

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2008-404-6444**

BETWEEN                      TRADES R US LIMITED (IN  
LIQUIDATION)  
Applicant

AND                              LOIZOS MICHAELS  
CAROLINE WOOD  
Respondents

Hearing:            16 June 2009

Appearances: Shane Kilian for Liquidators  
James Burt and Jane Innes-Jones for Respondents

Judgment:        16 June 2009

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**JUDGMENT OF HARRISON J**

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**SOLICITORS**

Duncan Cotterill (Auckland) for Liquidators  
Chapman Tripp (Auckland) for Respondents  
Jackson Russell (Auckland) for Creditor

[1] An application made urgently by the liquidators of Trade R Us Ltd (Trade) to examine three individuals was set down by the Court for hearing at 10 am today.

[2] The background is briefly this. The liquidators were appointed pursuant to an order made in this Court on 15 December 2008. Subsequently, they issued notices to at least three individuals to take a number of steps: see s 261 Companies Act 1993.

[3] Mr Michael Fisher, one of the liquidators, swore an affidavit on 27 April. He annexed a notice sent to Mr Loizos Michaels on 20 January 2009 requiring him to attend an examination under oath on 3 February 2009 and bring with him all records and documents in his possession relating to the company. Mr Fisher's evidence that Mr Michaels did not appear is not disputed. Nor is his evidence that on 10 March he sent Mr Michaels a further letter requesting him to arrange a meeting but without reply.

[4] The liquidators applied on 1 May for orders directing the examination of Mr Michaels (and two others) and production of any books, records or documents relating to the business, accounts and affairs of Trade. The adequacy of the specific grounds is questionable but they include Mr Fisher's notice dated 20 January.

[5] The liquidators' application was called on 8 May 2009. The liquidators' counsel advised that they had been able to serve copies on one of the three respondents. He is Mr Jeremy Phillips, who has not taken any further part. Nevertheless, Associate Judge Sargisson made an order directing Mr Phillips to appear for examination at 2.15 pm on 29 June 2009.

[6] The application was called again on 21 May. By that stage the liquidators had been able to serve the other two respondents – Mr Michaels and Ms Caroline Wood. Mr Burt appeared on their instructions. Associate Judge Christiansen made an order in terms of the liquidators' application against Mr Michaels and Ms Woods. He directed that an earlier fixture be allocated by the registry than the original date for 29 June. The Associate Judge's minute concluded with this statement:

[6] To accommodate Mr Burt's situation, he having only very recently been instructed, I am reserving leave to Ms Woods and Mr Michaels to

apply before 4:00 pm on 27 May 2009 if they wish to set the order for urgent examination aside.

[7] Mr Burt did not make an application to set aside before 27 May. Instead this morning he has advanced an oral argument to the effect that the order made on 21 May was without jurisdiction. He says there is no evidence that Mr Michaels falls within any of the specified categories – the liquidator is empowered by notice to comply with certain steps: see s 261(2). At best, Mr Burt says, Mr Michaels could only fall within the category of “other person having knowledge of the affairs of the company” (s 261(2)(e)). Mr Burt submits there is no evidence to support a liquidator’s contention to that effect. He submits that s 261 must be strictly construed, given the wide and directive powers it confers upon a liquidator: see *Re Communication and Energy Workers Union Incorporated* (1996) 7 NZCLC 261,264 and *Deuchrass and Nellies v BP Oil New Zealand Limited* HC CHCH M327/01 3 July 2002.

[8] However, I accept Mr Kilian’s submission to the contrary. An order was made on 21 May requiring Mr Michaels’ appearance today for examination. Associate Judge Christiansen expressly reserved leave to Mr Michaels to apply to set aside the order within the following week. The appropriate procedure was to file a written application together with an affidavit in support. By that means the Court and the liquidators would be fully apprised of the grounds upon which a challenge is made.

[9] Mr Michaels has failed to comply with the terms of the order made on 21 May. There is no application or evidential basis for a decision to set aside an earlier order of this Court. The proper course would be for Mr Michaels to have gone on oath to set out the factual foundation for Mr Burt’s argument that he was not somebody “having knowledge of the affairs of the company”. His failure to take that step is fatal. His oral application for an order setting aside the earlier order is dismissed.

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Rhys Harrison J