the CMS website has been put on the line. So I'm talking there about the renewing of domains. Also for if you've got a CMS website

and you get a notification from in this case (inaudible) that said that an upgrade had to be required that has to be done. I can't allow a client not to do it and affect my server and allow other hackers into the website. And that was made very clear at the start. That there would be costs for upgrades as they came available from the whatever CMS it was. (inaudible). As a consequence of the repudiation of the contract, Spats Ltd sought to (inaudible) invoice 614/2. Spats did not charge for the additional time that had been incurred or additional requests made by Ora. Ora were only charged for the domains and hosting (inaudible) in addition to the quoted price for development.

So have I got a copy of invoice 614/2 ... I'm not sure.

Is this the first invoice you'd sent to them ... So that would be the second invoice. The first one would have been the deposit. That one. So that would be for \$2,500. The second invoice was for the um, the \$1,000 that was still owing.

That 614/2 ... 6412 yes.

For \$1,000 ... The \$1,000 that was still owing in the initial agreement of the price. Plus the hosting and renewal fees. It didn't include any (inaudible) work.

Ok ... No (inaudible) and no notification received that payments would not be received on time. At the time of Spats letter including attached invoice. The six weeks period had dragged out to 80 weeks without receiving full payment.

Except that the invoice isn't attached. That's one of my problems. Yep. We haven't got ... I do have (inaudible) if you require to see that.

Well I will require to see it but I want a copy of it. It's on your computer I will have to get a copy at some point. Let's just flag that as something I would need. The other party may have it. Was it paid ... It was not paid on time.

Was it paid at all ... No it was eventually paid only after getting my solicitor involved and what ended up being paid was only the amount on the original invoice but not the penalties and that's where again there's been a big disconnect.

Yes ... No dispute was raised before payment was due and no notification. (inaudible). Ora was given the opportunity to settle for \$1874.50 in a letter dated 20th of December 2011 before additional work was invoiced and debt collection and legal fees were incurred. A detailed explanation was provided to Ora along with a copy of the terms and conditions. So perhaps it would be helpful to actually refer to that letter.

Yes where is it ... And um.

Is it in the spiral book ... Yes. I've got one here. So it's email number 46 in the spiral book.

Whereabouts in 46 it's pretty long ... That was the letter that I sent.

That's an email ... It was actually a letter.

And whereabouts in that letter do you offer to settle for 1800 because it's a four page letter ... You've got me there. I don't know that it would say. It was probably referring to the actual invoice itself.

I've had a quick look through it and I don't think it's saying (inaudible) settle ... It was probably the invoice that was attached with that. But what I did make clear in that letter was that they had received the work and that I had not charged them for \$2,500 on just the upgrades alone that I had done to the website. And that this would be on top of the current outstanding invoice so if you want to pay commercial rates or have someone else work on your account I'm happy to oblige. And have you invoiced for an hour for the hour. Sorry, have you invoiced by the hour for work and communications outside the scope of the agreement. This letter actually goes a long way I believe in the dispute because I believe it was a genuine attempt made to resolve issues back on the 20th of December 2011. It wasn't a flippant email. It took three days to write.

Yes ... In reply to that correspondence Mr Heard wrote. Thanks for your very lengthy reply. You're absolutely right Don to accept no responsibility for the project the fault is all ours. That appears to be the problem. You'll be paid for services to date. We intend to hire another website company. About eight hours I believe after that.

Mrs Wilkinson replied. This is the exact reason we do not require your services. So long winded and makes no sense. We definitely do not require your services and will not be paying the invoice total until you have had a clear explanation of why you have done what you did without explaining. We wanted something simple and you have not supplied us with it. I believe and I refer to the reason why I believe this dispute has been created. If you go to email number 40.

Yes ... When Mrs Heard had been unresponsive about supplying the content I had spoken to Dr Maritz who was a member of Ora and at that time he was doing some sales. He was buying some bulk olive oil and sending it over to South Africa and some other places. He was interested in taking over from Mrs Heard. He wasn't prepared to do everything that she was going to do. But I said I was happy to work with him for nothing to help him get what he needed on line to promote the olive oil. In the third to bottom of the first email. Or maybe I'll just read out the whole email. Would you like me to read it out.

Well I don't know. I'm still not sure where you are so carry on. I'm on page 40 ... Email number 40. This is an email from Mr Heard to Mrs Wilkinson. Hi Fran when I rang him, that being Dr Maritz, to finalise that we were in agreement with the invoice, that's the invoice for his work he was doing, we were about to send him. He said he had been in touch with Don about the possibility of getting the website up for the purposes (inaudible). I guess he thinks this may be interest coming from his South African venture. I told him we had given up on Don as he had not prepared what we had given him to do. I said international sales would be unlikely because of the high cost of freight and that's why we had not bothered. He said Don said he was working, doing any extra work for nothing. So whatever happens we will not be paying him.

So what are you trying to prove to me by that point. I'm not sure what you're saying ... What I'm saying is that at that stage Ora had agreed not to pay me.

Well at that stage I think what they're saying is. What I understand that email is to be saying is that they believe you told them you're not charging for your additional work so they won't be paying you ... No. That's where it's been disconnect.

That's right, there may be disconnect but that's what I think that email is saying. There may well be a disconnect ... That is that they have misunderstood. Not me. That the work I was prepared to do with Andreas I was prepared to do for nothing. I had not waived that with Ora at all. And by trying to help resolve the situation with Andreas, as you'll see from the next email down from Mrs Wilkinson, was who has given him the right to do this. We sure as hell have not. This is not on. We are not using Don anymore, Mark so why is (inaudible). I think I'm trying to make it quite clear that I was actually helping Ora. They obviously had decided to go in a different direction.

If I could just stop you. Well it's actually quite disrespectful. I don't intend to laugh at what you say and I think if I did you would find it a little bit upsetting. So it's not actually ok. So I need you to stop with that kind of behaviour. I've heard you do it a couple of times and I've let it go. But I think enough's enough. Right.

MS TUNNICLIFFE / MR D ANDERSON

But this email is way back in the 9th of July. It's not in December ... No. But I'm trying to frame why I believe they didn't think they were going to have to pay the (inaudible).

Ok ... So they're completely separate things.

Sure ... I'm just trying to see what.

I'm just trying to see what's in their mind ... Yeah I'm just trying to be fair and say well may be they've misunderstood. The letter that I wrote on the 20th of December I believe explained everything at that time and we were at. At that time the website was on line. (inaudible) website providers (inaudible) and was fully functional. (inaudible) open-source CMS award winner in the Patt Publishing Awards. The contest is regarded as one of the most established platforms for recognising excellence amongst open-source software. So not only was it going into it I had that won the award. 2011. Of all the open-source software to choose from that was the one I picked from. That was the one they agreed. Ora disputes that the website provider was suitable whereas in fact the website provider was developed using industry-recognised an award winning software for which the criticism of it is unfounded. Despite being informed that non payment was accruing additional costs

including legal fees Ora did not file the dispute in the Disputes Tribunal. All work (inaudible). Ora has acted (inaudible) subsequently making spurious and erroneous arguments to avoid payment of the Spats invoices. Spats solicitors who corresponded with Ora and obtained the original amount owing and this may be not quite clear but it breaks down to where I said \$1,000 for the original fee.

That would have completed the \$3,500 ... And it would have been the next year's hosting and domain's renewal.

No. The \$1,000 payment would only have completed the \$3,500 wouldn't it ... Yes and 600 plus GST would have completed the renewal and hosting the website for the next year. Along with what I explain on the board.

But they didn't pay the penalties ... Yep. So that's when I said the offer had been made for that amount and that email on the 20th of December the attached invoice was for that amount. Ora was (inaudible) a discounted price for settlement including being allowed to pay instalments and that's in the letter that's included that they include from Mr Hill the solicitor. Ora ignored the conditions of the offer.

So which was this letter. There's more than one to Mr Hill. But there's more than one ... It says on the letter. I don't think it's necessary to spend time on it.

All right ... But it is there. Basically I understand the structure of Ora. Rather than pay out one invoice I was prepared to take payment in instalments. But that saying that's if they agreed to do that. That option binding was not exercised. The (inaudible) forwarded to Ora without further (inaudible) were rendered Spats was put to additional cost to be incurred exceeding the \$15,000. So if you include the invoice I submit. (inaudible). I haven't had an invoice on my (inaudible) last week. I haven't submitted the invoices for renewal of domain names. For example the time I spent last week on this exceeded 40 hours at \$120 an hour that is \$4,800 that I would be legitimately entitled to charge Ora too. So I have spent weeks dealing with Ora. It's not just dealing with the website. So no dispute having been raised about terms and conditions in the 18 months before Spats claimed and sought to enforce penalties on payment. I can't stress that enough. Despite the matter being discussed (inaudible) in emails. Many opportunities have passed when any such issue should have been raised which were not. At no stage during the many phone coversations did Mr

Heard ever state he had not read the terms, or had been unable to view them. Nor was the terms (inaudible) raised until the 6th of February 2012 when Ora stated we logically did not sign the terms and conditions on what is displayed on the Spats website. We trust they are one and the same. And that's the earliest one. If they comply with that with any one of that then I'm happy to consider that. But certainly they were not raised or the disputes of the penalties ever mentioned. And there have been several bits of correspondence that have gone back in emails. For example the email that I showed you on the 29th of October to Mrs Wilkinson where I've referred to the terms and conditions. And at no time did they turn round and say well hang on a minute this is all new to us. Spats Ltd claims expenses incurred through Ora's repudiation including but not limited to debt collection, lawyers fees, penalties, interest and processing fees. Disputes Tribunal filing fees, copy costs and travel. Ora is responsible for all costs incurred having breached Spats' terms and conditions. Having been notified of the same Ora (inaudible) in the contract. In the terms and conditions if you'd like me to go and find it exactly where it says the client will be liable for all expenses incurred by Spats Ltd and any of the (inaudible) or breach of contract. Spats Ltd claims the sum of \$15,000. Spats further claims interest at the contract rate (inaudible).

So where can I just see the. I can see your terms and conditions. I see where the termination clause is. Sorry there's a 14 gives us clause 14 gives us the terms of payment and delinquent account, so presumably this is going to tell us about the penalties and it does. If we're forced to hand your account over to a debt collection agency for collection you will be liable for any collection costs and legal fees incurred. Has the debt been handed to a debt collection agency ... No. It was given to the solicitor who is in the role of the debt collection. I actually have a client who is.

Well it says a debt collection agency. I don't know that that would be a solicitor is it. If we are forced to hand your account over to a debt collection agency for collection you will be liable for any collection costs and legal fees incurred. So are you saying your solicitor is a debt collection agency ... No. In this instant he was acting as a debt collector.

Ok ... So I actually have a client who runs a. I actually designed the website although I can't actually say that they're still a client because, actually only did the initial work for them, for a debt collection agency and I have not proceeded with actually doing

that because of the situation that my parents are also shareholders in Ora. I have (inaudible). But it says on the last page of my terms and conditions it says in the third paragraph down. Client will be liable for all expenses incurred by Spats Ltd in enforcing any (inaudible) contract relations or breach of contract.

Ok. Now the 15,000 that you're claiming, I just want to go to this here you've attached. You've got all the first pages 614/3 ... For simplicity I think I just included the last invoices that were sent out.

Well these are the unpaid ones aren't they ... Yes.

614/2 was paid except for the penalties. So are those penalties being transferred into the 614/3 ... Yes. There will be penalties which would have been added to and where I've sent out the additional invoices for example for the upgrades I've only charged one processing fee rather than a processing fee each. So it may appear on one invoice and then not on the other.

Right so if we were to go through to 614/5. This correspondence with client outside of the project scope. Is this 32 hours is this doing things that Mrs Heard ought to have done. Other people ought to have done that you've taken over. Is that right ... It would probably have just been. There's the upgrade costs. And it would probably include things that I had done and that would be it's not including all of the time that I spent.

But you must have arrived at 32 hours in some way or other by looking at timesheets or counting it or something. I mean you've arrived at 32 ... Yes.

So how have you arrived at 32 and what does it include. I mean that's a very blanket statement. Correspondence with client outside of the project. So I want to know what do you mean ... I understand. It was the time when I was in Melbourne that was calculated in doing some of the work on the Ora project.

But if you were in Melbourne doing work on the Ora project how am I to know it's not the work that you had agreed to and been paid for ... Because I'm trying to differentiate between anything I did extra.

Yes ... Between the contract price of the website.

So I might need to have some more detail about that ... And I put my, I can't do it now for you.

I'm just flagging that one ... And that's only fair.

Yes. So Mr Hill's legal fees ... I have not had more than to date.

Well this was 487 so presumably you've got an account for that have you ... Yes.

16 hours. Documentation time for proceedings. These proceedings ... Yes.

Ok. All right. So what's this maintenance charge on 614/4. Maintenance charged as per section 16 terms and conditions, 2,520. That's quite a big whack. What's that for ... As I explained.

Oh ... The role outs for the upgrades for (inaudible). Like (inaudible) the organisation sends out notification that the upgrades have to be completed and that's the time it's taken to do those upgrades.

How many were there ... I've got a list somewhere. They're now available on line if anyone would like to go to the website.

So you did the upgrades for them ... Yes.

Even though you didn't have the maintenance contract to do it ... No. Sorry. Yes I did them but they would then go into the \$120 an hour rate. So that was a claim (inaudible).

Did they ask you to do these upgrades ... No. They were notified that they would have to be done when they came available from (inaudible). And as I originally said in the claim I did not charge for those upgrades.

Why not ... Well because I was trying to help Ora.

So because you didn't charge for them, could they have known that these costs, this work was being done by you ... Yes because I told them at the meeting that they would have to be done.

Yes ... And then on the 20th of December I said to them look at this stage I haven't charged you for this work. (inaudible) pay \$18,013 or (inaudible) we'll resolve it at that. We'll walk away at that stage.

So you told them in the 20th of December letter ... So that was.

But by the 20th of December letter you'd already done these upgrades ... Yes.

Ok. So what they knew is that some upgrades would be needed. They knew they didn't have a maintenance contract with you for that so they ought to have known there would be a cost. They did not know however that you were doing them or had done them until the 20th of December when you told them by the way I've done these ... Yes.

Would that be fair to say ... Absolutely. But the point I'd like to make here is that I didn't arbitrarily just decide that they had be updated. They are a roll out from the organisation that produces the software and it's not my, I just decide, Ok well this week (inaudible) website.

Are you the only person that could update them ... Yes.

Ok. All right. Is that all ... Yes I think if you're happy with that.

I am thank you. I've had to ask quite a few questions sorry to interrupt your flow. But as you've probably guessed I don't know about website design as I don't know about lots of things that come into the Tribunal, so that's why I've had to ask quite a lot of questions to make sure I understand the factual situation that's happening in relation to the contract and contract law. I'm trying to keep in my mind separated, what actually is going on with this website but what contract law might apply to htat situation is another matter as well ... I do have reference to Judge Harvey's rules on online in the next lot of documentation. I think it's probably fair that Ora has an opportunity now.

Yes but Judge Harvey his rules about online issues, on line law, don't necessarily apply to the status for instance of a questionnaire ... No. His terms are quite clear about being terms being online.

That's another matter ... So what I'm saying is.

I understand what you're saying about terms on line but there are some I think, difficulties for you in that there is a lack of clarity I think around what and we're having to piece together now what the contract actually was. It may be that they don't disagree with you. But because some things weren't recorded straight after that meeting at the cafe ... I understand.

That you've relied on a questionnaire that I think they're going to say they didn't realise was the terms and conditions. Well they've kind of already said that in what I've read and so I'm going to have to decide well is the questionnaire, does it form part of the terms and conditions upon which everybody can rely. And I've already flagged to you that that might be an issue for me given that there are two responses to that by two different people saying two different things. So how can we rely on them and which one could they reasonably be expected to be relied on as terms and conditions. Could the reasonable person have expected that something that's headed questionnaire and not contract terms for a start. Then that there's two responses. So there are some queries in my mind about the status of the questionnaire as forming the basis of terms and conditions. And I haven't read through the questionnaire because I only got it today to see exactly what's in it. So I'm just flagging there are some issues there ... The terms and conditions are both the same for both questionnaires. The only differences are between what the goals and objective of Ora. So (inaudible) terms and conditions. I have accepted that the one signed by Mr Wilkinson as a director on the 26th of June formed the contract and we.

And I have to decide whether I agree with you or not ... Absolutely.

That's what I'm saying. I've got some issue with that. Online terms and conditions I understand what you're talking about there. That's something quite separate. Like this status of this questionnaire and even how relevant that will be in the end you

know what the status of it is. How relevant it will be. I can see that a director has in fact signed the questionnaire above a statement that says all work will be carried out under the terms and conditions of Spats Ltd available at Spats. I can see that that's there so they've been signalled that there are terms and conditions. That they are on line and that work that you do will be done in accordance with those terms and conditions. So I can see that that aspect itself is starting to bind Ora into the online terms and conditions. I don't know what they're going to say about this yet but I can see that it's starting to bind them in. But the rest of the information in the questionnaire as to whether or not that forms terms and conditions because you've been saying they've breached parts of their questionnaire. I'm not sure I would agree that's a breach. I think what we should do is just take a break for ten minutes so we can go out and have a breath of fresh air, go to the loo and grab a glass of water and we'll start with Ora's response. So we'll just take a break.

HEARING ADJOURNS

MS TUNNICLIFFE / MS HEARD

So now that we've reconvened the floor is Ora Marlborough Limited's. Now what you're doing Ora is you're responding to the claim against you. You're not dealing with your claim ... Then should I read the summary or go through the summary of events because they sort of intertwine.

Have I got the summary of events already ... Yes. This document we submitted on our claim.

Summary of events. You can go through that if you like ... Ok. First of all I'd like to apologise for laughing. I know it was extremely disrespectful. Also an amused response more than anything else. I'll go through our documentation. See document one in notification of the meeting that's the file for Mr Anderson. Mr Timothy John Anderson.

Just a minute. Ok ... That's the notification of our meeting for Ora. So we believed that everyone was foreknowledgeed that we weren't professional. That we were in the process of forming the company and we're not aware that Mr Timothy John Anderson was a member of the Spats. That he was a shareholder. We certainly would have been a lot more circumspect and would not have entered the um, arrangement at all.

This was not disclosed at the meeting and I'll just go through from here on that there was no meeting took place at the Combined Clubs of Marlborough. We believe this is a fabrication. It was not called or notified and anyway.

MS TUNNICLIFFE / MR HEARD

It was a chance meeting I think. I don't think it was a proper formal meeting. Are you saying Mr Heard you did not meet him ... I have no recollection.

You didn't meet Don ... There's no recollection.

Of a communication between yourself and Don at the Marlborough Club ... That's right.

MS TUNNICLIFFE / MS HEARD

Yes. Carry on ... We then moved to meeting with at Raupo which has been the only meeting we have had with Mr Anderson face to face. Mr Don Anderson. And that took place. It was a long meeting. We did see a slideshow. We pointed out many pitfalls but that was all. We watched the slideshow. We didn't discuss. It was very confusing meeting. We couldn't commit to memory all the things Mr Anderson has referred to previously. He did notify us his terms and conditions on the website but that was not the website that we viewed. I'll just go through the emails because it makes it a lot easier. If you start from please refer from now to the bound copies of all known correspondence. We had no recollection of the 4th. This is the first email we got from Spats that was on the 16th of April. but everybody had already been notified. All prospective olive growers in Marlborough had been notified that a meeting was to take place previously to this email. The budget was sent out it was available.

Sorry. Just refresh me again. What date was the meeting at the cafe ... The cafe meeting was on the 29th of May.

Right ... So there'd been some contact ... Yes.

Just not sure how the contact started between Don and Ora if it was not at the meeting at the Marlborough Club ... The information had been sent out to all growers

before then. It had already been discussed. There was a meeting in. There had already been a meeting of Ora prospective members.

Yes ... Mark thinks it was at an Olive New Zealand meeting.

MS TUNNICLIFFE / MR HEARD

What do you think happened. What was at the meeting ... It was brought to my attention that perhaps Don could do the job.

Ok and who brought it to your attention ... Probably by Tim.

MS TUNNICLIFFE / MS HEARD

Yes ... The only thing we knew about the Andersons was that they had sons that had something to do with computers. Spats hadn't formed as an entity in our minds at all. And we received this from. The first email from Mr Anderson on the 16th of April. There was the budget released and that's also in the documentation booklet of Mr Tim and John Anderson. So everyone was well aware that Ora was forming. They had the business information. And you'll see. Notification of the meeting took place on the 7th of April.

Well you have to take me a bit slower through them. I can't go backwards and forwards between these documents as quickly as you can so you have to make sure I'm on the same page ... Sorry.

Now you're on the green folder ... Yes. Document one. This is a notification received by all the olive growers in Marlborough. There's the budget that was presented that day by Mrs Wilkinson.

Document two ... Document two. And document three was what was available for others being at the meeting. And sent out. And available again if people requested it. So it was a comprehensive budget. We had already approached Blue Flowers Marlborough, a website design company and had discussed a contract. They were going to come and visit us. We'd agreed on 4,000 and when you, as you can see from the budget that we would have ongoing maintenance costs and that we would be paying for stock photos and it's not correct to say we weren't set up for it.

So if I look at your budget document two, where will I see these things ... Under website. Web expenses.

Right down the bottom. \$4,000 ... And then ongoing through the year 250 and 300 at various points along.

Ok the second pages ok ... So we had a clear vision for our website. We went to Blue Flowers on the recommendation of a previous client and also in looking up their website. It looked. It was clear, clear prices, clear quotes, clear budget and he was very clear on the phone to Mark. What prices he would be.

All right. So you'd spoken over the phone to them ... Yes.

Had you met with them as well ... They were about to meet with us. We put them off.

So that you could meet with Don ... Yes.

Ok ... So we're up to the spiral bound folder. We received this email from Don on the 16th of April and the proposal quote and contract it didn't arrive. We were waiting for specs.

What proposal quote and contract ... Well that's what was stated would come. This.

Where was it stated it would come ... In the questionnaire. It's normal practice for website designers to issue specs and with clear timeframes. If you go to the highlighted section at the end of the first email it says, please don't distribute this information as I don't normally provide it without a proposal request which I charge for. But seeing it is you I am happy to help because ultimately I am sure mum and dad will be interested too. The proposal quote and contract never arrived.

Ok so you knew that you weren't going to get a proposal did you ... No.

Please don't distribute this information as I don't normally provide it without a proposal request ok ... We hadn't engaged Mr Anderson at that stage.

This is even prior to the meeting at the cafe ... Yes. Ok. Email number two. Email number two from Spats is.

Can I just ask. That first email from Spats did it include this Annex one ... Yes. As I point out we (inaudible). If we'd seen the name Spats at the bottom we would have. We were busy at the time and it looked, it was a long email, it was complicated. We assumed (inaudible) didn't read it microscopically.

So you didn't notice it said Spats Limited ... No.

So you just thought were dealing with Don personally. Ok. And how would it have made a difference if you'd seen Spats ... Because I'm a researcher and I would have started looking into the website. I have to research all my work

But you wouldn't. You'd what have a look at Spats Limited website ... Yes and I would have researched the company. As soon as I had seen Mr Tim Anderson was involved I would have not have. It was remiss on my part because I do think it gives an unfair advantage. It was a conflict of interest. It gave the Andersons too much say in the direction of the company.

Ok ... So I'm leading to email number two. The 20th of June, no email arrived on the 4th of June from Spats. We're surprised to see it wasn't in our system.

But you did reply to it ... Yes. Apparently.

So do you accept that you got it ... Um, um, we have to.

MS TUNNICLIFFE / MR HEARD

... Can I answer that.

Yes ... I just noticed that the copy of those emails looks different to what you'd copy off a computer as an email.

So you doubt its authenticity ... Possibly.

MS TUNNICLIFFE / MS HEARD

So are the emails on the 4th of June 2010 ... Mark understood that he had responded by phone. We had a meeting on the Sunday after the Raupo meeting. Email number two from Spats said the 8th of June. No email arrived on the 4th of June from Spats informing Mr Heard Spat's new website was up and running as Mr Hill claimed in his letter 6th of March 2012. We can't find it in our system. Email number three. This is where the Google docs were downloaded. If I could go back to the Raupo meeting. We understood it was a pitching meeting. I made notes to that effect. We hadn't decided on anything. As we left Raupo I informed Mark that if he took Don I would be personally disappointed. As the other members saw it as a cost saving at the meeting I was overruled.

Ok so when you left the Raupo meeting after what you thought was a pitching sort of a meeting ... Yes.

I think Don agrees with you there was to be some discussion amongst yourselves before proceeding. So how did you confirm with Don that you were proceeding ... Mark rang him on Monday. I think.

MS TUNNICLIFFE / MR HEARD

... That's my recollection.

MS TUNNICLIFFE / MS HEARD

... That's his recollection.

So you think you rang Don on the 4th of June and confirmed you'd be going ahead ... Yes.

MS TUNNICLIFFE / MR HEARD

Ok. Yes and can I just check with you Mark. I'll come back to you Phyllis. Just Mark when you confirmed you were going ahead what were you going ahead with and on what basis ... We were going to engage him as our website designer.

MS TUNNICLIFFE / MS HEARD

Ok. Ok. And did you know what price you'd be paying for that ... We're not clear at that point. 1500 was definitely agreed to. Not clear.

MS TUNNICLIFFE / MR HEARD

So why did you decide to go with Don without investigating Blue Flower further ... Well when we agreed meet with Don we'd already put Blue Flowers off because we felt sort of in-house. It was family and that in a group. That should be enough good faith and guidance (inaudible).

MS TUNNICLIFFE / MS HEARD

So did you know it was going to be cheaper than Blue Flowers ... Yes we must have.

MS TUNNICLIFFE / MR HEARD

And what had Blue Flowers said to you about cost ... Well it's in that.

The 4000 ... Yeah.

MS TUNNICLIFFE / MS HEARD

All right. So when you engaged Don you knew you were going to pay at least 1500. That's your recollection and you know that it would have been less than 4,000 ... Yes.

But you're saying you don't know what the price is that you agreed to pay ... Well.

At that point ... No. We were aware of it.

MS TUNNICLIFFE / MR HEARD

... We haven't got it in writing at this point. So it's.

No but ... (inaudible).

That's right. So it wasn't in writing but I'm just trying to figure out what the (inaudible) ... I can't say that I could remember, 3,500 at that point.

At the meeting at the Raupo cafe had you been told you would get a \$4,000 discount. Do you remember any of that ... Well we certainly knew it would be cheaper than what the actual figure was. It would be cheaper if we provided all the (inaudible).

MS TUNNICLIFFE / MS HEARD

Have you got your notes with you Phyllis about what you took at that meeting ... I have but.

Would they help ... They might.

Did you make any note of cost ... No I didn't. All I wrote down was.

It's only one page sort of thing ... Yes. We own the website but Mark is to make sure, they can deal with him. I wrote Liz Anderson down. For some reason I think it's Conrad Wines, (inaudible) lawyer. A book on freemasonry. It says. And then I wrote taking risk. Don doesn't listen. He reminds me of and it was a former colleague of mine. Just to remind myself I won't use that. Where are his other clients and endorsements. I think he's living at home. This concerns me.

Ok so you were writing down your concerns more than actually what the content of the meeting was ... Yes.

Did any of you write down what the content of the meeting was ... No.

MS TUNNICLIFFE / MR HEARD

Did any of you take a (inaudible) ... If I did I don't recall to tell you the truth.

MS TUNNICLIFFE / MS HEARD

And so when you went back to the others in the group because you had to talk about it with others didn't you. I'm not sure who else you had to talk about it with ... The four of us who constitute the Ora directorship with Erol Wilkinson.

So all four were at the meeting. So you just needed to talk amongst yourselves ok. So you didn't need to take notes to report back to anybody else because you were all there ... No. Yes.

Ok ... (inaudible) Email number three. This is where Don downloaded the Google documents on July 17. In between there there's obviously been communication although we don't have these emails. The one that states all the graphics is obviously from me because it mentions our graphic designer. And he wouldn't have known who she was. And we were supplying stuff from the 1st of July. Email number

three. This is the location of Mr Anderson's so-called proposal and quote it was unable to be opened although long frustrating hours were spent trying to. I tried to download work into it. Some documents worked sometimes. I lost a lot of work.

I don't think it's a proposal. It doesn't say it's where the proposal and quote is. It says this is a link for details where you can cut and paste or write the content for the website. It's nothing to do with ... But it was Anderson's documentation. It said that he actually told someone in the Ora Co-op that that's where it was. What we wanted and was already proving frustrating for us at this point was a clear specification, timeframe, quote and proposal.

So where do you ask for that ... We didn't get it and that's.

No but where do you ask for it ... We didn't ask for it.

So how would he know that's what you wanted ... It should have been offered.

I'm not talking about should have. I'm asking if that's what you expected ... Yes.

Where is it agreed that you would get it or where did you ask for it ... It didn't come.

Ok didn't come. So it's not coming, it's not coming, it's not coming. To me if that's what you're waiting for to me the response is you'd ask for it ... Yes.

But there is no request for it ... It was extremely difficult to get Don to respond to requests for anything.

MS TUNNICLIFFE / MS WILKINSON

But where is the request for it ... Here. Could I just interrupt.

No. I've told you what your role is. You can remind others but if I let you speak I know what's going to happen. You're a person who did not want to be excluded by having to wait outside. You wanted to be involved, in everything I can see. I know from my experience in the Tribunal you're a person that is actually expecting to be fully involved in this and you're not going to be because you haven't got the role ... Ok. That's fine. No that's fine.

You haven't got the role. So I'm just reminding you, you know what your role is you can remind others.

MS TUNNICLIFFE / MS HEARD

But I'm putting out to you Phyllis that if you're expecting a proposal and I can understand why you might be expecting that. But it's not coming, it's not coming, it's not coming. Meanwhile you've been asked to upload this do that and yet you're not saying, hang on where's our proposal ... Because it becomes clear later. Ok. But it said of the questionnaire should the project not go ahead I understand I will be invoiced 1500 plus GST for preliminary work associated with the proposal. And I will hereby authorise Spats Limited to prepare a written proposal for the project.

Ok so as a result of having got the questionnaire and signed it you were expecting a proposal. It didn't come. You acknowledge that you didn't ask for it. Well it's certainly not been emailed ... No. We didn't ask for it. In email number two. Here's what I hope is a simplified version of my questionnaire. If you wish to collaborate on it that would be fine. So email number two from Spats sent 8th of June 2000. No email arrived. We did get this questionnaire. The questionnaire caused considerable annoyance. It was long winded. We filled it in with puzzlement really. We were really clear about where we were heading. We would have liked the proposal not the questionnaire. It was the start of very confusing communication. Email number four. We kicked off with asking everyone for their pictures and profiles.

Because that's what Don was wanting ... Um, it's what we agreed would go on the website. And it also arrived at the Anderson home. Email number five.

Do you agree Phyllis you were going to be the person who would upload all of this on to the web ... Yes. We agreed at this point that because the Google docs wasn't working it's not. Don used the word would not. It was could not. And we couldn't get. Mark agreed with him that it would be on email. Conventional email with photos.

So you agree that you were going to upload the information but you couldn't because of the connection ... Yes.

And so therefore the agreement was it would be emailed to Don and he'd do it. Is that what you're saying ... I don't know. He agreed that that was the way that he received it. That is the only thing we could do. I'm not computer savvy. I didn't understand what he asked. Mark isn't either. So it was.

So you asked if it could be submitted by email. ... Yes. And no dispute. He seemed perfectly happy although no doubt he did try Mark.

Yeah. ... Email number five, this is the 6th of September. Just to put it in the time Errol had already, Fran's husband who works for Rare Works had already organised the radio campaign so he's depending on getting the website functional and this arrived at the Anderson's home too, Don will have seen that. Email number six, this is the email we got on the 8th of September, I'll highlight it. As I see it the Ora website is something we were all going to be relying on so it shouldn't be rushed, but that doesn't mean we can't roll it out in stages as time is of the essence.

So at this stage are you saying you didn't understand you were holding Don up. ... Well apparently we were.

Did you know though that you were holding him up. ... No idea.

Ok. ... And this computer geek's speaking gobbledegook, had taken it off a website in Picton that said they guaranteed they did not use it, so that was work had not started.

Sorry what are you talking about Picton. ... Oh it was off a website, another website designer's site who guaranteed that they don't use computer geeks speaking gobbledegook to people of our generation. We were getting bombarded with it as it is clear from, and we were really lost in the process by this point and I'm being sincere when I say that. We're of a generation that doesn't use it, I don't carry a cell phone, Mark can barely work his.

Ok so you get this email that's gobbledegook, do you tell him – can't understand what you're on about. ... (inaudible) not, no we didn't.

Ok so Don's unaware that you can't understand his language. ... He would be aware that we were having trouble.

MR HEARD

He (inaudible) telephone conversations in particular anyway you know, it took a lot to comprehend what he was talking about.

MS HEARD

So the radio campaign for work had not started as is clear from the last sentence in the first paragraph. Mr Anderson had no intention to rush the project but intimated it was acceptable to roll out in stages. If the attachments contained his proposals and quote they were not opened as did not comprehend it. Spats new website the terms and conditions was not located by either Mr Heard or Mrs Wilkinson, as is clear from emails between them. We were getting frustrated and it was hoped the meeting on the 12th of September would move Mr Anderson along.

So where are you reading from at the moment. ... From the email known as six. So we were in the disconnect.

So why couldn't you have a look at the terms and conditions on Spats new website. ... Because we weren't aware that there was a new website or we couldn't locate them.

But on the questionnaire it tells you where to look. ... Yes but it wasn't there.

www.spats.co.nz, are you saying you opened that up that website. ... We think we did at the time, we couldn't find it. By then we were looking actively just to see what we were in for.

So you couldn't find the Spats website at all. ... I don't think so or the contract. By then we thought maybe he'd given us a contract in all the email. At the time we were really busy getting information to him, getting information to shareholders, organising the (inaudible)

Yeah I can understand there's a lot going on but you're telling me you looked at the website or you couldn't find it. I want to know whether you found the website, looked

at it, couldn't find the terms and conditions, they weren't there, or just couldn't find the website or didn't even look for the website, what was going on. ... We can't recall. We don't think they were there because we did look for documentation.

But did you find the website. ... No I don't think so.

Ok. ... Email number seven

Can you just check, do you know how to find a website.

MR & MRS HEARD

Yes.

MS TUNNICLIFFE

Ok so you know that much of how to find a website.

MRS HEARD

Oh yeah, we would have been looking but we couldn't locate it.

MR HEARD

It was Done from from our place and the Wilkinsons, we both tried to find these terms and conditions whether we (inaudible) go on the website or not but we couldn't find what we wanted to see.

MRS HEARD

I think we might have been looking for a very clear contract or as is normal on a website at the time what we were in for which was our, you know they normally put prices.

MS TUNNICLIFFE / MS HEARD

Ok so you thought rather than general terms and conditions you might find the terms and conditions specific to you is that what you're saying. ... Yes, yes.

MR HEARD

Maybe.

MS TUNNICLIFFE / MS HEARD

You didn't find any terms and conditions you thought relevant. ... No, no, nothing that told us what our time frames were.

Did you tell him – we can't find your terms and conditions. ... No I don't think we did.

MR HEARD

I'm sure in the telephone conversation he would have mentioned he couldn't find the terms and conditions and there were a number of telephone encounters.

MRS HEARD

Most of our encounters were by phone. Email number 7 is the start of the agreement to send all photos, copy, information and graphics by conventional email as the Google docs system had failed. So if you move through you'll see all those things at the top and what we were sending him. By the 10th of September we assumed Mr Anderson had a recipe section, a house section and a home page, by the end of the 10th of September. They were not written in a rush as Mrs Turner's was working with (inaudible) the chef at Bangkok restaurant and was testing all the recipes. They were comprehensive, the recipe section was based on winter/spring seasonal produce and game particularly suitable to Ora's robust oil style. We needed the recipes on line as they would be out of date and could not understand why Mr Anderson did not keep them on display later and order the stock photo ok. We called another meeting of the 12th of September, if you turn over this was minutes that arrived at the Anderson's home. Minutes of the meeting where Tim Anderson was asked by Mr Wilkinson to get Don going as the regular campaign was being prepared.

MRS TUNNICLIFFE / MRS HEARD

Okay. ... So email number eight I'm asking him to pick out photos.

Just a moment. Ok yeah. ... I've emailed him (inaudible) to other people in the Co-op and Fran's Errol to choose photos. Email number 9, these are the photos we would like you to consider. I will send you the links and following emails and you can arrange payment or I will if you let me know.

Payment for what. ... For the photos. Email number ten, more stock photos. Email number eleven, the 13th of September, Mr Anderson had a home page and health benefits section and photos sent to him. The Ecommerce paid health facility was required but the photo and product description he could launch if he was rolling it out in stages. At this point all we really wanted was the Ecommerce section and our products online. Don was dictating what he wanted online, like we didn't want to place single bottles because they would be expensive. Cos we had the logistics to think about, it makes it expensive if you sell in a single unit (inaudible) six which we have every intention of selling in bulk, so that's why the product's not expensive online as opposed to in the shop (inaudible) Email number twelve, he's still getting information but it's still only in the 13th of September. 19th of September is recipes. The recipes are important because when you are, we like to put recipes in the box and that directs people to the website, or if you're demonstrating at a food fair if you give people. Cos we have food samples made up of the products that we're demonstrating, if you give them the recipe and they go to the website that was our way of directing traffic to the website and we always give recipes. Email number fifteen, they're up to the 23rd of September, Hi Cloe, the photos are great but we've decided at that last (inaudible) to say so thanks a lot, it has helped to get things on track and gives us peace of mind. We sent in six in total, it's good to have more on hand for future options, thanks again. Mr Anderson used the clothesline example that was one of many and he chose the worse sample. Mr Anderson was not happy with the quality of the photos, he had not read his (inaudible) questionnaire answers that stated and they did not want a slick looking website. He was bullying us into his ideas and exercising editorial control.

Mrs Heard contacted an olive harvester who had taken photos during the season on a professional camera and who has a tertiary qualification in photography and hopes to be professional. She sent us great photos and volunteered to take as many as we wanted. Mr Anderson was not being held up, he was holding Ora up. Email number seventeen, Mrs Heard has completed her end of the bargain, sufficient copy has been provided. The recipe section was very important as we have used the services of a young chef who was beginning to make her mark and was more than happy to continue testing and supplying testing and supplying recipes. We had more in the pipeline and could have dropped them in at any stage but we were fed up already. We were fed up and there was no point talking to Don, he doesn't listen to people, the customer or his client is always wrong. At this point we were tired and testy. We

sent out email number 18 which was letters to shareholders and that outlines what was happening. It wasn't just about the website, we had other advertising campaigns going as well directing people to the site and if you turn to the part marked 'funding' Mr Anderson has probably (Don) has probably interpreted that we were dependent on selling the oil to pay him, that was the ridiculous assumption and not what Mr Heard had told him at all. Email number 19.

MS TUNNICLIFFE

Can I just check with Mr Heard what he had told Don about the payment.

MR HEARD

Well the situation was we'd asked for some more money from the shareholders and that was, most of that was in the bank when I talked to Don and that was available to be paid. It could possibly have been that Fran pays on the 20th of the month, it may already have been loaded in on the 20th of the month he paid.

MS TUNNICLIFFE / MRS HEARD

Ok yeah. ... Email number 19 indicates that the website was coming online and three orders have come through.

On via the website. ... Yes.

Yeah so the website was definitely online by the 19th of October. ... It was cos Don was obviously checking to make sure. The 29th of October, in spite of his claim to the contrary he did not always respond in a timely manner. He had already been asked to buy stock photos by email Ora directors called a meeting, we were really concerned cos he didn't respond and put the recipe section online at this point. We knew we were in, we were remiss in meeting his terms and conditions and his specification, by then we were really familiar with the terms and conditions.

So how did you become familiar. ... He had kept saying that he operates within the specs and his timeframes yet we still didn't have them, we were checking. We believe the website came online, his terms and conditions on the 6th of October.

And did you see them. ... Yes, no we didn't at that point, we'd stopped looking I think. But we were definitely always looking for the contract, we knew that was the contract.

All right but when you've said that you were aware that you were breaching the terms and conditions what were you breaching. ... I don't know.

You were aware, you were being told that you were breaching them so you were clear that he thought you were breaching them but you're saying you didn't know how you were breaching them. ... We were supposed to remember his entire presentation that he'd given at the Raupo café and commit it to memory we think.

Hm, hm. ... And if you read the script this is the first indication that he charged hosting fees of \$500 a year, we were not aware of that. And it says, I've highlighted it on email number 20, I'm not quite sure how to answer your question. Fran had obviously rung him concerned, that's how we were aware as the project costs were covered in our meeting and a budget between \$3,000 and \$5,000 was sent back to me so I'm not sure what you are defining as additional costs.

And somebody's written no \$3,500 plus GST on that and I presume that's you. ... And he said I've not heard back yet.

So that note 'no \$3,500 plus GST' is that meaning that you believe you were to pay \$3,500 plus GST. ... Yeah that was the total price of the project.

So by then you knew that it was \$3,500, by the 29th of October would that be fair to say. ... Yes, yes.

And that was accepted was it. ... Yes. And he wrote I have not heard about the purchasing of stock photos and I reluctantly agreed to put Stage 1 online. We weren't sure what Stage 1 was or

Sorry where are you reading from. ... The highlighted part on email number 20.

Yeah you'd already been asked by [inaudible] yeah. ... I think an investment of either \$200 to \$300 photos would be money well spent.

Where are you reading from. ... Email number 20, at the top 'Hello Fran' have you got that?

Yes but when I asked you where you're reading from you said the highlighted bit at the bottom I thought. ... Oh no.

I haven't got anything highlighted other than I've not heard back about the purchasing of stock photos okay and are reluctantly, okay so you're saying he's telling you there he hasn't heard about the purchasing of stock photos, yet earlier on you had authorised him. Where was that that you'd authorised him to purchase stock photos. ... On email number 9 and email number 10, and then it's the 29th of October where

Hang on a moment, stop, I'm just trying to make notes as you go and it's difficult for me to find where to make the notes [inaudible] I won't be a moment. Okay thanks. ... Okay email number 21 is from Mark, I'd stopped communicating with Don it was extremely frustrating. Ignore the last email that was accidentally sent before finished but below is a copy of the email we sent to you way back. We were actually giving you the mandate to purchase the photo for the front page. We sent you this one and there's a follow up email [inaudible] so if you find something suitable then run it back past us before we purchase from this [inaudible] stock photos that would fit some of our recipes in a time we hope to come up with some done by ourselves. Is it possible to put the recipes on the site as they are and add the accompanying pics later as they become available? If Phyllis gets trained could she do it? The idea of the recipe section was to replace periodically the in-season dishes etc, what else do you need to progress the site in the attached jpg is a pic from Fran's dressing recipe. By then we'd given up explaining but I'd done the garden thing in Awatere Valley and people had requested Fran's recipe desperately, it was a real hit in every demo we'd done. Email number 22, this is where we made late payments.

So this is going back in time was it, oh no. The last one was the 31st of October so we're going through now to ... 13th of November.

Oh yeah okay hm, hm. ... Okay cos if you read through he's telling us off for being late but he'd never by then maybe we'd seen the terms and conditions. We were winging it without specs and without clear timeframes so. Miss Wilkinson pays Ora's accounts on the 20th of every month, she's a volunteer accountant contributing countless unpaid hours to Ora, Mr Anderson is aware of this. Mr Anderson was clearly causing irritation, he had not purchased stock photos and his accounts were

unclear. He had no quote or proposal with clear timeframes. Mr Anderson was bossy and constantly offered advice. We made enquiries but could not find those in the wine industry he had worked for cos there was no testimonial or portfolio section on the new website and it's really hard to work without it when you are paying professional fees or not, but they did pay. Mark rang and explained that the accounting system was loaded allowed him to pay on the 20th and by then Mark's dealing with Don from this point, all the rest of us had walked away. Now we've got email number 25 sent on the 23rd of November.

Hang on, 25 we're up to is that right. ... We were having trouble getting profiles from the other methods, that's to make sure [inaudible] Co-op. Mr Anderson had sent the the following email on the 11th of November stating what he had and he writes [inaudible]

Sorry where is the one of the 11th of November, what number email are we up to. ... Oh that's the attachment, email number 25 the attachment.

Yeah which is the 23rd of November, ah there's an attachment on the 11th of November yeah, the checklist. ... Yeah and this states what he has. He puts the recipe section in there but it wasn't visible on the website. Well we don't know, it wasn't visible to us, that's all we have to go on.

Yeah. ... So email number 26, this is Don again, that is disappointing as most of their phone numbers will already be online in the white pages and it tells me they are proud of what they are producing. Phone numbers and [inaudible] website show viewers on the website as genuine if their phone number is in the book then the decision not to include the numbers detrimental to the website integrity. Email number 27, this is Mark valiantly battling on. And 28, 29, email number 29 on the 17th of December – I will purchase images for the recipe section of Ora website that Ora will [inaudible] before we finish this section of the website. So I mean he didn't, he wasn't listening to our end of the. It says no purchase of stock photos our request ignored yet again, we had all given up on Mr Anderson. He talks about Michelle Richardson's email campaign and disregards our responses to his questionnaire. Olive oil is not wine as it is a perishable product as it does not keep like wine, it goes rancid if it doesn't sell quickly, unlike wine it does not develop flavours over time or improve with age. So we were having to get rid of, we don't like to hold stock.

MR HEARD

We were starting to panic about actually selling our product.

MS TUNNICLIFFE / MRS HEARD

All right. ... This sent to all email number 30, went to all Ora shareholders and outlined what we've been up to. Meanwhile number 31, the first attempt to end our relationship. We had agreed to pay \$3,500 plus GST but were concerned about the extra \$1,000 I think at this point or what we thought was an extra \$1,000. So how are things progressing, the suggest email campaign has some merit, it would cost nothing. So we're getting marketing advice.

So how was this trying to end the relationship. ... We wrote so if the Ora website can be made to look reasonably well finished and we train a couple of people up to add and replace news, recipes etc that's all we'd expect from you. Give us a call if there's anything you want to discuss.

So it's still ongoing you're wanting him to make it look reasonably well finished. ... Yes.

Yeah. ... Email number 32 was when we approached C I Test Stores and that was very good for us and has proven to be. Email number 33, and this is 24th of March 2011, not requested or required. We did not require Mr Anderson for his marketing expertise in regard to olive oil. Mr Heard sells up to 15,000 litres of oil per year, Mr Wilkinson is the marketing manager of a major national media company. We simply wanted Mr Anderson to respond with information of how we could let him go for Mrs Heard to receive instruction on how to update the relevant sections of the website but received no instructions on how to do it.

So when Don is saying I've set up an account at Mail Chimp do you interpret that as telling you how to market. ... No just all the rest of it too and more coming up.

But that comment that you've got below this e-mail doesn't entirely fit that email I don't think. ... No it doesn't.

So what is Mail Chimp. ... I don't know.

Okay, all right. ... It had on tutorial video with it. By then we were just, had enough. Email number 34.

Just a moment. Hm, hm. ... We communicate all the time with the Co-operative and we've been sincere, I mean nothing hidden and we've let them know that the advertising campaign wasn't going well, that we were moving into other areas, which is what you'd do in business if something's not working. Email number 35, this is the Annabel Langbein, Don went and did it off his own bat I think.

MR HEARD

Well initiated it.

MRS HEARD

He initiated it and we were in no, we didn't want a relationship with him at that point being honest and we'd already worked with. When you get a celebrity chef once they fall out of favour that's actually detrimental to the product and it's happened with other olive growers so we were very reluctant to enter into anything, we already had our chef that we want to work with. And you know at the time Annabel Langbein was hot stuff but it doesn't mean that they always will be. Yeah at email number 36, this made us very grumpy cos at the time this email was received Village Press were being threatened with litigation by most commercial olive producers in Marlborough and they actually were in Court with one of them. They were generating capital and offloading oil in order to pay up their suppliers and we can clearly prove how difficult it is to get any payment from Village Press in a timely manner that's why Ora was set up.

But this isn't about the Village Press is it, isn't this about, I'm not sure who Barry Moore is but isn't this about doing some marketing through Grab One. ... Yes.

So why should Village Press come into anything. ... I don't know.

It's just saying that Village Press did well on Grab One isn't it? ... Hm, hm.

So it's just giving you a bit of information as far as I can see but this is an example of internet sales requiring minimum work. ... Yes but even the reason that we

established, at the time you have to put yourself in our position, we were actually requiring payment from Village Press ourselves.

Yeah but this has got nothing to do with Village Press. I can see that the mention of the word Village Press if you were having problems with it might have been a bit inflammatory but all I can see Don is doing in this email is to pass onto you an idea about putting the product on Grab One – Village Press had done pretty well on it, isn't that what he's saying. ... Yes that's correct but afterwards in subsequent correspondence he mentions that we cost ourselves by not listening to him.

Well he's giving you some advice that you didn't want. ... Email number 37, this email shows Mr Anderson as being obdurate which is what we were accused of being. He's ignored and has not responded to Mr Heard's request to wind up his activity on behalf of Ora, he's still going ahead. Number 38, Mr Heard had emphatic opposition from his wife and Mrs Wilkinson. They had both had enough of Mr Anderson and Spats Limited and the terms and conditions. Mr Heard's innate kindness investment [inaudible] cost him \$3,500 plus GST.

Hm, hm. ... Don wanted to present his idea to Ora shareholders.

But that's not Mr Anderson's issue who paid the money, he's just expecting to be paid if it comes out of Mr Heard's pocket that's, cos he's made that decision it's up to Mr Heard to make yeah. ... Now he contacted Andreas Morritz and Mr Anderson is once again breaching his own terms and conditions by dealing with an undesignated spokesperson okay and if you knew Mr Morritz you'd know why this caused huge concern within our Co-op, because most people find him exceptionally difficult to work with and the reason we've formed such a tight huddle was to keep some members of the Ora Co-op. Because everyone has their own ideas on marketing but they don't usually market in the volumes that we do. Okay email number 39B, the meeting on the 10th of July was called to tell Mr Anderson we emphatically and absolutely no longer require his services, he was creating chaos and confusion among Co-operative members. All the directors knew that he would be litigious as we knew of his work for Mr G Hill as Mr G Hill featured on his original website or links as was noted at the Raupo meeting and subsequently.

So who met on the 10th of July. ... We did, the four of us.

Okay so the meeting of ... It was called and we've received the subsequent email, this was just, Kay [inaudible] was taking everybody along

So the Heards and the Wilkinsons all met and decided to dispense with Don's services. ... Yes number 40, email number 40. As you can see from Fran's email on the same page it's email number 40, she was not happy. Email number 41, [inaudible] attempt [inaudible] involvement of Mr Anderson.

That's the letter from Fran Wilkinson, email. ... Hm, hm, that's very clear. You were not aware any roll over date occurred on the 26th of June, have you read his response to us we're never notified what roll over dates [inaudible] It doesn't say specifically in the terms and conditions that there were rollover dates but most website designers contact their clients.

How do you know. ... I do know I've checked.

Who did you check with. ... With several Marlborough website design companies, they will notify their clients by email. If payments are concerned sometimes by phone. We believe that our treatment was quite draconian.

When you say it's not mentioned in the terms and conditions I'm not sure that that's correct because the terms and conditions have got a termination clause haven't they. A client's desire for termination must be submitted in writing no later than 40 days before the anniversary of the start date and the proposal. But you didn't have a start date, you didn't have a proposal with a start date. ... No [inaudible] and if you look at email number 41 [inaudible] it's the 26th of June at that point and then if you turn over it's now the 26th of August.

Yeah. ... And it says the last email from Spats was 12th of July 2011, Mr Anderson did not correspond with Ora for 40 days, we think it was more, apart from invoicing. He has broken his own terms and conditions again. As I did not receive a reply to my

So where are you reading from about the, oh down here the 40 days hm, hm. ... And as I did not receive the reply to my request for your intentions for this site and

Where are you reading from. ... The highlighted bit, email number 42.

Your intentions for the site [inaudible] ... Including those needed to sustain existing and functional elements of the website I'd continue to support it and ensure the website remains online and accessible to your customers as per my terms and conditions. The third attempt to end it was the 30th of November 2011 and we did make very clear that we were not computer literate at the start of this email number 44 and the highlighted point is at this point we do not have access to a copy of the contract we have with you and have been unable to source information from

Whereabouts are you reading from. ... From the highlighted part, from your website

At this point we do not have access yeah. ... So we are working in the dark to some extent.

But by this time you were able to access the terms and conditions on the website weren't you. ... Yes but we had no contract and no clear outline and no specification.

Right so this is the third attempt to end so what are you saying about ending it, where do you say we're ending it.

MR HEARD

It's in the whole letter, the whole letter is about trying to wind it up.

MS TUNNICLIFFE / MRS HEARD

Well you say, you're saying that in the first paragraph you're talking about promise of communication and you haven't got what you wanted, an easycare site. Second paragraph, breakdown in communication – we would have been wiser to take on a company without conflict of interest. Website's not a priority for us at present. We wish to terminate the contract with you as soon as possible in an orderly fashion to minimise further costs to the shareholders. We trust you will make it clear to us who owns all website addresses, credit card facilities etc and before any payments are made for your services rendered. Okay yeah. ... Email number 45. The following letter was sent on the 22nd of December and that's Don's (or the 20th) and that's Don's lengthy email that he'd already contacted Mr Hill or Mr Hill

Well 45 is actually a letter from Mr Hill to Spats, so it's not an email from Don. ... No it's the 16th of December.

So what's your point about this. ... He'd already agreed to start litigation because the following email's dated the 20th of December. Mr Graham R Hill describes the reciprocal relationship between himself as the contract law specialist and a forensic computer specialist and Mr Anderson of Spats who is also Ora's web designer as a mundane matter. We trust the Law Society says that this [inaudible] can make a determination of this as ethical. Cos we felt we were trapped in an endless round of

So how did you get hold of this letter from Graham Hill to Spats. ... I don't know it arrived

MR D ANDERSON

Can I just answer that. It's an invoice, it's an invoice.

MS TUNNICLIFFE

Yeah how did they get it Don.

MR D ANDERSON

Mr Hill sent them a letter asking for payment for services of trying to sort out the winding up of the payment of the invoice. So Mr Hill sent that to them for payment which they did not do.

MS TUNNICLIFFE

Oh I don't know whether [inaudible] letter have you.

MR D ANDERSON

So it's obviously [inaudible]

MRS HEARD

I've never seen that letter no [inaudible]

MR D ANDERSON

Mr Hill sent the letter out.

MR HEARD

Oh is this the one in the email.

MS TUNNICLIFFE / MRS HEARD

There's a letter from Graham Hill to the directors of Ora dated (your 48A) dated the 2nd of February. ... We're not in December 2012 so I'm assuming it was a mistake.

I'm just wondering how you got that, I mean it must have been attached to something else addressed to you, but what I don't know. It may become clear later but I take the point that by the 16th of December Mr Anderson is concerned enough to have gone to his solicitor. ... And in email number 46 he says in an [inaudible] meeting and subsequent meetings, we never had subsequent meetings, we only had one face to face meeting with Don and that's on five items. It says he flicks a switch, at this point we wanted him to flick any switch that he could find. A dynamic, and they're highlighted, a dynamic content management system that you engaged me to build is not a transferable asset. My terms clearly state that you were purchasing my skills and expertise, not an object that can easily be handed over at the end of the transaction. He had delayed from the 11th of the 7th 2011 till now. I think that (page number 2), I think Ora has become confused with me helping Ora in the things that Ora is actually supposed to do itself, like upload its own content using the content management system provided. We've received no instruction on how to do that.

But Mr Anderson says he's actually been on the phone to you talking you through it. ... No he talked us through the Google docs, he didn't talk us through anything once the website was up and running. It was the responsibility of the four of you on behalf of the [inaudible] stockholders to fill in your questionnaires accurately so the project reflected what Ora wanted. Our review of [inaudible] has left me confident that I have delivered a website capable of performing to Ora's specifications however what is apparent is that Ora's no longer operating by following the information provided in the questionnaire. We didn't have a copy of the questionnaire of what we'd filled in, I had no idea what we've done and we had no timeframe to return the questionnaire by [inaudible] Oh and the last page, the second to last page, if there was any suggestion that the website has failed in meeting original expectations then I can remind you of your responsibility in maximising its potential as a complementary strategy to your marketing objectives or responded opportunities to obtain email addresses to build a data base at events like the Food and Wine Festival and other

events like Garden Marlborough. You've priced your products to be more expensive online and your retail outlets and did not follow my suggestion of running an online promotion using Annabel Langbein, it had been arranged for you. Whoever made these poor decisions has cost your shareholders at least \$15,000 from my calculations, contrasted against other similar projects. This is correct if you understand food marketing. At each wine and food festival we deal with very intoxicated people, asking them for an email address is out of the question. At Garden Marlborough which is only one of many events where we've promoted the oil, Garden Marlborough we always gave out our printed matter which says on it you know, it's got the website address directs people to it. And on your last page

Whatever, it's Ora's role to decide how it's going to promote itself. ... I [inaudible] websites and not making his terms and conditions available until 6 October 2010 and that was really clear, everyone who works with Mr Anderson is working in the dark. Email number 47, this email was genuinely sent in error.

Hm, hm, how did it end up being sent in error. ... We've got no idea, we have a big family.

But if you were not intending to send the email why would you write it. ... It was probably written in a fit of pique. Mark says it was me, I accept that but it must have been just left there and walked away, I see it's around lunchtime maybe, I mean everybody was arriving home for Christmas etc. That was a genuine mistake which we apologise for. Email number 48A, this is the first letter we got from Mr Hill. We anticipated it was coming, we were surprised it took that long, we thought it would be a lot earlier. Email number 48B

But 48A is asking you for \$2,302.65 is there an invoice with that, do you know how that's made up. ... No.

Had you already had an invoice for this amount. ... Yes I think we have.

Okay. ... But it was unclear because we thought our sum was \$3,500 plus GST. There is the, the invoice is actually listed further along I think. Mr Anderson changes his invoices all the time, the wording. There's [inaudible] responses from Don. At

this point it was really confusing because we thought we were dealing with Mr Hill and he responded separately.

Just a moment, I just want to stop for a moment. Right well I can see that the invoice, I'm just seeing that you've got an invoice 614/3 which says overdue notice on it as well for \$2,302 so I can see that that was probably what Mr Hill was referring to in his letter. And I notice that invoice 614/3 in Mr Anderson's bundle is for a different amount. So in order for me to establish what demands have been made of you I will be relying on the invoices sent to you in your bundle, yeah. ... We're not sure at this point, cos Fran was concerned that it seemed to be more than the \$1,000 which appeared to be outstanding to make it \$3,500 plus GST and so she asked. Cos we were really concerned that we were trapped into a very draconian contract by then.

Okay. ... Hm, hm, email number 51. It's not standard practice to put terms and conditions on a website. I [inaudible] it is not standard practice not to issue a quote, a proposal and a contract with clear timeframes. It is not standard practice to hide portfolios and only display terms and conditions on your website. It is standard practice to publish quiet testimonials and to [inaudible] prices for all services offered in different web hosting packages. Mr [inaudible] sustainable website [inaudible] is very, very unusual. This is a request for the full contract and this is what we got, exactly what was posted there and they said it was the full contract not a questionnaire. And this is the Blue Flowers' web design so I just used it in contrast to show you that

Show me what. ... They have the portfolios, the marketing, the graphics, domains and hosting. It's just a print off the front page but there is no reference to terms and conditions, that's given to you in a hard copy so you've always got it to refer to.

But for instance if I joined Trade Me or something like that, so tick the box that you've read the terms and conditions. ... Yes, yes but then it's always available and presumably it's not altered. The blue flowers hosting packages are listed on the second page as well and that was news to us that \$7,500 was a quote, we don't even recall a [inaudible] being given.

\$7,500. ... From Spats.

For their package you mean. ... Hm, hm, we weren't given that [inaudible] in any way written down or stated in that our yearly hosting fee would be \$500. Apparently we turned down the maintenance contract, whatever that means, but you will see that had we had it explained. This is Spats Limited website, the home page and the rest is terms and conditions and. Email number 52, we're still asking for the contract. Email number 53, it said the work was done but it's unavailable to be, it's not available to be viewed by the public until it is published by the administrator, i.e. me. This is not happening till as already mentioned I have been paid in full figure but at which point he never asked for money to be paid in full before the recipe section was required, he was disciplining us I think and we really thought this clearly illustrated why you don't have a conference of interest in the business. As my father is a shareholder I have a beneficial interest in Ora, my children would be most interested to know that one of them was claiming a beneficial interest before Mark and I had [inaudible] Email number 54, we will supply you with the name of our lawyer when the signed hard copy of our full contract has been forwarded with all due respect to Mr Anderson. That's in response to Mr Hill. Mr Hill [inaudible] We continued in dialogue with Mr Anderson [inaudible] understand that the contract had to end, that his relationship with Ora had to end. We've put the invoicing in.

So you haven't put in the original two invoices either. We've got 614/3 so I haven't got 1 or 2. ... So then the

And these go somewhere else. ... These are all coming.

What do you mean these are all coming. ... These are all in response to the amount on the [inaudible] here, yeah they're going up every month until we get to \$15,000.

Yes but no one has given me, and I think I'd need to get it from Ora to make sure that I know exactly what you've received, the invoices 614/1 and 614/2 those ones so I can see what you were invoiced for because that's relevant to the claim so I can see what's been left over.

MR D ANDERSON

[inaudible] There's 614 and there's 614/2, there's no 614/1.

MS TUNNICLIFFE / MRS HEARD

Okay 614 and 614/2 hm, hm. Okay alright I'll get them from Ora because then I'll know exactly what you've received and we can be confident they haven't been altered as you suggest they might have been by Spats on those demands that's been made of you okay. So that's fine, we can get those in a subsequent hearing, cos we are going to have to come back on the other claim alright. ... Then we'll go onto email number 58, the website has been shut down at this point, it shut down back on the 8th of February, which we were really grateful for, we thought that that meant our relationship had completely ended. Mr, email number 58, we didn't receive this email and Fran responded, we were away marketing Ora and I think [inaudible] Email number 59, they were responding separately and that was causing confusion. Email number 60 I've highlighted at the end of the date [inaudible]

I still don't know how you've got a copy of that or when it was sent to you so it might become clear at some point. ... Email number 61 another we responded to Mr Hill saying that we would like, your suggestion [inaudible] a discussion of these matters with Mr Anderson and his family and ask him to provide all emails he has received from us as well as his responses to give you an overview exactly what services we have received [inaudible] This may help the Anderson family clarify their decision whether to remain in the Ora Co-op. Email number 62, we pointed out we couldn't locate this email and all correspondence from Mr Anderson has been saved. Email 63, Mr Hill is still engaging.

Hm, hm. ... Email 65, we have a Queen's Counsellor in the Ora Co-op as well and Mr Anderson seemed to want us to engage a lawyer. I was against involving him at all but he was approached, Mark went to see him just to make sure that our terms and conditions were breached or if we'd done anything wrong and Don responded and sent the email to them as well. Mr Sisson was also apparently unaware that Spats Limited had been engaged without Ora reading the terms and conditions that were online. Also the emails reminding Ora of the terms and conditions went unchallenged when Ora failed to make its first payment on time. These would have been pointless of the terms that were created in October 2010 as you have already recently suggested. So we contacted the shareholders again with this [inaudible] payment I think or let them know how things were going and that was just before Christmas. Email number 67, Mr Anderson, as Mr Anderson did not reply further to Mrs Wilkinson after 12/7/2011 and did not put the recipe section on view or purchase

stock photos and did not contact Ora for 40 days he far exceeded his own 40 day breach of contract clause. Ora did not supply Mr Anderson with the name of the lawyers, as Ora did not supply Mr Anderson with the name of the lawyers he did not provide Ora with the full contract and proposal. Mr Anderson clearly needs money, he caused considerable stress by delaying going to Court (this is the 14th of June) and hoping for a settlement. He has been paid fairly [inaudible] for work he has never completed. Ora has no website and printed matter it is obsolete as a result. [inaudible] Ora did not receive any further correspondence from Mr Don Anderson after his 12th June

Sorry where are you reading from. ... From this last piece of the whole folder.

Which whole folder, which folder are you meaning. ... After email number 68.

Okay so this is something, just a statement you're making, this is not an email or anything. ... No.

Okay it's just something you've thrown in okay. ... Yeah, did not receive any further correspondence from Mr Don Anderson after the 12th of June 2012 email. Ora has no website and has received no evidence the website has been worked on since October 2010, that's when work ceased. Apparently Mr Anderson does work his clients don't get to see. Ora directors were concerned following Mr Anderson's email 8th of September 2010 that he was not going to get on with the website with any urgency. As Ora received no quote or proposal Mr Anderson's timeframes and stats, current terms and conditions could not be checked, although Ora directors did try. The terms and conditions on the new website could not be viewed until 6th of October 2010. Ora was given no official start date on any documentation anywhere. If it was 17th of July 2010 Mr Anderson caused delay by providing Ora with Google docs that did not work. He clearly knew they did not work after lengthy discussions with Mr Heard so conventional email and attachments were used, this was not Ora's fault. Mr Anderson made assumptions regarding Mrs Heard's computer literacy and of her broadband speed. He appeared to be more concerned with offering advice, telling his clients what could wrong with the project and emphasising his terms and conditions, rather than listening to his client. Mrs Heard provided all copy for the website from 9th of September until the 27th of September, a period of 18 days and well within the six weeks timeframe stated within Spats terms and conditions. Emails

clearly show Mr Anderson raised no objection. He now states he was responding to a special request by Mr Heard to rush the project, he cannot have it both ways, he used obfuscation and computer talk to confuse the client. Mr Anderson was having difficulty with the [inaudible] our e-commerce facility, he was delaying the project. And there's this photo of our website and he wrote in that you see highlighted is the last work we assume is the 7th of October 2010 – Ora Olive Oil is currently developing their website, we will be bringing up various recipes, tips and special offers over the next month, we will be [inaudible] significant content for you to read and enjoy.

And you're saying he had that information, or some of it, and didn't put it on or didn't make it visible. ... [inaudible] but the recipe section is very full and it's full of information like how to use olive oil. If you go to the third folder which is Ora Research Documents, this is Document 1 and this has been altered again by somebody. Terms and conditions have now posted as of today January the 1st 2010 it reads. Document 2 is the we printed off, we printed this off on the 25th of the 3rd 2012 where it clearly states terms and conditions came online on October the 6th. Mr Anderson stated to you previously that the questionnaire notified us of this new website, we didn't receive that.

Well his website, I don't know about a new website but his website. ... He said that it was his website and also

But you keep saying it's his *new* website as though there was an old one. ... I think we saw an old one at [inaudible] cos it was then he had a lot more photos and content on it. I know we looked at his mother's website and maybe I took the links off there but I think the original Spats website looked quite different and had been altered.

MR HEARD

It was the date of when the terms and conditions were posted, that's the important thing.

MRS HEARD

And this is Mr Hill's website that Mr Anderson designed for him. A point of interest although phone numbers are listed on the website I couldn't locate Mr Hill in the phone book.

MS TUNNICLIFFE

Okay is that all you want to say.

MRS HEARD

Yes.

MS TUNNICLIFFE

Alright what I'm going to do is to adjourn for probably 15 or 20 minutes and I'm just going to write some things up on the white board, I'm going to bring you in and go through those issues. They will be things that I see that the Tribunal has got to decide, they probably won't be in a great order because I'm fairly rushed and we're at half past four already so, and I'm intending to finish by 5.00 p.m so I'll just go through and, cos all the staff finish at 5.00 p.m. I'm going to go through and just say these are the issues that I think I'm going to have to decide and talk a little bit about gaps in, perhaps in the information I've got and where there's confusion that we'll need to have further discussion on. Then we'll adjourn the hearing to come back to another date and I will also follow up that in writing, giving you the date but also following up in writing what I've put on the board and probably a more sensible order alright. So that when we come back to the next hearing we can have a discussion around those issues and you can tell me if there are any issues that are missed out that need to be added. That's on this claim so at the next hearing we're going to have to finalise this claim and talk about your claim.

So just briefly, I do want to just briefly before I adjourn just have a quick look at your claim because you seem to be claiming \$15,000 as well with absolutely no information for me as how you'd arrived at that amount. So you can't just claim something without any justification so what I'm, you know your claim is deficient and that you don't tell me what the breaches on, well what breaches that you're linking your loss to. If there's a breach of contract then the party who, the innocent party can claim damages for breach of the contract to cover their loss arising from the breach so there's got to be a bit of a connection here. This \$15,000 because of the nuisance and stress, well how are you going to quantify that? I'm looking at that loss

associated with breaches of contract, loss associated with that and I wouldn't be looking to make an award for stress or the fact that it's caused problems, I'd be looking to you to quantify that. The \$15,000 will cover stress, we don't do stress, we do damages arising from a breach so you'll need to think about that and I'll probably be including it in my issues as one of the things that you are going to have to prove, I'll just make a note of that. So I'm just going to adjourn till I write things up on the board, probably 15 minutes or so. This is not going to be your last chance to speak ever on this claim but today I'm just going to do some kind of wrapping up, possibly just make sure that there's no blaring gaps in my issues list and then we'll call it a day. So we're not going to discuss these issues, we're just going to go through them. You can point out to me if I've missed anything out, then we're calling it a day, so see you in about 15 minutes.

MRS HEARD

Can I clarify a point.

MS TUNNICLIFFE

Yeah briefly.

MRS HEARD

Do you have to go through with the counterclaim.

MS TUNNICLIFFE

You can withdraw but you have to withdraw in writing.

MRS HEARD

Okay thank you.

MS TUNNICLIFFE

And you will have to do that before you know the outcome of the original claim because I won't be releasing the outcome from one claim until I've heard all of them. Because I don't know yet what your claim is, the losses that you've suffered, I haven't really gone into your claim yet. I know that why you're resisting his, had a brief look through it but we haven't heard the evidence and I haven't heard from Mr Anderson in response or Misters Anderson in response to the claim that you're making and I won't be making a decision. I will be two provisional decisions on the original claim

but they won't be released until I've heard the other claim, so you have to decide whether you're withdrawing your claim or not before you know the outcome of this.

MRS HEARD

And at this point now or do we have to [inaudible]

MS TUNNICLIFFE

No you can withdraw your claim at any time up until I've made the decision on it. Once I've made a decision [inaudible] too late. [inaudible]

MR HEARD

[inaudible]

MS TUNNICLIFFE

But you will, even at the next hearing if we go through, we get to the point we're going to hear your claim and you want to withdraw at that point you'll still be withdrawing it without knowing the complete outcome of his claim. You may be getting some idea of the strengths and weaknesses of his claim because that will become obvious as we go through I think what the issues are and what the evidence is in relation to each of those issues and what the law is. I think that it will become a bit clearer you know, the strengths and weaknesses will become a bit clearer but that's all you will know before you have to decide on whether to withdraw your claim or not. That's all you will know.

MRS HEARD

Okay thank you.

(Parties adjourn for short break)

MS TUNNICLIFFE

[inaudible] Right just close the door. Now as I said this is fairly brief and I'm just wanting to let you know that, well to check back with you actually that I've got all the issues and that I've had a reasonable understanding of what you've said. So I think these are the issues that we need to decide to decide this claim by Spats. First of all I have to decide was there a contract between Spats and Ora. So I'm just going to go through and say about what the issues are and I'm also going to talk a little bit

about it. Now I think there was a contract between Spats and Ora because I think there has been an agreement for Spats to do some kind of work in the expectation of some kind of payment, so I think that contract has been formed. (2) if so what were the agreed terms and this is where it gets more difficult in relation to the scope of work to be done by Spats, the work to be done by Ora and there's a content issue there, the timeframes within which people should do their respective tasks, the cost of web development, the cost of work outside the web development project, the cost of posting and penalties. Now all of those things I'm going to have to make some decisions about in order for me to be able to determine your claim. So I have to decide that there was a, for your claim to be successful I have to be convinced okay that there was a particular piece of work that you were going to be doing and that they were going to be doing some other piece of work that was to intermesh with yours; that the cost of the work that you were to do was spelled out to them and they knew exactly what it was; that they didn't do their work that they were supposed to do and that you have and that they ought to have known the cost of that work; that they ought to have known the timeframes within which they should have got their work done, that they ought to have known when you did their work that they were going to be charged for it which you've now done; that there was a cost of hosting that was made known to them that they had all these charges up front – you have to prove to me that those were the agreed terms in relation to this contract. as you say they are. Because I hear them saying something else, there's quite a lot of lack of clarity. If you want all your penalties and your cost of going to the lawyer you're going to have to prove to me that they knew that there were agreed terms to those penalties, that that term had been agreed. If it hasn't been agreed then I've got to look at okay what's fair and reasonable if there have been any breaches.

So first of all I've got to find out what the terms were of your contract and therein lies a problem for you because I think you've relied, I think you've missed a step in what you probably normally would do and that's what I'm guessing. So I'm letting you know now I think you've missed a step because I think according to the documents, and normally you would give a proposal, your email says that, normally I would do this. I think there's something missing, you've made this presentation at Raupo there hasn't been a written proposal put forward for them to consider. So you're asking me to remember what was said to them at a meeting over an hour where a whole lot of information in an unfamiliar field of expertise, they don't know anything about computer web design and I think you know there's some, as a professional that ought

to be reasonably clear, you would have even picked up that these people aren't necessarily *au fait* with computers, I think that probably would have been clear. There's a huge reliance on that for your case to succeed. There's also the reliance on, I'll carry on about the terms and conditions, I'll talk about that later, on the website that they would have seen them and therefore [inaudible] And there's some argument for that that you were told these terms and conditions were there, you might not have been able to see them, you didn't tell him as far as I can say, he says you didn't and there's no emails to show, you didn't tell him you couldn't see the terms and conditions. So he's going on you know blissfully unaware that you haven't seen the terms and conditions are necessarily [inaudible] because you didn't tell him so how could he know, so I think there's a lot of communication issues here on both sides.

So the job, the onus falls with an applicant, which in this case is Spats for your claim, to prove all of these things and you've got to prove your claim, so you've got to prove all of this. If you can prove to me that these were particular agreed terms or I can figure out what the agreed terms most likely were from the mess that that I've got presented to me, and I think it is mess. (3) then I have to decide whether Ora have breached any terms that were agreed or reasonably ought to have been known by failing to carry out the agreed tasks within the agreed timeframes and not paying on time and if you have breached any terms what's a remedy that's available to Spats. So they might be, if you have breached any agreed terms I might be able to find [inaudible] to do work instead so there's a reasonable expectation they should be paid for it you know at normal rates, even if you haven't agreed what those normal rates would be because you can't remember back to Raupo alright. But you know if he's done work outside what he's expected to do maybe it is fair that he should pay or maybe it's not, maybe he simply took on this work because he had a relationship with Ora through the parents and everybody was trying to. This was being done in a friendly way and sometimes those friendly ways get in the way of a proper contract because people made assumptions and dah dah dah dah. They do things they might not normally do. So those are the questions for me is well if they've breached any terms of the contract I still have to decide what really if any is Spats entitled to, it's not just simply oh they've breached the contract therefore you're entitled to something, maybe not.

Okay (4) has Ora repudiated the contract, ended the contract with repudiation is more or less refusing to perform it, or indicating that you're not going to perform it. So I've been told by Spats that Ora has repudiated the contract, so it's come to an end because you repudiated it and if so is Spats entitled to any relief because of the cancellation by repudiation or damages because of that or was the contract cancelled by notice, you know there's a different way you can end the contract. The law I have to look at in relation to this is contract law first of all, this all arises out of a contract and a contract can be formed verbally and it can be formed in writing or by action. So just because there isn't a written contract with every little fine detail doesn't mean to say there isn't a contract and there isn't some agreed terms, cos I might be able to figure out what probably was agreed even if it's not written down cos probably is all I need to decide, probably was this right. Here in the Tribunal the standard of proof is the balance of probabilities so, in the Criminal Court it's 'beyond reasonable doubt so I don't get to decide beyond reasonable doubt 99% sure this is what it was. Balance of probabilities which means more likely than not, more certainty than doubt, so somewhere about 50%, somewhere above you know like that, ah it seems to be a reasonable more likely, so that's how I'm finding fact if it's not absolutely clear, what's more likely to have happened and I have to look at the verbal stuff, what in writing and what have people done, how have they acted because you can form a contract without even speaking. You know if I stumble along at the end of the day to the supermarket, go in and get my newspaper, put it on the counter, pay the money, haven't said a word, go out, I expect the contract has been formed and we pay the newspaper for \$1.50 or whatever and I expect it to have writing on the inside and if hasn't [inaudible] I've got a remedy. So that's what I'm saying actions can bind you into contracts and that might be an omission, it might be failure to do something, like failing to say I can't see the terms and conditions might mean something. That's just an example alright, I'm sure that I could also point out some example on Mr Anderson's part that he might fail to do something, an omission that could mean something you know. So that's what I've got to do, look at okay what's happened verbally, what's in writing and how people acted.

In relation to looking at I think you have you know, there's been plenty of, there's been verbal, there's a bit of writing, there's a bit of actions which tells me there is a contract to do work in return for money. Money I'm not too sure on but I think certainly along the way there's been seen to have been an acceptance for \$3,500 was a figure. It may not have clear at the beginning, I accept there was a bit of lack

of clarity but there seems to be something going on about the \$3,500 cos you've got [inaudible] Parties are bound by the agreed terms so I've got to look at that meeting in Raupo because contracts can be formed verbally. You were being given information at that Raupo meeting upon which Mr Anderson was going to rely if you accepted the contract and you did accept the contract. I've got to work out okay well can you be expected to remember every single thing that was said at that meeting and be bound by it. Well I'd better look at the terms on the website because you were referred to those in the questionnaire and you had agreed in that questionnaire well Mr Wilkinson did on behalf of the company as a director he agreed to be bound by those terms and conditions. But I can't ignore the section above the signature which talks about a proposal alright, so I can't ignore that I've got to say okay well you've been told the terms and conditions were on the website – were they actually on the website, you're going to have to answer that. They say well they weren't there, we couldn't find them, we don't think they were there until October [inaudible] so you're going to convince me that the terms and conditions were on the website, I don't know how you're going to be able to prove that, there might be some way technically you can prove that, and also that the terms and conditions that you've presented to me are the ones that were on the website that they ought to have been able to see.

The status of the questionnaire, I've got to decide whether it's a term of the contract. I think what it does show is that you were telling them where the terms and conditions could be found and that they were agreeing to be bound by that (4) whatever it is, the section above which doesn't relate to this, it relates to the proposal, it doesn't relate to the validity of the website. So there are some problems for you in that, I just don't think you can so confidently rely on that entirely alright. You've indicated on the questionnaire they've breached bits of this the contract cos they've said, and I've found the space where they've ticked it by the way, it says be online, they've both ticked that, the both people that filled it in, it says only be online, but that's not a contract that they're forming with you to only sell online, that's just information they've given to you so you can develop the website. So there's no breach of contract with you that they will only sell online, that's just the policy that they've decided the marketing agreement that was entered into at that stage, you're not their marketing, you were their website design, that's all you were doing. And I'm thinking you may have confused your role with it as well so you need to tell me more about this at the next hearing, that I'm thinking maybe the boundaries have been blurred between

Don's, what Don was supposed to do because of, I suspect because, I think there's been a blurring, and you can correct me if I'm wrong, I'm just putting it out there so that you know. And I suspect there's been a blurring and I suspect that could have been because of the family relationship with the whole industry and this thing. I've seen it before here, when people who know each other, do business with each other they actually do it differently from how we might normally do it and that can rise to problems with the situation you've found yourself in. So I've got some real questions about this questionnaire being part of a contract because it's [inaudible] the questionnaire, it's not [inaudible] the contract. It tells them at the bottom, there's a little bit at the bottom that says you know sign here and you'll be bound by the terms and conditions for the proposal which is going to cost \$1,500, well

MR D ANDERSON

Yeah quite [inaudible] I know I said to my son [inaudible]

MS TUNNICLIFFE

So does that signature binding on terms and conditions for a \$1,500 proposal bind them to the scope that you say they should be bound to okay? So those are the questions I've had, I might answer yes but I'm just saying there is a question that has to be answered. So I really think that in terms of the terms and conditions on the website yes you know, some more about that and I don't think it's unusual in a commercial sense for people to be bound by the terms and conditions on the website. For instance I mentioned Trade Me and I think telephone companies do it as well, they tell you to go along with the terms and conditions on the website when you. I think, I can't quite remember who they are but I know big organisations often do when you've joined them they actually often do say [inaudible] my terms and conditions on the website cos you're going to be bound by them. So I think what Mr Anderson was doing there is probably not you know out of the ordinary, out of what commercial people do. Other people as you say [inaudible] print them off and give them to you but there's more than one way of skinning a cat. The other law that I'll need to look at is the Contractual Remedies Act because it relates more down here is that if a contract has been cancelled the contractual remedy or repudiation or possibly in other ways as well and as yet haven't heard your claim so contractual remedies may apply to your claim as well in terms of misrepresentation [inaudible] If a contract has been cancelled the contractual remedy there does give some [inaudible] about what happens next, do you have to, basically it says once the

contract has been cancelled the parties have no obligation to perform future tasks. It doesn't mean to say they shouldn't perform what they've already you know up to here but you don't need to perform any more future tasks for the contract and it does provide, and money stays where it is, everything stays where it is. Property, money stays where it is when the contract is cancelled but the Court might provide relief to one party or another or damages or damages to innocent parties.

So that's where your claim comes in if it's cancelled the Court might provide relief for damages, if there's no terms particularly you know. If there are terms we can say definitely this is what's going to happen for the penalties if you breach the contract or you cancel it and there is an agreed term about penalties and how what's going to happen and we rely on that because it's been agreed as part of the contract, but if it hasn't we're going to have to [inaudible] to the Contractual Remedies Act okay. In these situations if there's nothing actually agreed hard and fast about what's going to happen now then I'll have to look to Contractual Remedies for a bit of guidance. So a bit gabbled and I might have missed some things out, what I'll be trying to do is just to tell you what the issues are and what the law is and as I've talked about the issues in law I've tried to let you know as much as I can in the time available that I've heard some of the arguments you've put forward and that I'm reflecting back to you there are some weaknesses and strengths here and there, it's not a complete summary cos you guys have been talking since 12.30 p.m. to 4.30 p.m. – what's that three hours is it? So it's hard for me to summarise all of that just in 15 minutes, but generally that's where I'm going with this and I've tried to reflect where in the time available where I've got some doubts so that you'd come back to the next hearing to you know shore up the position if you want, you're going to have convince me. Where there's an area of doubt you're going to have to convince me because I have to be more certain than not about, to establish facts I have to be more certain than not. So just Mr Anderson if I answer these questions will I get a result for your claim, are these the only questions or have I got, have I missed something? I need, you know that this claim is there as on a contract basis your claim so if we can establish there was a contract, what are the terms in the words of that contract and then we can apply those terms. If they've breached the terms well we can see well what is the remedy [inaudible] and if they've, if the contract's been cancelled because of repudiation then what does the Contractual Remedies Act allow you to get if any? Do you think that would if I go through that process would I have missed anything [inaudible]

MR HEARD

[inaudible]

MS TUNNICLIFFE

No I appreciate that you haven't got much time either and this isn't your last chance but this is a chance to tell us now. It's not your last chance to [inaudible]

MR HEARD

[inaudible]

MS TUNNICLIFFE

[inaudible] going to work?

MR HEARD

[inaudible]

MS TUNNICLIFFE

Alright do you agree [inaudible] each other.

MR HEARD

I think you've done a very good job in just highlighting the important aspects of each [inaudible] and what we're talking about here now.

MS TUNNICLIFFE

Right alright. Do you think if I answer these questions that will address your issues in here, cos mainly you're in here I think, what was the scope of work to be done by you [inaudible] and what were the timeframes and what was the cost of the website development, was there any agreement for work to be done outside the project and if so what was it and what was the cost you know, these are things I'm going to have to tease out at the next hearing. The cost of hosting, you said you didn't know anything about that so you know how much of our hosting was talking and the penalties, cos a lot of the cost is penalties and fees and legal costs, penalties for [inaudible] for penalties not collection costs. As well as just the interest for late payments actually the whole [inaudible] on you. So if we go through those things there will that address

all the uncertainties that you have in relation to this contract, or is there anything I've missed here about the terms that we need to try and figure out what they were?

MS HEARD

No.

MS TUNNICLIFFE

It's not your last chance either but at a first look does that look like it would cover everything?

MS HEARD

Yes.

MS TUNNICLIFFE

If we could sort out all of that. You may not be able to sort it out yourself. In the end I'm going to have to if you can't. Cos I think this is the main issue for you, this contains your issues really here, number 2 because you've said there's a whole lot of uncertainty about this, so I think this is where most of the work that we do at the next hearing and that I will be doing in my decision is mostly in here. Cos once I can establish some facts about that probably you know, more certainty that the doubt what was the scale of work, probably what was to be done by Ora, probably what were the timeframes and were there any. That's all I've got to decide, probably what was happening here and once I establish some facts then I know well have you breached them, if there was some kind of agreement has it been breached and then what happens, so yeah.

MR D ANDERSON

Will you be doing the next hearing for us?

MS TUNNICLIFFE

Yeah.

MR D ANDERSON

Oh that's good yeah.

MS TUNNICLIFFE

Yeah, yeah, no we're just, it's really just the same hearing it's just we've run out of time, we're just continuing on [inaudible]

MR D ANDERSON

Yeah but there's so much to take in.

MS TUNNICLIFFE

There is and what I'm going to do is to write this down before I rub it off overnight on a piece of paper, it's already brought this on a piece of paper anyway. I'm going to write to you a bit of summary of what I think this case is about, so there'll be a little story of what the case is about, a little bit of a story about your response to it setting out the issues, setting out the law and the next hearing we'll be coming back and the ball's in the Anderson's Court to start, work our way through this and we can just then start to have a discussion. I'm not going to go through another hour of someone speaking and then wait, we've got to start working through these one at a time and having a discussion I'll probably be standing and be walking, walking around and just try and work through things so we can get everybody's information about each of those. And as a result of that once you become clearer about the other person's point of view it may be that you can start to reach some agreements yourselves about okay, well has there been any breach, did we fail and well what are we going to do about that now. You may be able to reach an agreement cos that's one of the roles of the Tribunal is to provide a forum you know for you to discuss and understand and reach agreements if you can.

But it may be that it's gone too far and you don't want to do that or it may be that you try to discuss a settlement and you've fail, you just can't get there and in that case that's alright, I'll make the decision using this sort of framework. So that's what I was trying to say, I think my comment to you before when I was saying to you, you won't know what I've decided before you have to decide whether or not to withdraw your own application, but as a result of the discussion in this you will know where the strengths and weaknesses are because we're going to have a to and fro on all these things here and the questionnaire, we're going to have a to and fro discussion and I'll be saying but what this and I'll be raising some questions, you will know where I've got doubt, I'm trying to let you know now already where I've got some doubt so that you could talk back to me about it. But you will have some idea yourselves where I've got doubt and I may even have said well that's not proved, I've already told you

there is a contract so as we go through I might be able to say some things are so clear that I will disclose what I think on it, what has to be a fact. And I've already said I'm thinking ah you know you might not have known at the beginning but later on there seems to be an acceptance about the \$3,500, so I'm already letting you know I think that he's got some support for the \$3,500 claim.

MS HEARD

The bill has been paid.

MS TUNNICLIFFE

Well that's right, that's right. But I don't know yet what your claim is about so I haven't heard it fully and your claim might be saying we want a refund, I don't know cos you've just got this big \$15,000. So if you want a refund of any monies already paid because of performance issues or whatever I mean that's a whole other ball game and that's why I can't make a decision on this one until I've heard yours, and in any case I just don't, I always hear claims and counterclaims, both of them before I release the decision.

MR HEARD

So I think I understand it clearer, do I need to give these guys a copy?

MS TUNNICLIFFE

Ah yes, yeah and I will, I'd better put that to remind myself [inaudible] Alright so I'm going to ask you in this adjourning room to actually do that and to provide a copy to the other party before the next hearing so that they're fully, so we don't have to waste time and they don't have to have another adjournment, so they're fully informed before the hearing. And if there are any documents that you want to present at the next hearing as well, I'll just [inaudible] document exchange, I'll be asking you to exchange them before then because that will just save possibly another adjournment. Now I think there's still quite a lot of discussion to go here, even though I'm not going to allow somebody to talk for half an hour even without the other person having a chance, we're going to do a bit of debating, cross talking. It's still going to take quite a bit of time possibly to go through all of this before we even get onto your claim so we're going to need quite a long time. So I would prepare to be here for a day alright, I may even set aside a whole day and you may not be here all that time but I don't want to run out and have time and have you come back again. So I don't

expect you'll be here for a whole day but you could be here for another four hours, three or four hours if we you know. I think there's a, what is there, there's probably a good couple of hours here going through backwards and forwards, going back to [inaudible] there's probably a couple of hours in all of this and then there's still your claim to come so I can easily see four hours okay, and it may take longer so prepare to set aside a reasonable amount of time. I think I will try and set aside a whole day and if we use less of it that's fine, if you agree great, I've got some time to get onto another task but if you haven't agreed I'll use the rest of the time to start writing the decision. So I think for my purposes I'll probably set aside a full day to make sure we've got plenty of time that we do finish without having to come back for a third occasion, but I'm just saying to you allow plenty of time, I will set aside the full day. It might not be for a couple of months before you're back because it might take, I've just to find a time on the schedule to bring you back alright. Thank you for your time today, it's been a long time you've had to wait as each person has spoken it's been a long time to listen but the next hearing we're going to have much more of a discussion, you'll be much more involved. Okay thank you.

MS HEARD

Thank you.

MR HEARD

And you're going to [inaudible]

MS TUNNICLIFFE

You don't need to [inaudible] I'm going to send it to you. It might not be exactly like that and it might not be the exact wording and I might add a little thing that I've talked of but basically that's the basic, that's the basic, that's the basic sort of guts of how I've got to get to a decision.

MR HEARD

No, no, that's good.

MS TUNNICLIFFE

And you'll have it and I think it's useful if I give it to you so you can think about it before the time comes.

MR HEARD

Yeah thank you.

MS HEARD

And then we're you know [inaudible]

MS TUNNICLIFFE

At any time you can withdraw your claim in writing, at any time until I've made the decision, even at the next hearing you can do that.

MS HEARD

Okay.

MS TUNNICLIFFE

And you can have a you know [inaudible] you can [inaudible] and even then you can withdraw it, but once you get [inaudible] after I've made the decision you can't withdraw it.

MS HEARD

Okay thank you.

MR D ANDERSON

Have I got to travel back from Australia again?

MS TUNNICLIFFE

Ah you're in Australia, okay so are you coming back from Australia at any particular time and we can try and work things.

MR D ANDERSON

I might come back for Christmas [inaudible]

MS HEARD

We would like it resolved and not [inaudible]

MS TUNNICLIFFE

Yeah so you're not coming back before then?

MR D ANDERSON

I'm not asking for additional costs for staying in a hotel, I mean I'll stay with at my parents that's fine.

MS HEARD

[inaudible] asking for air fares?

MS TUNNICLIFFE

Well no the cost of attending a hearing lies with the people who are [inaudible]

MR D ANDERSON

Not if damages are being awarded.

MS TUNNICLIFFE

Pardon?

MR D ANDERSON

Not if damages are being awarded.

MS TUNNICLIFFE

Well that's a decision you know, I think you should phrase it what if, can I ask for these damages.

MR D ANDERSON

I'm sorry I thought for a minute that you were going to accept fees for damages.

MS TUNNICLIFFE

[inaudible] fees but not, I haven't made a decision on it.

MR D ANDERSON

That's right yeah I'm saying

MS TUNNICLIFFE

And in general what I would say costs of attending the hearing, all the costs associated with preparing for and the photocopying and preparing all your time, the

travel costs to get to a hearing are considered it costs, you know that phrase [inaudible] costs? Now the Disputes Tribunal has got very limited jurisdiction to make an award of costs and I almost never can because we've got such tight controls on the circumstances within which we can afford costs. So under the District Courts costs [inaudible] I can say to you you're unlikely to get any of the costs of attending the hearing, the only way you're going to get any costs of coming to the hearing is if you can convince me that collection costs [inaudible] are under the term of the contract alright, so that's a separate matter. So damages for breach of contract is not travelling to a hearing, I wouldn't see it unless you've got something specifically in your contract that would cover that and therefore it's a term agreed to so yeah, that's all I can say. You live over in Australia now do you, you're not just over there working, you're living over there?

MR D ANDERSON

No I have a [inaudible] tax account, [inaudible]

MS TUNNICLIFFE

Oh okay, alright, alright. Well what's happened was were you doing business just briefly in New Zealand or were you doing business in New Zealand up to [inaudible]

MR D ANDERSON

I started the company I had in Blenheim and now doing work overseas.

MS TUNNICLIFFE

Yeah right and you started doing the work overseas since this contract is that right?

MR D ANDERSON

No I've been doing work overseas for years [inaudible]

MS TUNNICLIFFE

Oh okay so you were coming and going.

MR D ANDERSON

But there's far more, larger scale work in Australia at present.

MS TUNNICLIFFE

Okay well you've chosen your venue, you're in Blenheim [inaudible] you've got to get yourself here. We can do telephone conferences from Australia and we have done it but we only do it if you ring in and you have to be in a you know private sort of room so [inaudible]

MR T ANDERSON

You could probably do it on Skype.

MS TUNNICLIFFE

We don't have Skype, this is the Ministry of Justice, we're not that far ahead. We've got telephones [inaudible] so that's something you can think of, you'd have to apply in writing if you wanted to attend by teleconference.

MR D ANDERSON

As a director I mean [inaudible]

MS TUNNICLIFFE

You could attend yeah so your options are

MR D ANDERSON

I don't want to, I want you to be here [inaudible]

MS TUNNICLIFFE

Tim attends as a director which will link in possibly your case because you'd have to break it pretty much in three cos he wasn't involved it was you, it's your direct evidence that's stronger [inaudible] So Tim could attend on behalf of the company, you could attend by telephone conference if you apply in writing to Heather Adiss you know [inaudible] she will organise that for you and she will tell you it's your responsibility to phone in, she'll give you the number to phone in at the time of the hearing. We do do telephone conferences at the Ministry's cost within New Zealand but not overseas, so you can ring in. But I'm letting you know it's going to be a four hour hearing and if you're going to do that you can make sure you've got all the paperwork with you over there cos we'll be referring to documents and we'll also I think we'll add to the hearing time so make sure you're going to allow yourself. You don't need a cell phone or anything that's going to go flat because in fact they probably wouldn't agree to you having a cell phone from Australia cos of reception

and battery issues over such a long period. It would need to be a land line, you'd have to phone in and it will slow the hearing down so make sure you're going to be available for at least more than four hours, and it's alright, it doesn't matter if it slows down or you can come and absorb the costs it's up to you, you've got those choices.

MR D ANDERSON

Thank you, it's good to have a choice.

MS HEARD

Thank you that was marvellous.

MS TUNNICLIFFE

Right I've got to let you out now.