

production. To determine otherwise, would place third parties in the untenable position of not knowing the terms on which they could transport their products to port.<sup>27</sup>

### **Order**

The court ordered that, pursuant to the Mount Newman Agreement and the RTA, the Mount Newman Participants were obliged to negotiate, and enter a contract, with Hope Downs to carry the iron ore produced by Hope Downs.

## **NEW ZEALAND**

### **FIRST RIGHT OF REFUSAL\***

*McLachlan & Ors v Mercury Geotherm Ltd & Ors* (Court of Appeal, New Zealand, unreported, 28 August 2003 CA 142/02)

*Joint venture – First right of refusal – Requirements – Wish to sell and also the terms upon which to sell – Issuing an Information Memorandum not enough*

### **Background**

A joint venture had been established between the various parties in order to facilitate development and construction of a power station.

### **Facts**

As part of the joint venture agreement it included a first right of refusal. A material part of the agreement is as follows:

“In consideration of the mutual promises contained in this Lease and in the Joint Venture Agreement, the Lessors grant the Lessee or its nominee a right of refusal in respect of the Land or any part thereof, should the Lessors wish to sell or dispose of those parcels of land (together, the “Relevant Land”) as are comprised in the Land, or in the property the subject of the Landcorp Property Agreement (as that term is defined in the Joint Venture Agreement) or in any other parcels of land which the Lessors may acquire after the date of this Lease.”

The power station project ran into financial trouble, a receiver for the joint venture was appointed and the receivers circulated a “confidential information memorandum” to selected potential purchasers including the McLachlans.

The McLachlans allege that the first right of refusal had been triggered and their rights not honoured.

### **Judgment**

The Court of Appeal, upholding the High Court decision, found that the first right of refusal had not been triggered by the issue of the Information Memorandum.

The Court of Appeal held that in order to trigger the right, the vendor must “overtly manifest” a wish to sell, and also the terms upon which to sell. The Court of Appeal found that the absence of terms in which the receivers could be said to have indicated a wish to sell the leased land was fatal to that argument on appeal.

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<sup>27</sup> Ibid [81].

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