



KIWIFRUIT EXPORT REGULATIONS 1999

IN THE MATTER OF an Appeal By **Southern Fresh Fruits Exports Limited** ("SFFE") relating to the Decision of **Kiwifruit New Zealand's Asia Collaborative Marketing Committee** ("KNZ") dated the 1st February 2007, in respect to the SFFE application to export kiwifruit to jointly or partially owned wholesale markets in Hong Kong and China in collaboration with Zespri Group Ltd ("Zespri").

APPEAL COMMITTEE: Sir Brian Elwood (Chairman)
Ruth Lee
Mark Bayly

DECISION: 10 April 2007

Status of Appeal

1. The Board of Kiwifruit New Zealand ("the Board") constituted pursuant to the provisions of the Kiwifruit Export Regulations 1999 ("the Regulations") established committees to consider collaborative marketing applications for the 2007 kiwifruit season. A committee was so established (KNZ) comprising Hendrik Pieters (Chair) and Ian Greaves to consider the application of SFFE to export New Zealand grown kiwifruit to Hong Kong/China through distributor Hoi Sang Loong Fat Kee to jointly or partially owned wholesale markets (the Hong Kong/China Programme).
2. KNZ declined the application of SFFE for the Hong Kong/China Programme and advised its reasons by a written decision dated 1 February 2007.
3. By letter dated 9 March 2007 SFFE advised the reasons for its appeal of the decision and other decisions of collaborative marketing committees of the Board relating to separate collaborative marketing applications. The Appeal

Committee established for the purpose of considering the SFFE Appeal is that set out on page 1 of this determination.

4. The Appeal Committee met on 13 March 2007. SFFE and Zespri were invited to meet with the Appeal Committee. SFFE was represented by John Thompson. Zespri was represented by Warren Young.
5. The letter dated 9 March 2007 referred to in paragraph 3 detailed submissions which were in part relevant to all the SFFE collaborative marketing applications to the Board and in part relevant to country specific applications.
6. The Appeal Committee is aware of the responses given by another appeal committee of the Board comprising Sir Brian Elwood, Hendrik Pieters and Ian Greaves in respect to the Oman Programme of SFFE. In so far as the views of that appeal committee in its decision on the Oman Programme addressed common submissions by SFFE in respect to its four appeals, are also relevant to the Hong Kong/China Programme, they are adopted and incorporated into this decision. In particular paragraphs 1 to 11.8.6 are so incorporated with the exception of paragraphs 6, 7 and 11.2.
7. SFFE submitted that KNZ took into account irrelevant considerations by considering a lack of Zespri support for the SFFE application as relevant.

Appeal Committee Response

- See the general comments in paragraph 11.1 of the Oman Programme Appeal Decision.
- KNZ's decision was not made for the reason that Zespri did not support the SFFE application. The application was declined because of:
 1. A lack of collaboration by both SFFE and Zespri in the development of the application.
 2. The proposed collaborative marketing arrangement was for the sale of significant volumes of NZ grown kiwifruit into the wholesale markets in Hong Kong and China, by substitution of lower priced

Chilean kiwifruit in particular. Of itself, an alternative channel for increased sales volumes is not necessarily a benefit to the supplier of NZ grown kiwifruit. There was no evidence provided to KNZ as to how the sales from this proposed arrangement would be “ring fenced” so as not to operate to undermine Zespri market development and sales. The likely outcome was that the wholesale markets would seek to purchase New Zealand grown kiwifruit at the best possible price and this could see Zespri and SFFE competing with each other. The probable result can only be market instability and reduced return to the New Zealand supplier.

3. There was no evidence provided to KNZ as to how the proposed collaborative marketing programme would operate to the benefit of NZ suppliers. The absence of such evidence suggests there are no benefits. Instead the risk is that this basically wholesale programme will tend to undermine Zespri returns and potentially adversely affect the longer term development of this important and growing market for NZ grown kiwifruit.

The Hong Kong/China Decision

8. The SFFE submission in support of the appeal contained five elements.

- 8.1 Zespri were determined not to cooperate with SFFE in this application. The lack of collaboration was particularly manifest in this instance.

Appeal Committee Response

- The Appeal Committee did not have brought to its attention any specific examples of a refusal to cooperate with SFFE in a consideration of the application. Section 2 of the collaborative marketing application for the proposed programme completed by SFFE indicated that the proposed programme had not been developed in collaboration with Zespri. The application form asked the applicant to detail the consultation undertaken and the outcomes from that consultation. An alleged failure by Zespri to call SFFE in response to telephone messages left with Zespri is not

evidence of a determination by Zespri not to cooperate. The Appeal Committee would have expected evidence from SFFE of a refusal by Zespri to meet with SFFE to discuss its proposed programme given the size and importance of the application to both SFFE and the development of the Hong Kong/China market. It could have been reasonably expected that SFFE would have left no stone unturned in order to meet face to face with Zespri and in particular its Collaborative Marketing Manager to explore the possibilities of what SFFE proposed as a suitable collaborative marketing arrangement designed to increase the sales of New Zealand grown kiwifruit into the significant Hong Kong/China market.

- 8.2 This application was for supply to the wholesale market that supply (amongst others) the “Lemon Boys” a distributor that serves the hotel segment of the hospitality industry. The industry is not price sensitive and a premium kiwifruit earns a premium through this distribution channel.

Appeal Committee Response

- What lay behind the application in terms of the specific market to be serviced and how the proposed distributor would service that market was not made clear to KNZ. In spite of some questioning of Mr Thompson for SFFE the Appeal Committee itself was unclear as to how the specific market was to be serviced without spill over into other aspects of the current arrangements for the sale of New Zealand grown kiwifruit into Hong Kong/China.
- The Appeal Committee noted Mr Thompson’s emotional attachment to the development of the Hong Kong/China fruit market and the opportunities that he saw to develop that market with a supply of New Zealand grown kiwifruit. That attachment was not by itself an adequate basis to found a collaborative marketing application. However enthusiasm coupled with specific proposals to develop a niche market not currently available to or accessible by Zespri would have provided a rational basis

to initiate discussions to explore how the opportunities available to SFFE could have developed into a collaborative marketing arrangement of benefit to the overall wealth of New Zealand kiwifruit suppliers.

- 8.3 KNZ mistakenly focussed on supermarket supply and failed to consider the benefits resulting through supply to other wholesale market participants (where returns are attractive and Zespri has no interest).

Appeal Committee Response

- If KNZ was so mistaken the appeal to the Appeal Committee gave SFFE the opportunity to clarify those benefits. It could have provided material, other than the personal observations of Mr Thompson, to clarify what was intended, how it was to operate and how the wider interests of New Zealand kiwifruit suppliers in the development of an important and growing market could have been protected from possible risks. Those risks include the spill over of fruit into segments of the market already supplied by Zespri.

- 8.4 SFFE had worked hard to align the dominant industry player. Something not achieved by Zespri.

Appeal Committee Response

- SFFE had the opportunity to work hard with Zespri and persuade it that here was an opportunity not to be missed, which could be taken advantage of through a collaborative marketing arrangement.

- 8.5 This application is a stark example of SFFE being able to supply a complete fruit service to a major customer, a service that Zespri cannot compete with.

Appeal Committee Response

- If this be so then this is a matter that should be explored with Zespri at the initiation of SFPE with a view to developing a collaborative marketing arrangement which complies with the appropriate regulatory provisions.

Outcome of the Appeal

The Appeal Committee is not persuaded that SFPE has established reasons to justify the Appeal Committee referring the Hong Kong/China Programme back to KNZ for further consideration. The Appeal Committee is satisfied that the Hong Kong/China market is in fact two quite distinct markets within a single country, one highly developed and the other full of potential. Unless the development of both markets is undertaken in a careful and considered manner with a focus on short and long term benefits to growing the volume of kiwifruit sold into the markets, the achievements by Zespri to date in developing and expanding the markets could be put at risk with potentially serious detriment to the overall wealth of New Zealand kiwifruit suppliers.

It was not for KNZ or for the Appeal Committee as part of the appeal process to try and develop a collaborative marketing programme from the enthusiasm of Mr Thompson. The Appeal Committee is satisfied that Mr Thompson has identified a possibility which may have merit but which requires careful consideration in discussions with Zespri to assess its impact upon the existing sales of New Zealand grown kiwifruit into the important Hong Kong and China markets. The application as presented and as verbally explained by Mr Thompson to the Appeal Committee is not yet sufficiently detailed or documented to form a proper basis for a collaborative marketing approval.

The Appeal is not upheld.

For and on behalf of the Appeal Committee

Sir Brian Elwood
Chairman