



20 December 2012


Spats Limited  
120 Shandon Road  
RD 6  
Waihopai Valley  
Blenheim 7243

Dear Sir/Madam,

**CIV-2012-006-000150 - Spats Limited v Ora Marlborough Limited**

Please find enclosed a copy of the transcript of the second Disputes Tribunal hearing.

Yours faithfully,

  
Heather Addis  
Deputy Registrar

**Copies To:**

Ora Marlborough Limited

**DISTRICT COURT**

58 Alfred Street, Blenheim 7240, DXmail - WX10502, Blenheim 7240, New Zealand.  
Telephone: (03) 520 9250 Fax: (03) 520 9251



## **DISPUTES TRIBUNAL**

**Spats Ltd v Ora Marlborough Ltd**

**CIV-2012-006-000150**

### **Transcript of Evidence**

#### **DAY 2**

##### **MS TUNNICLIFFE**

Just have a seat. Right just to remind you I'm Jeanette Tunncliffe, thank you for being able to come back today at short notice. I realised just after you'd gone, I was checking my schedule for the next day that we had this gap in the afternoon if I would shuffle something round earlier to make the time and that it might be easier for you at least if we can finish one claim, and we may be able to get onto the other claim or you may decide not to proceed with it I don't know. But I thought if we could just, you'd both indicated an early end to this would be the best so we're just trying to do our best to fit you in. Okay so I'll just make a note of who's here at the moment. Right so what I've done is I've written back up on the board what we had up there yesterday. I said that I would give you an order adjourning and send it all out to you with this information but of course when I realised I could probably slip it in today that wasn't going to work so I've just stuck it on the board again. Now I did ask the Tribunal clerk to give you a ring to see if you could bring in the copies of the accounts that you've had.

##### **MR T ANDERSON**

These are all the invoices here that [inaudible] we think you've had.

##### **MS TUNNICLIFFE**

Yeah so these are the invoices yeah photocopied yeah.

##### **MR T ANDERSON**

There is a [inaudible] if you need it, you probably don't need it but

**MS TUNNICLIFFE**

Well I think it'd be good if we all sort of had them at the same time cos when we go through those. Okay thank you. Right now just in terms of sort of like moving on, I just would like to have a discussion on the first point on the board, was there a contract between Spats and Ora? I mean I think that there was a contract form in my view because work was done in expectation of payment, has anybody got any real objection to that, that there wasn't a contract, does anybody disagree? Phyllis you'd be the one to [inaudible] they say there's a contract of some kind, we just need to figure out what it was.

**MR T ANDERSON**

Well the law says as soon as you enter into something where something's been done for money and you agree to go ahead you're in a contract.

**MS TUNNICLIFFE**

Yeah so you'd agree that there was a contract?

**MS HEARD**

Hm, hm.

**MS TUNNICLIFFE / MR D ANDERSON**

Okay so if so what were the terms in relation to it? Now the scope of the work, I think all of this here, just looking at what is the proof for all of this, how can we look at that, I think that all of this anyway was at the Raupo meeting as far as I can see. That possibly would have been on the website, the cost of work outside the web development, it may have been in the Raupo meeting as well. The cost of hosting, that would have had to be Raupo so this is the terms and maybe Raupo. Penalties and collections costs, I don't know whether that was at Raupo terms. So just in terms of this here, you may disagree with me I'm just saying these are where I think they would have known what the terms were from the Raupo meeting their terms, they could have seen it on your terms and conditions and maybe that was talked at the Raupo meeting as well. The cost of hosting might have been talked about at the Raupo meeting, the penalties and collections costs might have been talked about



there but where are the terms. So that's where I'm thinking the evidence that Don you can provide probably lies, would that be fair to say? ... Yes I'll concede to that, I'll go along with that.

Okay so those first four, the only evidence you've got for that is the verbal contract at Raupo. ... No it's not the only evidence I've got for that but to

But in terms of what the scope of the contract was, this is the terms of the contract that have to be agreed before the contract is entered into. ... The terms, the scope of the contract was discussed at the Raupo meeting.

Yeah. ... The evidence of that I would submit that when Mr Heard sent me an email on the 4<sup>th</sup> of June he said to go ahead, that he therefore knew what the scope of the work was. That I am very clear about was about the Joomla's website, I believe that I had articulated

Joomla you say? ... Yes.

Hm, hm. ... That I had articulated to them that my terms were online, I have standard terms, I spoke to them about the problems with people having the best of intentions and not finishing what they started. I told them that I charge \$120 an hour any extra work chasing up clients, so I believe that I have fairly given notice of all those sorts of things. To be entirely honest when it comes to penalties I don't honestly recall whether I said they will be liable for legal fees but I did bring up the fact that there would be extra costs if I had to chase up clients for the content.

Hm, hm. ... They certainly were aware, it says on the, it says in the picture that it was Spats here and it says that the, the opening picture said it was a proposal.

#### **MR HEARD**

That was at the railway station.

#### **MR D ANDERSON**

That's correct yeah. I also said initially, explained how that the minimum price to get into a website is AU\$5,000, I explained why that price was there. So what I'm saying is that it wasn't just simply a \$3,500 that's it, you get everything, you get a website and I think that that's probably where there's been a bit of a disconnect. If I can just have a second.

**MS TUNNICLIFFE / MR D ANDERSON**

The cost of hosting was that discussed? ... Yes, yeah, I said to them that I would give them the first year for free as part of the development and then there would be an annual cost of around \$500 a year, plus the domain's renewals. So that was discussed.

Hm, hm. ... So in Ora's Statement of Claim at 8, I'm sorry that's not what I wanted [inaudible] so Statement of Claim at 9 they say in that paragraph that the Board of Directors agree to offer doing extra work, so the offer has been made.

Yeah. ... When they've had the Raupo meeting or another meeting Ora has confirmed that an offer was made at the spiral folder email number 31, an agreed price of \$3,500 plus GST has been accepted and consideration passed, so I believe that constitutes the agreed [inaudible] So further to that email of the 4<sup>th</sup> of June was originally omitted from the file and it says 'just confirming we're going ahead with the website, you as our consultant' and I believe that Mr Heard could only have done that if he had of known what he was agreeing to.

Yeah. ... So the starting date I'm willing to accept as being the 26<sup>th</sup> of June when the Ora director Mr Wilkinson signed the first questionnaire that said that all work would be conducted by Spats, it clearly states *all work* not just only that questionnaire. It gives notice of the terms being online and there's nothing in Ora's correspondence up until about 2012 to say that they had not read the terms and conditions or asking for a copy of it.

Okay anything else you want to say in relation to the establishing of the terms? ... The standard terms, as I understand it in law even if they weren't on the website and just hypothetically, they would still be, they'd still be applied, and I can find the citing

for that if you want at a later date. Now I've just like if I may cos you brought up an interesting thing about the order of events which I think is important, so if we say the 26<sup>th</sup> of June was the start date.

Well you're saying the 26<sup>th</sup> of June, though I think your own terms say it should be agreed with the client, the start date in your 7.0 says 'Spats will arrange a date with the client as to when we will officially commence'. So you might be taking it from a date but that's different from what you've said in your terms, so I mean in between you know just before this hearing today I had a spare half hour so I had a look through the terms which I hadn't had an opportunity during the hearing to go through thoroughly and in just looking at them in context. So although you've pointed out failures on the part of Ora I'm not, and I still think there's some gaps in what you did. ... I think they are [inaudible] yeah.

So you know you're trying, now we're trying to establish a start date but I don't think, I don't think though that a start date was arranged with the client. ... Yes there was.

So when was the start date that was arranged. ... It was straightaway, they wanted me to start straightaway. I mean there was no if/buts, there's no equivocating about it, they wanted an online urgently, I was prepared to do that. There is also an email which says to them that I can make the start dates and I think that's also indicating that I was starting, so that email was on the 30<sup>th</sup> of June I believe from memory. I don't think that email was included on either of any bundle. I acknowledged receipt of the questionnaires being returned to me and said thank you, I'll make a start if I can find the, hopefully I can find the email for you. So I think you know there was no argument about the start, the start was as soon as the things were returned. Ora were chasing me to start as quickly as I could for them and that's what I did. Then the completion date what we were talking about, the time they had got, I understood from Ora at the meeting at Raupo that the website had to be online by the 1<sup>st</sup> of September. I explained to them that it's a, we still had plenty of time, it's a six week process, you would have to give me all the content before I would start working on their website as in putting it online, not purchasing domains and those sorts of things. So the completion date was supposed to be the 1<sup>st</sup> of September, Mr Heard has confirmed in his email to shareholders that there was always their intention to

have it online in September. So you [inaudible] say it had to be on by 30 September, that was the completion date and Ora had until six weeks before the 30<sup>th</sup> of September then to supply everything that was needed for the website.

Hm, hm. ... There was also another meeting with Mr Heard on the 24<sup>th</sup> of August at the train station, I also have the emails which I supplied yesterday which is another meeting where I went down and I collected the logos and things and then Mr Heard explained some things about the project.

Why were you meeting him at the train station? ... Well it's just a convenient way, it was halfway, it was halfway between my parent's place and through the Awatere.

Oh yeah, and the purpose of that meeting was to collect the logo. ... For me to collect some of the logos and to incorporate, to adapt the websites at this time yeah. Bearing in mind that all that was supposed to have been when Ora told me they were ready to go, so that's almost, that's a month past when they told me they were ready to go. There's the discussions yesterday about the quality of the photographs and just as an example I have brought copies for everyone if you'd like to pass them around.

Yeah we'll pass them round [inaudible] submit anything [inaudible] ... So on page 13 here's some more examples of the quality of photographs that I was provided with. I don't think any of those are acceptable for a website, other people may you know interpret it that they are but I certainly don't and if you go over to

But if it's their website don't they have the choice. ... No because the, the situation was I was the, I think where it's been a bit of a disconnect is that Ora approached me about starting a website, an ecommerce and business for them. It wasn't just a website, it's a business and it had to be a successful business, that's why they approached me, well that's why I believe they approached me, so it's not just about the website. When I gave them the proposal I'd covered all sorts of things, I covered the marketing, I told them what had to be done and I've also said that if you're not going to do it then it's not worth doing, it had to be done properly. I've seen too

many people had the best of intention to start off and try to get a website going and of course it fails.

But isn't it their decision if they want to put up a photograph that you think's not adequate, I mean this is one of the points of why there's delays, isn't it their decision I mean ... No I

Who are you to veto it, who are you to veto it. ... Because as the project manager I believe that I have control over anything I do. If they didn't want to give me authority at the start then that was the time they should said no. I said it would have to be done the way I wanted it to be done and this is where I think I've had the conflict with Mrs Heard, I think she's wanted to have that control. **Now I didn't say anything yesterday but you know Mr Heard was the one I was dealing with as far as the contract goes, he should have been the one who was replying because most of the conversations I had with him over the phone so she would have been unaware and I think that's also contributed to some of the problems we've had because he's agreed one thing with me, and maybe he hasn't intentionally but things have been misconstrued when he's been talking to other members of Ora.** Going back about Ora being able to do it themselves, on the very last page this is what's called the back end of the website. Now at one stage I had a [inaudible] conversation with Mrs Wilkinson cos Mrs Wilkinson wasn't happy about the progress that hadn't been done on the website and so over the phone I asked her to log in, I gave her a password and a log in so she could log in so she could see exactly what I'd been doing on the back end of the website and you'll see there there's an article called Fran [inaudible] highlighted, it's on the 10<sup>th</sup>.

8<sup>th</sup>. ... 8<sup>th</sup> of the 10<sup>th</sup>. She actually logged in and Ora had given access to get into the website to do whatever they want to do. I actually talked her through, she saved an article, I explained to her how to do it and I explained the problems I had with Mrs Heard, so I don't believe Ora can barely say that there were never given any instructions at all. I also sent in an email to Mrs Heard but that, and this is one that was omitted from the, the fact that she'd be going to the Joomla demo website, that was actually covered up in here, which I believe is a little bit disingenuous. So she



was supposed to have gone to the website, the demo website and had some experience working out

**MR T ANDERSON**

With a tutorial.

**MR D ANDERSON**

Yeah with a tutorial, it's a whole lot of resources to do with Joomla. The training was never supposed to be that I sit down and spend a week training them how to use Joomla, that's completely out of the scope of the agreement yeah. The agreement was that they would load the templates, I would upload the template, they would do the content themselves. When Mrs Heard didn't continue doing that then that's when Mr Heard and I had the discussion and I agreed to put a Stage 1 on and I did that work for them. So in effect what they've actually got already is a \$7,500 website, whether they agreed to that or not that's what they had. They had back end, which is the Joomla website, they had the ecommerce facility that was working perfectly with them. There was some allegations yesterday that it wasn't working, now there was for two days I think there was a problem with, what happens I had the dot.com, the dot.org and the dot.co.nz domains for it. So if you went to the dot.com and it was forwarded through and you tried using Paypal then there was a problem with the frame, that was fixed very quickly. Now there were some other problems but they weren't problems with Mrs Wilkinson, they weren't problems again with the website, they were problems were her using Paypal and the emails covering those are here. Now she makes accusations like she tried six times and it didn't work and but I logged on, it worked perfectly for me and while I understand that she was frustrated there again I think her frustration is misplaced. And I think it's unfortunate there's been a series of events where people have maybe got a bit afraid that had resulted in Ora not understanding exactly what it was they'd got and then not wanting to continue with it. So as far as I'm concerned, or Spats is concerned is they got a \$7,500 website, they also had the upgrades which they haven't paid for, which I believe is a legitimate cost and they also got an awful lot of other work which I haven't charged them, I didn't charge for it because the account is over \$15,000 already. If I went away and made up an itemised account with all the time, additional time, I haven't charged them for marketing, I haven't charged them for

other meetings with Barry Moore or with Dr Moritz you know, but they were all the things that helped Ora. Whether they did appreciate it or not is beside the point. So if we go back to the third page, this is the Google docs account and I'll just explain to you all these things were supposed to be pages on the website. As you can see the owner is me which is myself and you can see where [inaudible] has logged in and viewed them and had access to them. There is a copy of a 'to do' list that's on there.

Where's the 'to do' list sorry, I don't know where you are. ... Ah that's the, there's a little box here which is the [inaudible]

But what page are you on? ... That's the third from the last page. It's actually page number 12 but when I printed it unfortunately it printed in the wrong place.

Yeah. ... So if you look at the dates there you'll see that it actually was accessed on a number of days there and that's multiplied by over a hundred times. So I do not accept that they couldn't get into it, that's actually proven that they did get into it. I don't know if you had time or read yesterday the e-mails dealing with Google docs?

No I don't think so. ... Okay.

They're in your bundle. ... Yes I'm just looking through and I can [inaudible] So these are some of the emails that were [inaudible] but they were in the

So where are they. ... So that's in the paperwork that I gave everyone yesterday which included the introduction [inaudible]

Yeah but what page. ... I'm sorry they're not numbered but I'll find them for you it's, so after

My pages are numbered. ... Oh I'm sorry they are, I've got a copy of, it is a copy and then it's probably [inaudible]

Yeah so what's it after. ... So if you give you the exact number that'll make it easier [inaudible]

Okay yeah. ... So if we go down to page 25 please.

Yeah. ... So if we go down to the first, 17<sup>th</sup> of July there [inaudible] is from Awatere River and it says 'Thank you very much for this Don, I can't find the link in the email, I'm thick when it comes to computers. Can't I just email it to you via Microsoft word under different headings? Cheers, Phyllis'. And then if you go down below that it says 'Hello again, should have received the link for Google docs the other day and prior to the email. I've sent it again in case it didn't reach you. I don't use Microsoft Word and there are annoying issues that can develop when characters are substituted etc in other programmes such as open office and even different versions of Word itself. Some versions don't like the dotx files etc. Another common problem with just emailing is that changes quickly become confusing versions of pages can become lost in other emails and a mess develops where parties think that they have the latest version or content when they are mistaken. Google docs provides a format where several people have access to the latest version of the content of every page of a proposed website. This allows easier contribution and collaborates too. With Google docs I can see when changes are made and by whom, make it easy to follow what has and hasn't been done. There is also a to do list where you can really keep each other informed of what needs to be done and by what date. If you need any help don't hesitate to ask'. So the claim was, in the Statement of Claim that I never said that I wouldn't accept all the documents, I believe that quite emphatically says though that Google docs was the process.

But what actually happened is that they started emailing them to you. ... That's because they just found it easier like that. So if you go to the memo down below we'll talk about where we started. So if you go down to the second to last and [inaudible] says can anyone email me the logos or pics, yeah from the [inaudible] shop, so that's the 30<sup>th</sup> of June. I understood that they had them all made, they were ready to go at the 30<sup>th</sup> of June because in the questionnaire Mrs Heard remarked that they were done, those were done. So the 30<sup>th</sup> of June I'm asking for them, Mr Heard got them to me I think on the 22<sup>nd</sup> of August, that's when we met at the train station so that's how long I had to wait for those and just underneath the last thing which I read 'I've received the questionnaires back so I can make a start, thanks'.



So I believe that's actually clearly saying that I'm working on the project. So what I'm saying is that's the clock ticking in June, I mean we can split hairs over what date in June but you know we're not talking about starting in the September, we're talking about starting in June so that's all on my [inaudible]

But a start date is important for rollovers and termination. ... That is, the start date is for the contract yes, you're quite right.

And in this case it's unclear, where we're counting 40 days we need to know when we're counting from don't we. ... Right. So on 27 there's the, I'm sorry I'd said the 22<sup>nd</sup> of August I believe it was, 22<sup>nd</sup> of August I confirmed with Mr Heard that I'd purchased those domains for him and it's the 24<sup>th</sup> of August sorry I had made an earlier mistake, that we had a meeting at the train station. So look I quite honestly and sincerely believe that Spats is entitled to all of its claim. I mean if Ora would like to make an offer for settlement I would be prepared to consider it today but I sincerely believe that they are, I'm, Spats is entitled to [inaudible] now.

Okay I just want to go back to the Heards to ask you if you want to talk more about that Number 2, about the scope of work to be done by Spats and the work to be done by Ora, was all that made clear to you at the Raupo meeting, the timeframes and the cost of web development.

**MR HEARD**

Well I can tell you now we would have come away from the meeting really not knowing what actually happened to us

**MS TUNNICLIFFE**

Yeah too much information.

**MR HEARD**

And we need it in writing. We really need it you know but we probably should have asked for it in writing, but we thought it was coming, that we were going to get something from it you know. We were going to get a proposal or it would all be you know written down somewhere and we would just refer to it.

**MS TUNNICLIFFE**

Can I just check back with you Mr Anderson, Don

**MR D ANDERSON**

Don's fine.

**MS TUNNICLIFFE**

Yeah Don would you finally, would you normally give a proposal after that meeting, a written proposal.

**MR D ANDERSON**

Maybe if I just [inaudible] explain what would normally happen. So what would normally happen would be the client would have a request for a proposal, so a client would ring me and say look we're interested in you doing a website for us okay. I will then say well what sort of website are you after? In this case what had happened Mr Heard had already talked to [inaudible] host I believe, so they had an idea of what they wanted right. So he has, they, all the other people would be suggesting to me that they want a contact management system. I don't know if Blue were going to offer them that for \$4,000, if they were only going to get a contact management system from Blue [inaudible] for \$4,000, they would get again a really good deal. So at the meeting which it's claimed is a fabrication.

**MS TUNNICLIFFE**

They were talking about a pitching meeting in Raupo rather than any proposal isn't it.

**MR D ANDERSON**

Yes I'm just trying to go and explain this [inaudible] might make it a little bit easier. When I spoke to Mr Heard he had it pretty clear in my mind of what they wanted and he wanted Mrs Heard to do the content and he said, and one of the reasons why he agreed to do this was because she was a published author. Getting content out of the clients is usually the biggest hurdle and I thought working with a published author was going to be wonderful. I thought we're not going to have any of that stress, it was going to be really wonderful and I've even actually in one of my emails I've said

to her look I think it's going to be wonderful to be able to work with someone, who's a writer. So what happened was after that meeting, in relation to Ora at paragraph, Statement of Claim 4 stating that no meeting took place, this is a fabrication. Ora then goes on to state in the same paragraph he, Mr Heard would never have suggested during this chance encounter, Mr Anderson contact him with details of, with his experience of ecommerce. So in the, that's the Statement of Claim that they had. So Mr Heard was saying yesterday he couldn't even remember that meeting and yet they were saying that no, no you know that in their Statement of Claim that it wasn't a meeting and then they were admitting that yes there must have been some sort of communication at a point, at a time, at a place.

**MS TUNNICLIFFE**

Yeah well there had to be some communication to set up the [inaudible]

**MR HEARD**

[inaudible]

**MS TUNNICLIFFE**

Yeah sorry can I just check with you Mr Heard.

**MR HEARD**

Well there was no meeting of Spats and Ora, there was a chance encounter [inaudible]

**MS TUNNICLIFFE**

Okay so you agree that there was an encounter at Marlborough between Mr Heard

**MR HEARD**

Unrelated.

**MS TUNNICLIFFE**

Ah you don't think it was at Marlborough, or maybe it was at Marlborough. You said it was a New Zealand olive place, well then maybe that was it at Marlborough.

**MR HEARD**

No it wasn't.

**MS TUNNICLIFFE**

So somewhere along the line you agree that there was an encounter between Mr Heard and Don Anderson.

**MR HEARD**

It was brought to our attention that

**MRS HEARD**

No not Don.

**MS TUNNICLIFFE**

No Tim, with Tim.

**MR HEARD**

And it came up because we discussed at the meeting various things that happened in the olive circle and this is this new brand we're going to, going to be launched and we're going to need a website you know and

**MS TUNNICLIFFE**

But Don recalls meeting with you, an encounter or some kind of meeting with you where you were actually quite clear about what you wanted is that right.

**MR HEARD**

Yes.

**MR D ANDERSON**

I'm not disputing the fact he might have talked to Dad at some stage but we had assumed at this meeting he would like to call back.

**MS TUNNICLIFFE**

What was happening at the Marlborough club was there a particular occasion.

**MR D ANDERSON**

I've only been there at the combined clubs in Marlborough, I've only been there for about two functions and one of them was for a grape growers meeting and another one was for a fundraiser for St Marks and they're about the only two occasions I can remember being at [inaudible]

**MS TUNNICLIFFE**

Does that jog your memory.

**MR HEARD**

[inaudible]

**MS TUNNICLIFFE**

Okay anyway there must have been some kind of communication between you two.

**MR D ANDERSON**

Well they've actually said that there was.

**MR HEARD**

I wouldn't call it a meeting [inaudible]

**MS TUNNICLIFFE**

Well depends you know, like a meeting can be all sorts of things. I'm not saying something was actually diared and everybody had organised but if you bump into each other and you meet on the street that's a meeting isn't it, some kind of meet. So that's what I think he's saying, there was some kind of meet, a chance meet where you explained to him and you think that was with Tim but Don thinks it was with him.

**MR D ANDERSON**

It was actually [inaudible] that was there at the time but he spoke to me.

**MR HEARD**

Well you must have been there [inaudible]

**MR D ANDERSON**

I don't recall going [inaudible]

**MS TUNNICLIFFE / MR D ANDERSON**

Okay so there was some kind of exchange before the Raupo meeting. ... But Ora have actually conceded in their Statement of Claim at 4 that there was a meeting. First of all they've called it fabrication yeah and then they've said that he would never have suggested during this chance encounter, so you can't have a chance encounter and say that you didn't have a meeting [inaudible]

Well maybe we're talking about Spats and Ora, if he didn't know you were Spats, I mean maybe that's what it is, I think that's what you're saying isn't it, there was no meeting between Spats and Ora. ... Look I hear that and with respect look I made it very clear at the time that I had a company and I actually said to Mr Heard that I wouldn't be doing it myself, that I had a company that does it and I explained to him the reasons why and I'm really getting a little bit. I don't think it's fair to keep changing the idea about whether it did or didn't happen.

Okay, alright, I don't want to get bogged down too much in detail because what I want you to explain to me is your usual process and I think you've missed something. ... I'll go back and come back cos that's exactly [inaudible] So having had that encounter I then sent the ecommerce paperwork that [inaudible] it was the annexed copy which talks it and on that it says 'please don't distribute this information as I [inaudible] without a proposal request. Now what Ora probably don't understand is what's called RFP, Request for Proposal and that's where the client writes down what they want. Now because I'd spoken to Mr Heard he'd given me an idea of what they were after, they were after a contact management system.

Sorry can I just look at where that is, is it in, I'm not sure which bundle it's in now. ... So I'm on page 4.

Your page 4. ... Of the counter claim. So at 6



Yeah. ... At [inaudible] 4 they've said, they've agreed that a meeting took place. First of all it was called a fabrication, then they've actually said that

Yeah but are you saying that then you emailed him with details of the ecommerce, so where is that email, which one is that. ... That is the one on the 16<sup>th</sup> of April. So there's a request for a proposal, which [inaudible] does. Because Mr Heard told me what roughly he wanted I was actually able to put together and in that proposal which was the picture of the proposal, the slide show, so that actually says the word proposal.

Yes but that's the slide show, have they got that, did you ... No it was presented to them, I'm trying to explain

No, no, no, yeah, yeah, hang on a moment, you're confusing me, I want this is chronological order. You had a meeting, and I don't need big detail, just bullet points alright, you had a meeting, chance encounter at the Marlborough Club, he explained to you what he wanted now you're telling me the next thing that happened was on the 16<sup>th</sup> of April you emailed him. ... That's correct.

And are you telling me that's the proposal. ... No.

Okay so you emailed him with some details. ... I'm trying to put into context what occurred and I'm sorry if it's fragmented.

So the next thing which ... If I can just [inaudible] I've had about four hours sleep last night, I didn't expect to be here today, I am really tired and I'm

Okay so just don't go and bog down in detail, go to the bullet points. So we go to the 16<sup>th</sup> of April then I think comes the meeting at Raupo. ... That's correct so we then after having the meeting at Raupo we actually discussed exactly what it was that they wanted.

Okay well we don't need to go into that detail, we've done that, so that would have the detail ... So what would happen is that you would have, I would have a client meeting where I meet the client, just to meet them face to face to talk about what they wanted, I'd already had that with Mr Heard cos [inaudible] so I then gave a proposal of what they would need as in the proposal.

So is that the meeting at Raupo is the proposal. ... That was a proposal.

At Raupo. ... That was a proposal yes. So I then used a standard form which then has the terms 'Proposal Document' in it which is normally given to a client at the first meeting I usually have with them.

So the standard form is the questionnaire is it. ... Yes and then the client then fills that out and then I get an idea of what they want and then I do a written proposal. However as you've pointed out there seems to be a step that was missed. The reason for that was I used the standard form that I sent to Mr Heard but we'd already had the meeting to decide on what the proposal was going to be, so there was no need in my mind to go and actually write it out but hindsight is a beautiful thing.

Yeah well in your terms and conditions you talk about what you do. So I've just got to find those terms and conditions. ... I [inaudible] it pretty good yesterday when you said look because sometimes when people know each other they do things maybe out of order or

Yes but you were wanting to rely on your terms and conditions so you can't have it both ways okay. If your terms and conditions show up deficiencies in your behaviour, in your actions then I will consider them if you want to rely on those terms and conditions. I'm not sure yet that we should but I'm just looking at, I think there's a gap in the normal behaviour that you would have entered into and I think you're agreeing that it's not quite the normal flow because of the relationship. ... Yes, yeah so the gap is [inaudible] the client rings you, have a talk, there's a request for a proposal is what a client normally does. Then you normally meet with the client, so you actually get a cup of coffee, you might meet in town, you might say well what's your business, what do you want to achieve by website. Then you have, then you



send them out the proposal, sorry the questionnaire, and then you have the meeting where you do the proposal and then you'd sign up a contract.

Right but things happened a different way around, you had the meeting and then sent the questionnaire. ... That's right and the reason it happened like that was because I'd already met with Mr Heard and he told me what they were after.

Okay where are your terms and conditions, which bundle is that in again sorry. ... So that was in the first

Sent in with the claim form wasn't it. Because if we look at your terms, and this is what I was trying to figure out what did you normally do before today, I was trying to get into my head well what would you normally do. You say at 3.0 'the project and deliverables will be fine in a proposal supplied by Spats Limited', so are you saying the proposal was the slide show. ... Yes.

Okay. 'All projects are provided as specified in the proposal and will not be transferable to any other medium or hosting provider'. So this proposal, are you saying that in your terms and conditions the proposal is always a slide show. ... No, no it's not.

Okay so there's normally a written proposal that's right. ... So normally there would be, there would be probably a slide show but there would be a, I would normally have [inaudible] saying this is it, it's going to be 16 pages.

This is the proposal. ... The problem with that was that Ora at that stage didn't know exactly how many pages they wanted yeah, so that's why that was not done, but they told me what they wanted [inaudible] Now Contact Management System if you

Okay just let me stick with this thought. Alright so the proposal wasn't done for reasons you've just explained. ... The proposal was given.

But it was given via the slide show, the written proposal wasn't followed up. ... Yes I'll accept that.

Yeah okay so then at 7 you say a request for a proposal for a website is followed up with a client meeting which was at Raupo. ... Yes.

Then a client survey is needed to be completed which was the questionnaire is that right, that was done. After the client survey has been completed by the client a quote will usually be compiled within one week and that wasn't done. ... Well all these things were done but they were done in a different order.

Well where is the written quote. ... Well the written quote was the presentation at Raupo where I gave them a list of [inaudible]

Yes but on the sly but it wasn't, a quote wasn't, a quote is usually written down. ... Or on the phone. So when I did this, when I went through this I went through the basic price structure, I explained to everyone that was there

I'm accepting that you explained things in your proposal, I'm accepting that you explained things but in your, in your terms and conditions do you mean this is all going to be verbal. ... No [inaudible]

Okay so after the client survey has been completed by the client a quote will usually be compiled within one week. Compiled, it seems to me like it's going to be put down on something. ... Well that becomes [inaudible] because

So that's what I'm just wanting to say to you, I don't think you followed your normal procedures and I think you're agreeing with that and I think that's one of the reasons we're in this problem now. ... Yeah but look I'll give you an example of why it wasn't followed was because on the 4<sup>th</sup> of June, which is the omitted email Mr Heard said to go ahead, so then I didn't need to go and get the signature from him, I've accepted the 4<sup>th</sup> of June [inaudible]

I understand what you're saying, you didn't maybe need to but the failure to record in writing is one of the problems that we're now, you are now facing. It's not my problem it's yours, you're the one that wants the money okay and I'm thinking there's

been, something's missed out. I can, for all the reasons that you've explained and they're all well intentioned and everybody knows everybody but I think you do agree with me that your usual process wasn't followed, that normally there would be something more in writing than there is now. ... Yes.

That things were not done in the same order so that the questionnaire, where it says, where Mr Wilkinson who is the director signed to say he authorised Spats to prepare a written proposal for the project as outlined above. 'Should the project not go ahead I understand I'll be invoiced for \$1,500 plus GST for preliminary work associated with the proposal', and I can see how that fits in with your terms now that I've read them properly. It could be that they actually formed the belief they'd be expecting something in writing because that's what they thought. ... I can understand that, I can understand that [inaudible] now.

Okay so while I understand that you were doing things differently I think there is another understanding going on on the other side. ... I can understand yeah.

Yeah so that's what I'm just wanting to really clarify with you is that I ... Yes and I understand exactly what you're saying but what I'm saying to you is that at the time that was discussed and that was acceptable to Ora. Now they're trying to say that no it wasn't acceptable and that's what really annoys me because the presentation I gave them

And that is the problem with discussions, that is the problem because that's what happens in the end is that people have got a different understanding of what was said. Somebody might have changed their view for convenience but quite often it's just simply a different understanding, people have just got off on the wrong point and forever after are going on different understandings not realising there is a difference. ... I'm sorry if I'm labouring the point but the presentation that I gave to Ora at the Raupo meeting I would normally charge \$1,500 for.

Okay alright so when, cos what I think that you've said to me at the hearing yesterday was that you said a number of times that you were waiting for something in writing, you were waiting for something to come through in writing.

**MRS HEARD**

Yeah.

**MR HEARD**

We thought there should be [inaudible]

**MS TUNNICLIFFE**

You were looking, you were, you said you had trouble looking on the website for the terms and conditions, you couldn't find them and it may be because of a problem just your broadband I don't know because Mr Heard couldn't tell me whether he'd actually ever got to the site or, he couldn't recall if he got onto the Spats website let alone found the terms and conditions. So I've got the Spats website up here now, I had no trouble finding the terms and conditions but of course time's gone on so I don't know what it was like when you were looking at it. It's got tabs along the top and it says 'terms and conditions' and you can [inaudible] so they are there to be seen and your evidence about whether or not you know they were even there to be seen when you can't recollect whether you even got onto the website or not is not, it's a bit weak okay from my point of view. If you're being directed to when you sign the questionnaire I'm not sure that the form was quite the right one in, the questionnaire was quite, I don't think it had been worded in the right way for the arrangement that you're entering into because you were actually doing things slightly differently. You'd already agreed to go ahead I understand from Mr Anderson at \$3,500 so the issue of the proposal and etc you know that [inaudible] you weren't going to get one according to him, they'd already gone beyond that point.

**MR ANDERSON**

Sorry can I just grab some [inaudible]

**MS TUNNICLIFFE**

Yeah sure. I can accept that that was a bit misleading but they are saying that all work will be carried out under the terms and conditions of Spats Limited available. So you are being warned that that's where to find the terms and conditions.

**MR HEARD**

That's on the questionnaire is it.

**MS TUNNICLIFFE**

Hm, hm, yeah.

**MR HEARD**

Well I would assume that that applied only to the questionnaire.

**MS TUNNICLIFFE**

It just says 'all work will be carried out under the terms' so there's no work in terms of the questionnaire, the questionnaire's been given for the purposes of developing a website, gives more information to the developer isn't it? That's all it is, it's seeking more information and it says 'all work will be carried out under the terms and conditions of Spats Limited'.

**MR HEARD**

That's not the way we interpreted it I'm sorry.

**MS TUNNICLIFFE**

How did you interpret it?

**MR HEARD**

Well that was on that document so it applied to that document. That document was, it was

**MS TUNNICLIFFE**

Well the document actually says 'I authorise Spats Limited to prepare a written proposal for the project as outlined above and should the project not go ahead I understand I'll be invoiced \$1,500 plus GST for preliminary work associated with the proposal'.

**MR HEARD**

That's right, that's right it's not the project, it's preliminary stuff.



**MS TUNNICLIFFE**

Okay, alright.

**MR D ANDERSON**

At that stage we'd already had the go ahead for the project.

**MS TUNNICLIFFE**

Pardon?

**MR D ANDERSON**

At that stage we'd already had the go-ahead.

**MS TUNNICLIFFE**

Yes I understand that and it does say 'all work will be carried out under the terms and conditions of Spats Limited'. So if you've gone you know beyond what you thought you were entering into at that time and you've gone beyond that, because you know you have because the website's being developed, going beyond the proposal hasn't it. You knew you'd gone beyond the proposal, you were giving contents so you knew you'd gone beyond it. **I think it's not unreasonable for you to realise that all work, ongoing work will be done under the terms and conditions of Spats Limited cos you'd signed for that and according to Don you'd been told that as well – on the slide show.** So you know it seems to me that if you've been told work's going to be done under terms and conditions, you've been told where to find it, if you can't find it I think there seems to be some onus on you to actually say well where is it, I can't get through, I can't find it can you give me you know, can you email me a copy anything so that you know what you're heading into. **But to blithely go on, not say I can't see your terms so I'm not going to agree to them, let him carry on in the belief that all's hunky dory in relation to terms.** Your actions, cos contracts, I mean all this sort of stuff can be formed by actions as well, if you've omitted all of that, omitted to tell him I can't see the terms, not sure I agree with them, don't go ahead till I've seen the terms, please email the terms, anything like that he would have halted but he's gone on in the belief that all of this has been done under the terms yeah.

**MR HEARD**

We certainly got nothing in writing that proves that we told him that we couldn't find the terms and conditions but it must have happened in the telephone calls.

**MR D ANDERSON**

It didn't happen.

**MS TUNNICLIFFE**

Okay so therein lies your problem as well with the whole verbal thing you know and in terms of you know acceptance of contract terms if you haven't, if you know how to get hold of, he's told you where they are, you haven't said to him well I can't find them and I don't necessarily accept them, time's gone on. There's time and an omission and he's continued to work so you can infer, for me I can infer that you might have accepted these terms and conditions by your actions.

**MR HEARD**

We actually never read them [inaudible]

**MS TUNNICLIFFE**

Well that's right but so do most people when they tick the Trade Me things just as I did, sign up to Trade Me, oh well they'll be reasonable, I'll tick them, everybody else ticks so I ticked them you know, but I actually don't know what they say so I could be breaching them. So I'm just letting you know that those, even though you've said well we couldn't find them, and I accept that you may not have been able to find them, I'm not even sure you got onto his website, Mr Heard couldn't recall.

**MR HEARD**

Much more recently we have found them.

**MRS HEARD**

And we've been emailing them.

**MS TUNNICLIFFE**

Yeah. The other point you've made Mrs Heard is that you said you couldn't find them, I thought you were stronger in your evidence about perhaps you'd got onto the site but just couldn't find them and you were challenging well when were they actually put on. So I want to know from you Mr Anderson how do I know the terms and conditions were there.

**MR D ANDERSON**

I thought about this last night after listening to what you said. I can get an independent person to forensically look at the hard drive that's in America that's on and that would cost I'm guessing somewhere between \$3,000 and \$5,000. If Ora is in agreement to increase the claim to \$20,000 I'm prepared to supply that evidence to you and get it done, but I don't want to do that if

**MS TUNNICLIFFE / MR D ANDERSON**

Don't do that is a reasonable step to take, we're just the Disputes Tribunal, we work on the best evidence that's reasonably available I think. The other point, so you're confident they were there. ... Absolutely.

Now your other point that it says in your terms and conditions, it says that they can updated. ... Yes.

So how do I know what the terms said at that time. ... I can tell you that the only changes that have been [inaudible] on the terms and conditions has actually only been spelling, there's been nothing of any material change to those terms and conditions. There has been change and yes I'll admit to that but they're only changes in spelling.

Okay alright.

**MRS HEARD**

And the dates that were visible to us, we couldn't get behind or you know.

**MS TUNNICLIFFE / MR D ANDERSON**



Well if I go to terms and conditions here I can't see a date, it doesn't show a date of ... Maybe I can explain that.

But they've been able to see a date posted. ... No they haven't, what they've done is they've both actually got an email. If you look at the email, email is not a website for a start and the two things that they've shown you aren't even consistent with each other.

So what documents are we looking at. ... They don't even look the same. This is what they've shown in one.

Hang on a moment, which bundle is that in Timothy's? ... It's in Ora's research document.

Ora's research document yeah. ... Look at this one.

The first one yeah. ... And then look at that one, they don't even look the same.

**MRS HEARD**

Can I explain how we [inaudible]

**MS TUNNICLIFFE / MR D ANDERSON**

Just a moment. But down the bottom it says Spats Limited, it says 'terms and conditions, posted on the 1<sup>st</sup> of January 2010 by admin' are you saying that's not what you would see. ... That's not, if you look up there now that's not what you see.

No, no it isn't now. ... That's not how it was at all.

So how would they have got this printed. ... I don't know how they managed to get it off and print it cos that's not how my website even looks like.

**MRS HEARD**

Can I explain how we did it. If you go into I think it's Links.

**MS TUNNICLIFFE / MR HEARD**

Links with where, on the Spats website. ... Yeah there's some things that it says a little box and you just type in client list and it'll come up, the dates.

Is this down the side. ... No it's on the

It's a link from the home page. ... Yes.

**MR D ANDERSON**

There is a difference between a post and a page and the difference that's occurred here is because terms and conditions as they're currently online are on a page not a post. When you do a search on the search feature you go into a post not a page. So the whole thing it's an erroneous, it's a faulty premise that that's actually the age of the website. The website itself

**MS TUNNICLIFFE / MR D ANDERSON**

No not unless you go into the website. They're saying the terms and conditions posted on the 1<sup>st</sup> of January 2010. ... Yeah so they don't understand the difference between a post and a page.

Well they might not but how do you explain this and it's a print of ... I don't know how to explain this because this is not off my website, my terms don't go down like that.

So this is your ... My tabs don't go down like that do they? No, it doesn't bend like that. In saying that

**MRS HEARD**

Are you telling me our computer's like that.

**MR D ANDERSON**

In saying that that website has been updated on [inaudible] occasions. If you go to 19, page 19 and that's my summary.

**MS TUNNICLIFFE**

Yeah, hm, hm.

**MR D ANDERSON**

So that 73, what Ora proports is [inaudible] and document 1 'Spats do not provide empirical evidence of its claim to establish when the terms and conditions were put on line. A search on Wikipedia will show that like Joomla [inaudible] needs to be upgraded from time to time. Spats Limited has been completely reinstalled on many occasions consistent with these upgrades'. And if you go down to the bottom they start, I started off went back when I started I think in June we were running version 2.9 on [inaudible] and that was dated back to the 19<sup>th</sup> of December 2009. Since then the whole website has been reinstalled for 3, 3.1, 3.2, 3.3 and currently it's on 3.4 so what happens is that you get a, everything gets reloaded. The whole permalink structure for the website has changed so it used to have PHB addresses, it now has the HTML addresses so it has the terms and conditions, it doesn't come up as ID304.php yeah. So I'll admit the website has been changed but what they are submitting as evidence doesn't actually constitute that that's when the website was put online, that's when the terms and conditions were put online. So if I go back to what I was reading 'Ora's reluctance to [inaudible] and understand this issue has resulted in wanting [inaudible] returned, allegations of attempts to not put it online until the 6<sup>th</sup> of October 2010. 7.40: Age on the website is always [inaudible] established on the hosting survey for this very reason. Dates on posts are often arbitrarily changed to make them look older to search engines. This increases their weight and ranking it is unlike a page in a book but that is always there. Each webpage is created on the viewer's computer screen. Joomla has at one estimate over 1.5 million lines of code. Ora does not appreciate the complexity of the commercial value of the website it's created for'. Now [inaudible] don't have that weight of code but they're still talking about, they're still talking about hundreds of thousands of lines of code that have to be reinstalled each time [inaudible] upgrade.

**MS TUNNICLIFFE**

Yeah okay. Is there anything else you want to say around this too about what the terms and conditions might be.

**MRS HEARD**

We didn't, I don't think that the meeting took place to start with, the Raupo meeting was a slide show, we couldn't remember everything he said at that meeting. He wasn't engaged, we weren't even thinking about it, it was still under discussion with Blue Flowers, they were going to come to our home so that's

**MS TUNNICLIFFE**

No you told me you'd put Blue Flowers off when you had made the appointment at Raupo, so they were out by then.

**MRS HEARD**

Yeah they were. So when we entered the meeting not, we still, did we put them off.

**MR HEARD**

It may have been after that [inaudible]

**MRS HEARD**

I honestly can't remember, we genuinely can't remember. We sat at the meeting and we were talked at for an hour, to remember everything over an hour. We saw slides, we saw Mrs Anderson's website, we think we saw Mr Anderson's website the first one. We certainly saw websites with a lot more graphic than the one that he says he put online and informed us that he was working on.

**MS TUNNICLIFFE / MRS HEARD**

Okay. Just did you understand that you were going to be doing the content and putting it on and that was why you wanted the CMS system to be up so you could update and keep it current and ... Well no I don't think so and I don't think, I can't remember if Joomla was mentioned or not, I thought it was later on.

Yes I don't think we'd actually picked the site at this stage and we had to pick [inaudible] ... Pick which format it was going to be in. We didn't understand the computer jargon.

Yeah but you did want to be able to put content on. ... Yes.

So would it be fair to say that you did agree to put the content on and that wasn't going to be Don's task. ... **No it was our task.**

It was your task, you agree about that yeah.

**MR HEARD**

Certainly to replace it, to be able to turn it over in the initial instance.

**MS TUNNICLIFFE**

For the initial content.

**MR HEARD**

I'm not sure about one.

**MS TUNNICLIFFE / MRS HEARD**

Because what I'm thinking and I just, I mean I'm a website person so I'm thinking that what Don's saying is that he's going to do the website that looks like his with you know the tabs along the top, some kind of logos [inaudible] there's tabs along here [inaudible] there might be the odd logo on top of something you know. But [inaudible] say it's recipes, these are the designs, get it that far so that you can enter your recipe [inaudible] recipe, is that what you understood you were going to be doing. ... Yes we think so. I mean I actually understood that I would be writing copy that's all you know, that somehow he would feed it magically onto

Okay so you understood you were going to write the copy but you didn't understand you were going to actually going to put it on. ... No not then, I understood I was going to be trained to like a blog on it or, I don't know [inaudible]

Okay so you were uncertain. Have I got it right about what the different tasks [inaudible]

**MR D ANDERSON**

I think you've understood it perfectly.

**MS TUNNICLIFFE**

Put some pages up and tabs to make it work and plug it in and we'll get the domain names, link it in with Paypals and things. Alright okay, so Mrs Heard you're saying you knew you were going to write them and you thought, you didn't know whether you were going to be putting them on yourself at all. After that meeting when you sort of got engaged with the project did you realise that then you were going to be putting them on.

**MRS HEARD**

Not directly onto the website, I thought that that was Don's job.

**MS TUNNICLIFFE**

Yeah okay.

**MR D ANDERSON**

Why could I ask, why would they be expecting training if they didn't realise they were going to do it.

**MR HEARD**

To make the [inaudible] use.

**MR D ANDERSON**

But what do you mean [inaudible] This is like give Don the problem of [inaudible] the website even though we're getting the discount and then turn round because Mrs Heard doesn't want to work for me from all accounts from yesterday. So we'll just, you'll phone me up and say look we need to get some [inaudible] Don can you do it for me and me saying well look I'm only going to do it if Ora sorts out the problem and gives me someone to work with. I'll put the front page on, get that done for you so you can make, have some sales, you can go to the meeting and not get into trouble with the other members because nothing's online. You knew very well that I was waiting for Mrs Heard and you agreed to talk to her about it and to bring her in line and then you didn't do so and then after promising me that you would make sure it happened if I got the website online urgently for you, you reneged on that and then you reneged on the deal finishing the website.

**MRS HEARD**

I don't think so.

**MR D ANDERSON**

All I'm hearing is to-ing and fro-ing, oh I'm not sure, ah yes we understood that [inaudible]

**MS TUNNICLIFFE**

Yeah well I think that's one of the problems that arises out of this meeting and then not recording exactly what everyone's responsibilities are in written form.

**MR D ANDERSON**

Can I just go for a brief walk, would that be alright.

**MS TUNNICLIFFE**

Sure let's have a 10 minute break, I'll just ask everybody to wait outside so that they're all out of the room and we'll come back in. I'll come and get you at five to four.

**(Court adjourns for 10 minute break)**

**MS TUNNICLIFFE**

Alright I just want to check on the, this number 3 has Ora breached any terms of the contract by failing to carry out agreed tasks I think you hear you saying, on your part you're saying there was some uncertainty about what the agreed tasks were that you had to do, there was some uncertainty around what you were to be putting on. You weren't sure whether you were just providing them or putting it on but Mr Anderson points out, quite rightly I think that, I think that there is some evidence that you were looking for training to be able to put it on, so if it wasn't your task why would you be looking for that. So I'm thinking there is some support for his suggestion that you were supposed to be putting it on, although that may not have been clear to you from, at the beginning you know, from the meeting at Raupo, I think it must have become clear to you that that was part of your task to put it on, would that be fair to



say. Cos you've got this CMS system so that you can do it and he doesn't have to do it.

**MRS HEARD**

And yes and we thought, I thought at some point I would get training on how to change it or add photos or yeah, I assumed that was part of his job.

**MS TUNNICLIFFE**

Okay so he's saying well if he is going to be training you to do it he'd have to charge I think, cos that's more than just developing a website, that's training you to operate it. I suppose if you think if you buy a car, go and buy the latest automatic hybrid something or other would you expect the salesperson to teach you how to drive. I mean I'm thinking of some kind of analogy like that, or if you don't know about computers and you buy a computer would you expect the man in Dick Smith's to show you how to use it.

**MRS HEARD**

No I wouldn't expect to that point, I just thought I was providing copy to be put onto the website.

**MR HEARD**

You thought that when you were writing it in that thing that Don would then upgrade it and put it on the website you know. But at some stage we're going to be able to get in there and replace it or whatever.

**MRS HEARD**

And [inaudible] find someone else showing me how to work it either, I mean we've got neighbours that are really great with computers. But my job was to provide the copy I thought and when I tried to download into the site that was provided it just [inaudible]

**MR HEARD**

It couldn't be done they said.



**MRS HEARD**

And Mr Anderson certainly accessed it you know, it was a very tense time because he was not an easy person to communicate either, I wished that he would be patient.

**MS TUNNICLIFFE**

Okay well I think that there might have been a lack of understanding cos he felt that he was being provided with someone who knew what they were doing and would be able to do it basically he said that, would that be fair to say. You thought that you weren't skilled enough to do it so therein lies another sort of chasm really.

**MR HEARD**

Well I certainly knew how to do the writing but

**MS TUNNICLIFFE**

Well that's right yes, so there may have been a

**MR HEARD**

[inaudible] is quite different, that's another matter.

**MS TUNNICLIFFE**

Okay so within agreed timeframes. Now six weeks from go to whoa and the start date was you know you were pressuring to start and that doesn't seem to be absolutely clear exactly when the start date was but it was pretty soon after the meeting at Raupo, get going.

**MRS HEARD**

No.

**MS TUNNICLIFFE**

June the 4<sup>th</sup> you said get going and certainly by the time the questionnaires were signed.

**MRS HEARD**

He gave us no timeframe to send the questionnaires back you know [inaudible] or the outline of work and he was desperate to get started [inaudible] told us to send them back promptly, we didn't, we left them sitting [inaudible]

**MS TUNNICLIFFE**

Okay so when you were at the Raupo meeting he says at that stage the proposed start online was the 1<sup>st</sup> of September, would that be fair to say Mr Heard you were aiming for 1<sup>st</sup> of September.

**MR HEARD**

Well I don't know whether it was the 1<sup>st</sup> of September, I do know that we did intend to launch in September but at that time a number of things actually put that date back not even related to the website.

**MS TUNNICLIFFE**

Okay.

**MRS HEARD**

The questionnaire actually arrived on the 8<sup>th</sup> of June.

**MS TUNNICLIFFE**

Hm, hm, yeah okay. Alright and because you haven't read the terms and conditions you wouldn't have seen that it says there approximately six weeks is the go to whoa.

**MRS HEARD**

I don't think Mr Anderson gave us a start date, I don't really know. Looking through the emails here it comes on the 17<sup>th</sup> of July he downloaded a Google docs and I started to work into this but I lost them, when I really genuinely [inaudible]

**MS TUNNICLIFFE**

Hm but that's what you're doing but he's got to do work before that, before you can load anything onto it doesn't he.

**MRS HEARD**

Oh I assume he has yeah.

**MR D ANDERSON**

And on the 30<sup>th</sup> of June I sent an email [inaudible] 'I've received the questionnaires back so I can make a start thanks', I mean that's quite emphatically saying that I had started. There was also would have been phone discussions where I would have given you the date of when I expect the content, which was what I said was the 27<sup>th</sup> of July, I believe I even sent a reminder email to you which hasn't been included in any submissions of evidence to say that the content, how are you going on with the content or words to that effect. So I can't honestly believe that you didn't know that I had started on the website.

**MRS HEARD**

I agree you'd started on the website.

**MS TUNNICLIFFE**

And did you know there was a six week timeframe.

**MRS HEARD**

No I hadn't any timeframe, I hadn't been given one.

**MS TUNNICLIFFE**

Mr Heard, that he devotes himself to around six weeks.

**MR HEARD**

I wasn't sure exactly what it was cos I think somewhere I'd seen it written 'within six weeks of finishing' and I'd seen somewhere else it said 'within six weeks of starting', that's I'm a bit confused about that.

**MS TUNNICLIFFE**

Okay alright.

**MR D ANDERSON**

In, I realise we haven't come to that statement of, or the counterclaim's been filed but Ora have made some quite serious statements to do with timeframes, they were very sure and that's why they've counterclaimed and to sit there now and say well you're not so sure, I just don't think that's being very honest and respectful of why we're here.

**MRS HEARD**

And yet we're trying to be extremely respectful. We haven't any recollection of a clear timeframe, you didn't have a contract or the quote or, in hard copy to refer to.

**MR D ANDERSON**

In for example, in your counterclaim you've said that the meeting's a fabrication you know that's a serious allegation, you even accused me and my solicitor of fraud you know, so let's just, can we just be a bit more.

**MS TUNNICLIFFE**

Okay well I just want to go now to, I'm just looking at the penalties and the paying on time business in Number 3, in which we associate with the penalty issue as well. So I just want to, now we've got the new bundle of all the accounts thank you, if we can both just turn to that and all just turn to that. The first one was 614 for \$2,875, the deposit of \$1,500 and working on Stage 1, so that was paid on the 19<sup>th</sup> of the 11<sup>th</sup>. The account was dated the 28<sup>th</sup> of the 10<sup>th</sup> so I assume you received it then on that date or soon after and the terms and conditions, 'The invoice is subject to the normal terms and conditions of Spats Limited available on our website. Payment is due within seven days of invoice. Spats Limited reserves the right to charge interest on any overdue account at the rate specified on our Terms and Conditions web page'. Now that wasn't paid until the 19<sup>th</sup> of the 11<sup>th</sup> so it was paid late, was there any agreement between Ora and Spats for that late payment?

**MR HEARD**

The first one?

**MS TUNNICLIFFE**

Hm, hm.

**MRS HEARD**

Here's the email Number 22, overdue account.

**MS TUNNICLIFFE**

22 right-oh, so that's referring to this account is it. Well that's the 13<sup>th</sup> of November, yeah okay.

**MR D ANDERSON**

So 13<sup>th</sup> of November I still hadn't been paid so I phoned up Mr Heard to say why hadn't I been paid and he didn't even want to know about it, he said ah you'll have to talk to Mrs Wilkinson. I said to him look I'm dealing with you, you're the person who [inaudible] for me to speak to, why don't you give her a ring.

**MS TUNNICLIFFE**

So okay it says, and this email says if you can assure me I will receive payment in my account on the 20<sup>th</sup> I will hold off adding the processing fee for late payment as I'm not going to wait till the 20<sup>th</sup> for a cheque to be posted and then wait for another week. Okay so it looks like you're agreeing not to charge late fees and that if they pay by the 20<sup>th</sup> and they did.

**MR D ANDERSON**

Yeah.

**MS TUNNICLIFFE**

Yeah okay.

**MR D ANDERSON**

But there was no contact from Ora [inaudible] the issue that [inaudible] say look we can't pay it by seven days, Mrs Wilkinson only does it on the 20<sup>th</sup> of the month. So there was no understanding of that at all and how she pays her other accounts has got nothing to do with my claim.

**MS TUNNICLIFFE**

Okay so you've obviously had a discussion around that time because Mark has asked you can you wait to be paid till the 20<sup>th</sup> and you've indicated then well this is pretty difficult for me cos there's not much, not much margin in all this. So I think you're indicating to them you're forgiving it this but you've let them know that it's difficult for you and forewarning alright. So the next account is for \$1,840 and this is for an outstanding, total outstanding Ora project \$1,000, that takes it up to the \$3,500.

**MR HEARD**

That's correct.

**MS TUNNICLIFFE**

Yeah the domain renewals were expiring and the domain hosting okay, so they've paid that. So although you might not have remembered about or known or remembered about these hosting costs you do seem to have accepted them by paying them.

**MRS HEARD**

Hm, hm. We weren't aware they were \$500 and we couldn't locate them on the website, Don himself confirms

**MS TUNNICLIFFE**

Well it says \$420 there, well I presume that's GST added might bring it up to \$500. So it's \$420 there exclusive of GST.

**MR D ANDERSON**

I'm sorry I'm failing to see the connection here between why they had to be on my website. Just because Blue Host advertise what they do and what their charges are on the website doesn't mean that I have to [inaudible]

**MS TUNNICLIFFE**

Yeah no but it's harking back I think to were they fully aware of the terms that they were entering into at the beginning and so they've had to remember everything from that meeting, the only other thing they can check on is the website, the terms and

conditions. Some things are mentioned on the website but this hosting [inaudible]  
\$120 fee [inaudible]

**MR D ANDERSON**

I would have expected [inaudible] query with that that I would have got a phone call  
[inaudible]

**MS TUNNICLIFFE**

Well that's right I'm saying they do appear to have accepted it by paying it. So that  
was paid late as well and I'm wondering whether there was any agreement to the  
late payment by Spats on that occasion.

**MR HEARD**

I know very well there was no written agreement but we didn't request clarification of  
the invoice [inaudible] tripped us up, tripped me up [inaudible] to version blah, blah,  
blah in the brackets there, I thought it referred to what was above it. I thought what's  
[inaudible] I didn't hear this before.

**MS TUNNICLIFFE**

Hm, hm.

**MR D ANDERSON**

So if you get [inaudible] payment wouldn't you normally phone the person to say hey  
look I'm not too sure about this as particularly if you know that you know you're  
charged penalties again cos you haven't paid it within seven days.

**MR HEARD**

That was some other [inaudible]

**MR D ANDERSON**

[inaudible]

**MS TUNNICLIFFE**

Right okay so where did you request the explanation?



**MR D ANDERSON**

I've got to move the car.

**MS TUNNICLIFFE**

What?

**MR D ANDERSON**

Sorry I've got to move the car.

**MS TUNNICLIFFE**

Well that was the 29<sup>th</sup> of October 2010, you hadn't had that invoice by then so that can't, it must be sometime after Number 22.

**MRS HEARD**

Oh it's the 2011.

**MR HEARD**

Yeah.

**MS TUNNICLIFFE**

So you've said that Fran queried that but how did she query it, or somebody queried it.

**MR D ANDERSON**

Maybe if I help.

**MS TUNNICLIFFE**

Hm, hm.

**MR D ANDERSON**

There's a, from email Number 43 in the spiral bound book it says there's a letter to me and I believe the letter is from the 29<sup>th</sup> of, on email Number 44 there's this email here.

**MS TUNNICLIFFE**

Okay 44, is that your last email and invoice, that's the 29<sup>th</sup> of November, that would work yeah. So that doesn't talk about the, it doesn't ask you to explain though does it? Oh there has been a, or the last line maybe 'further to this we're left wondering why the Joomla upgrade was actioned while we're clearly in the situation of a communication breakdown so maybe that's [inaudible]

**MR D ANDERSON**

So again that response is outside of the seven days.

**MRS HEARD**

We thought we'd already let you go on the 20<sup>th</sup> [inaudible] on the 7<sup>th</sup>. We actually asked for clarification so that you could bill us [inaudible] there was no response.

**MR D ANDERSON**

[inaudible] I replied on the 12<sup>th</sup> of July saying that if you wanted to terminate there was a breach of contract yeah. Now first of all the only person who had the authority to tell me that I had been let go if that's the term you want to use was Mark. He's my contact person for the [inaudible] doing the nuts and bolts of the website, getting someone to send me an email in itself is a repudiation of contract yeah. And then I made it very clear if I can read it out 'Hello Fran [inaudible]

**MS TUNNICLIFFE / MR D ANDERSON**

What number are we now sorry? ... Sorry we're now up to [inaudible] Number 41.

41 hm, yeah. ... So 'Hello Fran. Ora and myself had a contract for services as defined in my terms and conditions. Your email does not address these terms or covering [inaudible] a contract in relation to these obligations by either party. Terminations are covered under the terms and conditions and can be done 40 days before the rollover date which is the 26<sup>th</sup> of June. Therefore the email is not consistent with the termination in a timely manner before a new year of posting had begun and a contract was rolled over. I would like to offer you the opportunity to reconsider your email in consideration that I now have someone at Ora who is

prepared to fulfil Ora's obligation to the website and rather than breach that contract as your email currently stands'.

And that was Moritz? ... Yes. Now what is obvious is I'd actually been speaking to Mr Heard and Mr Heard thought that was okay that Dr Moritz was actually going to be doing the work on the website. But from communications it's obvious that it wasn't okay to various parties in Ora and that's been what Mrs Wilkinson had said 'what right did I have to even speak to him' and that I've already been let go but wasn't even been told, who was going to tell me?

Okay alright I just want to keep going on these invoices. ... Yeah.

So the next invoice, so that was paid, so the next invoice 14. ... So it wasn't paid for penalties.

No that invoice was paid but there was another one dated the same date which adds a late payment processing fee, so when would that have been sent. ... Is it not written at the top of the page I know it was sent on [inaudible]

Ah sent 21/12/12. Well who's written this 'sent' at the top of it. ... I did.

Well these are the wrong, they must be the wrong years, sent where, it must have been sent on the 11<sup>th</sup> you're a year out. ... Ah okay your're quite right, hang on a minute.

**MR D ANDERSON**

I'll accept he's a year out.

**MR HEARD**

Yes a year out.

**MS TUNNICLIFFE / [?]**

So it should have been sent on the 21<sup>st</sup> of the 11<sup>th</sup> of the 11<sup>th</sup> and then sent on the 22<sup>nd</sup> of the 7<sup>th</sup> '12 or not. ... Apart from those first two I think, oh hang on.

Well what should the dates be on the top here. ... The second one's '11 isn't it, 2011 and I think they're all 11s from there on right up to, hang on a minute.

Well sent 22<sup>nd</sup> of July 2011 doesn't make sense for a November account so I don't know what that means. ... I think [inaudible] that one's not right.

You then get sent an overdue notice of the same invoice, I don't know when you got it but it's dated the 20<sup>th</sup> of the 11<sup>th</sup> again so we don't know. ... And yes it would be '11, that's [inaudible]

### **MS TUNNICLIFFE / MR HEARD**

21/12/11 so you got it on 21<sup>st</sup> of the 12<sup>th</sup> 'of the 11<sup>th</sup> okay, so they're telling you and adding the late payment fee which you ignored and you only paid the original amount. Okay so then we go onto 614/3, total outstanding invoice, this is 20<sup>th</sup> of the 11<sup>th</sup>, so that's the original \$1,600 yeah exclusive of GST plus the processing fee, plus penalty interest for December and January and a second processing fee alright, and it's after that that you decided to pay cos you received that on the 6<sup>th</sup>, you'd paid \$690. ... That was because you'd had [inaudible] explained either directly or indirectly that we actually knew that that definitely wasn't [inaudible]

So why pay \$690, why that amount. ... [inaudible] because it wasn't the \$1,000 that we, that we queried about, it was the rest of it.

Okay so that would be what you were paying for in that initial payment was the domain renewals and the domain hosting plus GST, so you've separated that out and paid it. And then on the 7<sup>th</sup> you must have been satisfied with something or you've decided to pay, were you satisfied, had you had an explanation by then. ... We'd had an explanation but we weren't happy about paying cos we still felt that because of the merry mix-ups early on we felt that we hadn't actually had the website finished.

Yeah but you did pay. ... Yes.

Okay so

**MRS HEARD**

And then [inaudible]

**MS TUNNICLIFFE / MR D ANDERSON**

Yeah okay. Okay so I can see why that's come to \$2,302 but that balance has not been outstanding okay so, cos some of these accounts double up so I'm just trying to figure out which ones still apply. So that December that's all been included [inaudible] January. Right so would it be fair to say Mr Anderson that if they paid, the last one in this bundle is here, which is a total of \$716.28, that is all the late payment and interest fees on the unpaid account that was originally \$1,600. ... I don't think they've paid that.

They've paid the \$1,600 but they haven't paid any late payment fees or interest on that. ... That's correct.

And so if we just skip right through to this account for \$716.28 which they say was sent on the 14<sup>th</sup> of the 6<sup>th</sup> 2012, okay so that was what was owed. What's happening is you're sending out updated invoices on the same date, it's still got the invoice date, the same one, invoice date and it's the same one you're just updating it. ... That's correct.

So they're not a series of separate invoices that need payment it's just the one alright. ... But Ora was sent a letter, quite comprehensive letter on the 20<sup>th</sup>.

20<sup>th</sup> yeah. ... Where I said to them, I mean they'd obvious believed that Mrs Wilkinson was [inaudible] or the [inaudible] had sent the letter without asking why the updates were done without their consent, which I took to be very antagonistic cos I believe they knew full well, I'd given them full warning of notice that they required upgrading. And by then I'd quite clearly set out to them that if they wanted to pay the original amount that I'd be accepting all that so if prevaricating around then I would be charging them for the updates which they had. So they ignored my solicitor's letter, they just decided they were only going to pay the original amount, there was

some correspondence between Mrs Wilkinson and Mr Hill where she said she'd paid it and I checked, she hadn't paid the lot at all, she'd only paid the amount. Mr Hill contacted her again and said you've told us you've paid it but you haven't, you've only paid the original and then she basically said to him that we could just whistle for it.

**MRS HEARD**

Email Number 48 [inaudible]

**MR D ANDERSON**

And it got to the stage where Mr Hill actually refused to deal with Mrs Wilkinson any further.

**MS TUNNICLIFFE / MR D ANDERSON**

Yeah okay. So just moving on to the next account they've got which is 614/4 dated the 8<sup>th</sup> of February 2012. ... Yes.

That's for the 21 hours maintenance charge as per section 16, terms and conditions and in your claim yeah, that's still the 21 hours okay that's fine. Now what is that 21 hours for, that's where we got up to. ... Well that's the time it took to do the upgrading, as I said we roll out the [inaudible]

Upgrading Joomla. ... Yes.

Joomla upgrades. ... And up until that point I'd been prepared to help Ora do it without charging initially for it. I'd given them an ultimatum for want of a better description on the 20<sup>th</sup> of December and they continued to muck me around and not be upfront about it so they were charged for it.

Okay so by 20<sup>th</sup> of December when you gave them the ultimatum had you already done the 21 hours by then. ... Yes and there's actually more work on top of that as well which I did, it was just something [inaudible] the time for the upgrades. I thought it was only fair to charge them for the amount that I'd said in the letter, to me it would



have been a bit of a no-brainer, take the amount that's owed and don't have to pay an additional fee.

Okay so how would they have known that when they entered into the contract with you they were going to be paying for the 21 hours, you know at \$120 for upgrades. ... Cos I told them, I told them at the Raupo meeting.

The Raupo meeting. ... Yeah. I've offered the maintenance contract.

Yeah you had offered them the maintenance contract hm, hm.

**MRS HEARD**

It's fair to say we didn't know what he was talking about.

**MS TUNNICLIFFE / MR D ANDERSON**

Okay right, so then you've just got the penalties and interest on the maintenance. Okay so then we come to [inaudible] 614.5 and so they're you're charging 32 hours corresponding with client outside the project, so this is at \$120 an hour for all of the dealings that you've had to. Just requests for more information and chasing them up that sort of stuff is that right. ... Yes and that's not even half of it.

So why did you wait until March 2012 to charge that. ... Because I honestly thought that they would pay the account and given that pretty clear letter from Mr Hill saying that if they pay the smaller amount then [inaudible] all parties and we'd all go our separate ways. But Ora refused to even acknowledge the terms and conditions, refused to acknowledge the internet law of New Zealand, they refused to acknowledge that my lawyer can also have a website with me and they wanted to go to the District Court and for a Judge to decide.

**MRS HEARD**

That's not correct.

**MR D ANDERSON**

It's absolutely correct Phyllis and it's written in your statement.

**MRS HEARD**

What that I wanted to go to the District Court.

**MR D ANDERSON**

Yes you wanted a Judge to decide, shall we go through and find it?

**MS TUNNICLIFFE / MR D ANDERSON**

Just keep your voice down, it's no need to attack in that way. There is some suggestion in the correspondence about going to the District Court so I don't know who suggested who but what I'm just asking was why it was so late that you decided. I mean you'd incurred all this time, you hadn't charged for it before, in March you decide to charge because they were just intransigent in terms of paying for the other accounts would that be fair to say, you thought right I'm going to charge for all of this now. ... [inaudible] entitled to it and at the time I was working over in Australia, in Melbourne so I didn't, I'd been corresponding with Mr Hill to try and resolve the matter over here so that's when it was sent. I mean that's not even, that amount of time and money isn't even the \$4,000 that the website would have cost anyway so if I'd chosen the \$7,500 of the website that they got.

So then Mr Hill's legal fees of \$487 I can see where that's come from. Documentation over time for proceedings including [inaudible] okay so that's all your time preparing for the Tribunal. ... No that's only the time for the first Statement of Claim, that's not the last week that I spent about 50 hours.

Yeah okay. ... Now Mr Hill didn't do my Statement of Claim last week, I did it.

Hm yeah, okay and then there's [inaudible] just penalty interest on that alright. So if I just go to your terms and conditions about penalty now I understand the account, I just want to go to the terms and conditions and you've been referring to sections 14 and 18 of the terms, I'll just go over those. Which says 'Late payments incur an additional \$30 [inaudible] and will incur penalty interest at the rate of 10% per month' okay and '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'. And

then, what was the one you said, section 18 is liabilities, 'The client agrees that Spats Limited will not be liable for any indirect or consequential damages including but not limited to loss of property and not liable'. Okay so here 'The client agrees to defend, indemnify and hold as harmless from and against any and all claims, losses, liabilities arising related to any [inaudible] Isn't this claims against you by others not them. ... No it's all, all claims.

'Against any and all claims, losses, liabilities' okay. Well they're not claiming in this case, you're claiming, so this is not a claim against you it's a claim you're making against them. ... Yeah the costs that I'm incurring

'Related to arising out of the services provided by' oh okay, I understand what you're saying. ... So then at Clause 21 it says 'The client will be liable for all expenses incurred by Spats Limited in enforcing any interference with contact relations or breach of contract. And that's the, almost the second paragraph on [inaudible]

#### **MS TUNNICLIFFE / MR HEARD**

Yeah got that. Okay thank you, is there anything you want to say further about the extra penalties and interest and fees that have been added. ... The extra work we understood had been done for nothing.

What extra work. ... You know.

Oh okay, the extra work, the maintenance work and the time chasing you up. ... Yes and [inaudible] anyway I would challenge the hours, I'd challenge the whole flippin lot. And he's \$120 an hour, so that's an exorbitant rate, compared to other website providers in Marlborough [inaudible] \$70 [inaudible]

#### **MR D ANDERSON**

\$160 is probably the national average on \$120, so if you can get up to \$70 in Blenheim go for it.

#### **MR AND MRS HEARD**

We will.

**MS TUNNICLIFFE**

Alright anything else you want to say.

**MR HEARD**

Well we believe we entered a contract way back.

**MRS HEARD**

[inaudible]

**MR HEARD**

[inaudible]

**MRS HEARD**

We couldn't work with Mr Anderson, he was too arrogant and [inaudible]

**MR D ANDERSON**

What I believe Ora did was they sent me an email trying to get me to explain how they could exculpate themselves out of the contract and that's not how it works, that's not how you end a contract. If they'd wanted to end the contract there and then they could have asked for an invoice of all fees to date and asked to terminate the contract on a set date. They did not do so, they simply didn't reply, I believe in the hopes that I wouldn't send them any more bills and from the correspondence it's quite clear that they were either antagonised or did not wish to have, have someone else work on the website who I've arranged too.

**MRS HEARD**

We couldn't work with Mr Moritz.

**MR D ANDERSON**

He's a shareholder what do you mean you can't work with him, he's a shareholder in Ora.

**MRS HEARD**

It's our prerogative, we couldn't work with him.

**MR HEARD**

You broke your own terms and conditions.

**MR D ANDERSON**

I didn't break my terms and conditions, you don't understand the terms and conditions and that's been one of the problems.

**MS TUNNICLIFFE /MR D ANDERSON**

Well isn't there a confidentiality clause. ... No there's a confidentiality clause

Well there is. ... Oh sorry there is a confidentiality clause you're quite right.

Yes which binds you. ... I'm not, I'm not bound by confidentiality clause that says that I can't talk to other people [inaudible]

I think there, ah within Ora. ... I'm bound by a confidentiality clause that I can't go to another company but this is

**MR HEARD**

Well maybe you're looking at the wrong [inaudible] what we're looking at here is that you say you want to deal with me alright and then you go and deal with Mr Moritz.

**MR D ANDERSON**

No I'm responsible to you on Ora's behalf.

**MR HEARD**

Mr Moritz had no, did not have my permission to do what he did.

**MR D ANDERSON**

You actually weren't prepared to talk to him, I told you by the phone that Andreas was prepared to do the work, you agreed to it.

**MR HEARD**

No absolutely not. Andreas rang me or I was talking to Andreas and you said, I said the website hadn't [inaudible] been finished and I said something to him like, or he talked about internet web sales overseas you know and [inaudible] and he said some issues with the web and he wanted to sort it blah, blah, blah and I said well [inaudible] finish it if you want to you know and that was as far as it went and then suddenly we get all these emails that come back and things had gone a lot further, there was all sorts of stuff. I took, for something like that to happen I had to go to the Committee you know, I had to go back to the other director and

**MS TUNNICLIFFE / MR D ANDERSON**

Hang on I think that's where you, the thing is this is a company you were dealing with and the directors you were dealing with and so there is a, under this company I understand there's a cooperative that's trying to be formed but you were dealing with a company so Mr Moritz is not part of the company and I ... Yes he is, he's a shareholder.

He's not a director though of the company is he. ... No but if [inaudible] looking at 2 that the [inaudible] gives Spats Limited exclusive administration control of the project, I am the project manager it says so in the yeah and the contact for [inaudible] listed in the [inaudible] The client [inaudible] they will not undermine or interfere directly or indirectly with any work being performed by Spats Limited or allow others to do so.

Okay and the non-disclosure clause is 'Likewise Spats Limited will treat your business information as confidential', so going through Mr Moritz may not have been you know, that's what they're suggesting. ... Okay if the [inaudible] go to them to [inaudible] delegation. 'Spats Limited may assign or transfer our rights and responsibilities under contract to another party. We may also sub-contract the performance of any of our responsibilities under contract to another party. The client may not assign or transfer any rights'. So under that if I'm the project manager I can assign the job that Mrs Heard was filling if she wasn't [inaudible] to another party.



Well you can assign your tasks to another party. ... As the project manager and this is [inaudible]

So I just want to say I mean I think that there's another way you can interpret your terms and conditions. ... Yes I agree you might even interpret it that way that's, but at the end of the day we were trying to get the website online and it was supposed to be beneficial to Ora.

Okay and that's not a central issue to this whole thing, I don't think you're going to settle, I think I'm going to be making a decision. I was hopeful at the end of yesterday that we might you know get towards reaching a settlement but I'm not sure we will, but I think we should just have a look at that. You indicate I think that you are prepared to settle. We haven't dealt with your claim and we're not going to be dealing with it today but

**MRS HEARD**

I have a letter here that if we agree to [inaudible] to end our claim.

**MS TUNNICLIFFE**

Oh okay so you're withdrawing your claim is that right.

**MRS HEARD**

Yes, yes.

**MS TUNNICLIFFE**

Okay, okay so that's, thank you for letting us know that. So given that this is the only one on the table then, this is the only claim did you want to talk to Mr Anderson about settling with the payment of some money or are you leaving it to me to make the decision.

**MRS HEARD**

Actually we're leaving it to you.

**MS TUNNICLIFFE**

Mr Heard is that what you think, you're actually the director so

**MR HEARD**

There's probably a certain amount of risk involved [inaudible]

**MS TUNNICLIFFE**

Well there is, there is a risk involved, if you settle yourselves you're in control of the outcome. I've tried to sort of signal where I think there's, I've got doubts in relation to the position of each of you, I've tried to indicate that so I can get the feedback on it. I'm not giving a decision right here because I'm not sure exactly where I'm going with this myself yet, I've still got some doubts in my mind about you know about, I'm going to have to work out what I think probably was agreed because there's still some lack of clarity round that initial meeting.

**MR D ANDERSON**

Would they like to talk amongst themselves.

**MS TUNNICLIFFE**

Pardon.

**MR D ANDERSON**

Would they like to talk amongst themselves.

**MS TUNNICLIFFE**

It's a possibility, did you want to have a break to talk about it.

**MR D ANDERSON**

Do you want to go out, we can go out.

**MS TUNNICLIFFE**

No well everybody would have to go out, did you want to have a chance to talk together.

**MRS HEARD**

No [inaudible] Mark would like to talk about why we didn't pay if that's okay.

**MS TUNNICLIFFE**

Yeah.

**MR HEARD**

[inaudible]

**MR TUNNICLIFFE / MR HEARD**

Okay well you say why you didn't pay, Mr Heard tell us why you didn't pay. ... Because we believed the website hadn't been finished. Now I know in the terms and conditions it says that you have to pay whether it's finished or not. I think the terms and conditions, the terms and conditions as I've said the terms as I've said the terms and conditions are pretty draconian, there's nothing there that actually lets, that addresses the needs of the customer, it's all about addressing the needs of Spats you know, so we don't get any of that obviously at all. So we, when we got the [inaudible] emails you know there was threats of maybe we could get it for \$40,000 and all the rest of it, we kind of looked at it as being an act to try and get us to pay up so we didn't. Anything else, let's think.

**MRS HEARD**

We weren't sure that the contract would end even if we did pay you know. We had no guarantee that what we saw online was what we were getting [inaudible] was unclear.

**MR D ANDERSON**

[inaudible] quite clear [inaudible]

**MR TUNNICLIFFE / MR HEARD**

No hang on a moment, I'll just come to you shortly. So can I just check with you Mr Heard, when you say that you didn't believe the website had been finished, it had been put up, it was running, the content wasn't finished. ... But we were expecting some content [inaudible] the writing up and everything but it hadn't been put on and

later on I see somewhere along the way he uses a bargaining tool to get paid [inaudible]

**MRS HEARD**

Mr Anderson himself stated that he would do it. I mean he agreed, even as late as, even as late as November and he also gave a summary of what he had offered us to clarify with Mark and he included the recipes in that yet, they were not online

**MR HEARD**

Recipes and grower profiles were agreed to go on.

**MR D ANDERSON**

That was agreed as long as you had sorted out what you were going to do with Mrs Heard and she was [inaudible]

**MR HEARD**

But you broke the agreement.

**MR D ANDERSON**

It doesn't say that in [inaudible]

**MRS HEARD**

This is the 11<sup>th</sup> of November email 'here is the layout as I currently have it'.

**MR TUNNICLIFFE / MR HEARD**

You did however pay, what you haven't paid, what you didn't pay was the penalties and subsequent to that then Mr Anderson added other charges that he wasn't initially going to charge but did. ... That's right.

Okay so you didn't pay because you thought the website wasn't up and running but then you did pay. So are you saying you didn't pay, what didn't you pay because you thought the website wasn't up and running cos you did pay. ... Okay it was like, it was like, well as well as that the penalties weren't going you know on certain date, I did pay on a certain date [inaudible] maybe there was already \$60 worth of

[inaudible] on there or something, um I've lost my train of thought. We did want the relationship to end, then we thought that we had to come to some kind of [inaudible] to actually get it ended maybe.

**MR D ANDERSON**

Cos you paid me [inaudible]

**MR HEARD**

Well we had no guarantee at that stage.

**MRS HEARD**

We'd asked for the website to be taken off line, it was the only

**MR D ANDERSON**

It was taken off line and then you asked for it to be back online and then you don't want it and then you do want it so.

**MRS HEARD**

We asked for it to be taken offline, after we'd paid we thought you might be reasonable, you weren't.

**MR D ANDERSON**

I don't believe that's the case at all, I believe that there's been probably problems on both sides.

**MRS HEARD**

Which we acknowledge. We said that in our letter to you.

**MS TUNNICLIFFE**

Alright anything finally you want to say Mr Anderson, might be your car's got to be moved again and then I'll, I'm not so sure do you want to make an offer to Mr Anderson to try and settle this claim or not. You started off saying well you'll leave it to me realising there's a risk and that's fine.

**MRS HEARD**

That is fine, that's one way that Mr Anderson has a huge respect for the law so I think that's best in an [inaudible]

**MS TUNNICLIFFE**

Alright so I'll just take that letter and [inaudible]

**MR D ANDERSON**

Could I just, I've got some correspondence here from Dr Moritz to Mark and to other shareholders in Ora, I just wanted you, if I could leave these with you if you're interested in just having a look.

**MS TUNNICLIFFE**

Well you can't just leave things with me, either they're part of the evidence that everybody sees and we discuss.

**MR D ANDERSON**

Well I just, if you saw what Andreas Moritz was offering to do to help Ora it would give you some idea of how helpful he could have been in the field of marketing. He's got a doctorate in Business Management and has had quite some experience and he is offering to be helpful to the Ora group and it's really been turned down flat I guess because for some reason Mark and Phyllis don't like the man or something like that.

**MRS HEARD**

We adore Andreas but he is not easy to work with. He doesn't listen and he is not a reflective listener. He's South African and it's a different culture, it's not easy to work with Andreas and I think every member of the Ora Co-op would agree.

**MR HEARD**

He's a beautiful man, he's got a heart of gold.

**MRS HEARD**

He is.



**MR D ANDERSON**

He has done his best to try and help us.

**MS TUNNICLIFFE**

So did you want to submit some documents in relation to, it would give me the picture [inaudible] pass them round. Is there another bundle.

**MR D ANDERSON**

No that's really the, I just took it out of my file of communication.

**MS TUNNICLIFFE**

Yeah but everybody has to see them and read them and have the chance to respond so [inaudible]

**MR D ANDERSON**

Well I can copy them but, and Mark and Phyllis already have them, they're part of the Ora communications.

**MR HEARD**

We actually looked at them the other day I mean [inaudible] but it wasn't that it was the [inaudible] that was actually done that [inaudible] somebody else go in there and [inaudible]

**MRS HEARD**

[inaudible]

**MR D ANDERSON**

If I go back to my counterclaim, it's 6 [inaudible] Ora stated 'we think we should [inaudible] any idea [inaudible] such as this [inaudible] looking into consideration of what's involved, costs and [inaudible] and have time required to make it all happen. Barry and Alana could do an investigation [inaudible] consideration, that would be very much appreciated'. So what did Mr [inaudible] came down and saw me and then I'm getting told that you were prepared to do it by yourself.

**MR D ANDERSON**

Absolute rubbish, okay, okay on 64, you've said to me I'm to present your idea at the shareholders meeting next week [inaudible] However, Awatere River.

**MS TUNNICLIFFE**

Can you just lower your voice okay, lower your voice. It's not acceptable to verbally attack the other party here in a Tribunal, stop okay, that's the second time. I know you're short of sleep, take a deep breath.

**MR D ANDERSON**

Okay [inaudible] 'Would it be possible for you to present your idea at the Ora shareholders meeting next week. I've struck some [inaudible] opposition [inaudible] sometimes you have to work around people'. It appears the problem was not with Spats but with Ora, Mr Heard was talking about [inaudible] marketing through Awatere River, through the Awatere River that's what you've said.

**MR HEARD**

I said Awatere River might finance

**MR D ANDERSON**

That's right.

**MR HEARD**

Take the project.

**MR D ANDERSON**

That's right, you're talking about the proposal I was putting forward, this is all to do with what I was doing. You tell me one thing and then saying something completely different [inaudible]

**MR HEARD**

[inaudible]

**MR D ANDERSON**

So now Ora didn't have any money.

**MR HEARD**

It had the money [inaudible] pretty much spent its promotional budget for the year and we had plans for something, well so

**MRS HEARD**

We were adding to the business [inaudible]

**MR HEARD**

I said we might and I hadn't talked to Phyllis at this stage and I was doing that because I knew you were trying to help and I thought well we'll try and give you that you know.

**MR D ANDERSON**

Thank you for saying that, I actually do appreciate that.

**MS TUNNICLIFFE**

Okay well this is more than just a withdrawal letter, this has got a whole lot of other information in it so did you want to go through that cos the other party's entitled to comment on it so did you want to read it out.

**MRS HEARD**

Yes I will. 'Dear Ms Tunnicliffe, we would like to withdraw our claim against Spats Limited. We have paid \$3,500 for a website we cannot access and that was never completed. We do not want Spats website, we do not wish to work with Spats. We have withdrawn our claim as we hope for a final and clear resolution. We do so in the hope we can and are able to hire the services of a new website designer unencumbered by Spats draconian terms and conditions or ongoing mental stress from Mr Anderson. We are concerned in his response to our claim that Mr Anderson states we deliberately left out emails, this is not correct, we did not have those he presented yesterday in our system. We are all much wiser from our Spats experience. We ended our relationship with Mr Don Anderson as of 11/7/2011. Mr

Anderson tied us into another year by stating he had rolled us over once again on the 26<sup>th</sup> of June or the 26<sup>th</sup> of August 2011. No matter what we do or how clearly we try to end any contract Mr Anderson continues to revert to his terms and conditions. It is clear we should have insisted on a written contract and a written proposal with Spats Limited and viewed inside the terms and conditions in hard copy before work began. Although Mr Anderson now states we have to request them in writing and pay for them this was not made clear in this questionnaire. We emphasise we were busy, pressured and uncomfortable with our working relationship with Mr Anderson virtually from the beginning. Mr Anderson has never defined what additional work is or additional costs. We needed to come to the Disputes Tribunal so Mr Anderson could define what additional work is and to form an understanding in a legal forum that the relationship and contract between Ora and Spats Limited has ended. Our claim was neither frivolous nor vexatious, we all have concerns that Mr Anderson will through his father's shareholding in Ora continue to disrupt Ora and this is unfair to the other shareholders who have continued to support Ora, with the exception of Mrs Dodson who resigned when these matters were in dispute as she is a friend of the Anderson family. We fully comprehend and understand her reasons for doing so and trust the Andersons follow suit.

Ora directors are very committed to keeping an olive oil industry going in Marlborough. We have through another cooperative expanded capacity in the olive mill. Mrs Johnson is quite correct, the more bitter the oil, the better it is for you. That bitterness is a desirable trait, not only from a sensory point of view but especially for those with neurodegenerative disease. This is genuinely Mrs Heard's area of expertise regarding nutrition and exercise programmes specially designed to meet the needs of those with autism, trauma, obesity, foetal alcohol and epilepsy. These conditions all have the same brain profile as Alzheimer's however the result is seen much earlier. Mrs Johnson's opinion of our oil is her own and disputes the findings of the leading [inaudible] laboratory licensed to test and provide a sensory profile for the oil. With Mrs Johnson's resignation, hopefully followed by the Andersons we are able to move on without any resistance to our product within the Ora Cooperative and the wider olive community in Marlborough which will be a considerable relief. The 2010 oil that was featured on the Spats Limited website was all sold. We had three complaints including Mrs Johnson's from the 8,000 litres of oil sold and this is

normal for consumers becoming familiar with fresh, bitter, robust oil. Sales are increasing substantially particularly as public awareness is growing regarding the role of fats and lipids in and neurological disorders. We are desperate to get a new website underway to link our customers into current neurosurgical and neurological research, engaging Spats has hindered our progress. Ora is the only company in New Zealand testing for [inaudible] plus all other polyphenols and antioxidants to quantify and substantiate health claims, especially in regard to neurological health. Testing also assists us to make informed choices on which varieties produce the most anti-inflammatory components. It is now mandatory within the EU to permit health claims based only on olive oil polyphenols and New Zealand will be sure to follow suit. Robust medical and horticultural research show Marlborough and parts of Hawke's Bay being dry and sunny are possibly the only places that are producing a robust and bitter style of oil containing very high levels of [inaudible] and that has anti-oxidants activity in commercial quantities. Olive trees require the application of pesticides and fungicides if their root system gets too wet, this creates a paradox in the oil. Unlike the rest of the world there is no [inaudible] or Queensland fruit fly in New Zealand, more and more of our customers are aware of this especially those suffering from Alzheimer's and other neurological disorders where [inaudible] plaques form and [inaudible] proteins become entangled in the brain and may be caused by an excess of pesticide use. [inaudible] appears to remove the plaque and unfold tower proteins. This consistent finding by real scientists recognises this as very important when working with teenagers with neurological problems such as autism. A fatal oil crosses the blood brain barrier and reduces [inaudible] stress (see supplementary research). We need a website to convey this message to our customers and our competitors outside of Marlborough to keep the industry going. [inaudible] the website, or the research there's a

#### **MS TUNNICLIFFE / MR D ANDERSON**

Well I don't think that's relevant to me, it's a good plug for your olive oil but it's not relevant to the claim before the Tribunal is it. Okay so I just want to check back with you Mr Anderson, once the Tribunal has made a decision on your claim if it's in your favour for any particular amount, once that's out, been paid for and the Tribunal process is over are they free then to go to another website designer, soon as the ...  
Yes.

Yeah okay. ... And this is not because [inaudible] dealing with dispute debates but I will hand the domains back. If I believe the amount is the right amount I will hand over the domains [inaudible]

Well the amount is what the Tribunal says it is so that's the right amount. ... But as you are aware you can appeal a decision of

Well you can, you can appeal the decision. So the Tribunal process may not be over with this decision that I make because one or other of you may appeal it, but I want to let you know that you cannot appeal just because you disagree with the decision alright. The appeal ground is if the hearing has been conducted in a manner that's unfair and prejudiced your case – very narrow appeal grounds, so I'm aware of ... I'm not suggesting that's what I'm doing cos

No but I'm just letting you know and I want everybody to know because you're saying the door's still open, I can still appeal. Well you can appeal, you can appeal and the appeal goes to the Judge in the District Court but I want you to know that there aren't that many appeals even lodged, like a very small percentage of the claims heard appeals are lodged and an even smaller percentage get granted. So you can appeal but I'm letting you know unless there's been a big flaw in the process that has been, well a flaw in the process that has prejudiced your case you will not be successful. So I don't want you to leave here thinking if I don't like it I'll take it on appeal and [inaudible] I want you to know that appeals are very, very, it's unlikely that an appeal succeeds. ... Right I had actually read the Act so [inaudible] yeah.

Yeah a very, very limited number of appeals are granted throughout the country per, very limited. ... [inaudible] unlikely.

So you know while you can appeal that will extend the Tribunal process till that's all finished, and it's possible that there has been you know a flaw in the process, but I try to concentrate on the process very hard so try and make sure this is the end of it.

**MR HEARD**



I will do everything I can do to make sure he doesn't appeal [inaudible]

**MS TUNNICLIFFE**

Right but I mean the thing is I think that you wanted to go on with another website, everybody wants to get on with their lives and I just, in my reading of the terms and conditions in the half hour before we came today, the half hour gap I had, I looked through it and I thought yeah by the time this is settled I thought what your terms and conditions were saying is once the Tribunal has made a decision or you've agreed here today and that's been paid then they're free is what I thought the conditions were saying do you agree.

**MR D ANDERSON**

To facilitate that what would probably have been easiest is if I just get emailed who their new developer is, I don't have to even discuss what's happened here at all, I would simply forward the codes he needs to transfer or get control of those domains to him and he then does that.

**MS TUNNICLIFFE**

Okay alright, well is there anything final you would like to say because in fact this now kind of was a final closing from the other party, you might Mr Anderson want to respond – a lot of it's a good plug for Ora and local oil and the health benefit.

**MRS HEARD**

[inaudible]

**MR D ANDERSON**

[inaudible]

**MS TUNNICLIFFE**

Absolutely you can see and a good write-up, so I don't think a lot of it's relevant but it did raise the issue of we want to get on and promote. So that's why I've just put to you you know can they get on and promote once all this has been you know resolved and if there's any payment to be made that it's been made, and he said yes

except for the appeal process which is fair enough, there is an appeal process. Okay anything final you would like to say.

**MR D ANDERSON**

No that's, we'll [inaudible] on the [inaudible]

**MS TUNNICLIFFE**

Okay alright, thank you for coming, I hadn't realised you know when you'd agreed to come that you'd only had four hours sleep so that was a big ask to come here.

**MR HEARD**

We've only had four hours sleep too.

**MS TUNNICLIFFE**

Okay why is everyone only sleeping four hours.

**MRS HEARD**

It's a hard day today.

**MR HEARD**

I think all of us have been pretty stressed out after this whole incident cos we've been friends for a long time and it's just terrible being in a situation where you find we're on opposite sides and it's not good.

**MS TUNNICLIFFE**

Yes and I think that some you know, the unravelling has begun from the beginning in my view, the unravelling has begun from the beginning from that meeting onwards.

**MR HEARD**

We should have done something about it earlier.

**MS TUNNICLIFFE**

Where there wasn't sufficient meeting of the minds about what everyone was to do and I have to say that I have had other claims, naturally I never had a rash of them.

but I have had, cos I've been doing this 20 years at least, I have had other claims by you know web designers against people who want a web page and there is a disconnect between just understanding of how things work and what the back end and the front end means and what content means. So this is not an unusual scenario that there's a disconnect in understanding, from my point of view it's not an unusual scenario, I've heard it before and it's yeah. So it's difficult I think for someone like yourself Mr Anderson who's just so familiar with how things work and so familiar with the terms to actually figure out what other people don't know. I think there's an expectation that they might have a level you know, will I get somebody, appoint somebody who can actually upload the stuff and they appoint someone they think might be able to do it but they don't know that person can't do it because they just don't know what they don't know and nor do you. And yeah so I think that is one aspect that's quite difficult when you've got someone who's, it happens to lawyers too, I'm not a lawyer but you know. When you're working in the law, using legal jargon, using language that you're familiar with and you think everybody knows and somebody doesn't and so whenever you've got an expert in a field talking to people who are not expert in that field there is that potential for a complete misunderstanding to occur right from the beginning. Yeah so I think that you know this sort of website thing where it is concept to it's you know, you're talking concepts and if you haven't got a person on the other end of the conversation who hasn't got a mind like. I haven't concepts, I can't imagine anything, I have to have it drawn for me so I can actually see what the house is going to look like, I can't imagine things. So for instance my husband and I have these complete like differences of discussions because I've got no idea what he's got in mind when he's talking about altering the house, doing this, doing that and I cannot see it. And so if you're talking in concepts and you've actually got someone, other people who don't understand the concept it's a really difficult area that you're in in terms of communicating accurately. I think websites, in my view websites are actually one of the more difficult areas to communicate to and clearly get tasks you know so people understand what respective tasks are, I think it's a particularly fraught area actually so.

## **MRS HEARD**

My wife has learned how to do it and she manages to do it really well but she has struggled with other simple things sometimes and we wonder just how she manages

to do her website. She has mastered it now and she works it really well but I don't know how to do it, I don't do it myself.

**MS TUNNICLIFFE**

Different people have got different brains, and something's only simple till you know how isn't it, it's only simple when you know how, a simple task is not at all simple. On one of those Mastermind programmes you know, the answer's only simple if you know it and I think how true, how true is that, so you know things are only simple when you know how to do it.

**MRS HEARD**

Well working with autism you get to know all sorts of quirks the brain can take.

**MS TUNNICLIFFE**

Yeah I bet.

**MR D ANDERSON**

We've got grandchildren that know more about computers than we do and that's a four year old can send messages from Melbourne to us no problem at all and send photographs.

**MS TUNNICLIFFE**

Why I'm able to draw that little diagram and know about front pages and content is because of another, oh not just one other of other Tribunal claims. I didn't have a clue the first claim I had about this back end, front end, content, I thought what are they talking about. So we had to go quite slowly and use diagrams so everybody understood cos I have to be able to understand that as well, so I think you are in a field that is quite difficult to communicate about. Okay having said that it's ten past five again, we're going to let you out and I'll give you a written decision and then we'll leave it to you to see what you'll do with it.

**MR HEARD**

And thank you very much for all your help.

**MS TUNNICLIFFE**

Look the decision, look I'm not sure quite when I can get on with the decision [inaudible] tonight and the next few days it can be packed up so you may actually not get the decision, I may not [inaudible] cos I've got to find time [inaudible] to do it [inaudible] and I'll give all the reasons for it in the decision.