



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 8th February 2007, in respect to the SFFE application to export kiwifruit to Landmark and Shopwise in the Philippines 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) consisting of Hendrik Pieters (Chair) and Ian Greaves to consider the application of SFFE to export New Zealand grown kiwifruit through its distributor Elite Marketing Ltd ("Elite") to retail customers Landmark and Shopwise (the Philippines Programme).
2. KNZ declined the application of SFFE for the Philippines Programme and advised its reasons by a written decision dated 8 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 Philippines 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. Consultation with Zespri in the development of the application prior to its submission to the Board, would have established that an existing collaborative marketer was currently supplying the Philippines market including Landmark, both directly and indirectly, and Rustans which has the same owners as Shopwise.

2. There were apparent inconsistencies in the information provided to KNZ which were of concern to its understanding of the application and of the relationship between various parties involved.
3. Beauchamp the sole source of supply of New Zealand kiwifruit in the Philippines currently supplies SFFE's proposed distributor Elite. The proposed programme was therefore seen as a direct substitution of an existing collaborative marketing programme through which a stable and dependable source of supply was already available.
4. The proposed collaborative marketing programme was for the sale of significant additional volumes of kiwifruit into Landmark, Shopwise and the wholesale market, of an amount greater than the total New Zealand kiwifruit sales into the total Philippines market.
5. At the retail level, an alternative source of supply of New Zealand grown kiwifruit to Landmark and Shopwise was likely to result in Beauchamp seeking to retain its current level of business by seeking to supply direct to Landmark and Shopwise. The wholesale market would also seek to compete for the available business, including that of retailers, other than Landmark and Shopwise. The end result would see the existing collaborative marketer and SFFE competing with each other. The result can only be reduced return to the New Zealand grower.
6. There was no apparent reason why the proposed programme would result in increased sales. It is not a matter of not being able to source supply of New Zealand grown kiwifruit. The existing collaborative marketer is able to supply any unsatisfied demand through its distributor. Beauchamp is prepared to supply Elite. The proposed programme seeks approval for the alternative direct importing of New Zealand grown kiwifruit by Elite which of itself does not enhance the wealth of the New Zealand supplier. The characteristics of the kiwifruit supplied would be otherwise the same and business could only be won on the basis of price, a process that would be repeated apparently on a monthly basis. In KNZ's view the result can only be reduced return to the New

Zealand grower and no information was provided as to how to avoid that outcome.

7. Had the application been developed collaboratively, it is unlikely that it would have been submitted in its current form.
8. SFFE did not make a case to KNZ's satisfaction for its proposed programme to run alongside the existing collaborative marketer's existing collaborative marketing programme or to substitute for it. SFFE's proposed programme did not provide any enhancements or greater wealth creating opportunities, than those the existing collaborative marketer can provide. KNZ was not satisfied that the SFFE proposal will operate to increase the overall wealth of New Zealand kiwifruit suppliers.

The Philippines Decision

8. The SFFE submission in support of the appeal contained three elements.
 - 8.1 SFFE was unaware that another collaborative marketer already operated in the Philippines and for this reason had not had the opportunity to collaborate with it.

Appeal Committee Response

- SFFE have an incomplete knowledge of the Philippines market and the supply of New Zealand grown kiwifruit to that market even though its proposed distributor Elite was set to "supply all produce into Landmark and Shopwise." The existing collaborative marketer for New Zealand grown kiwifruit supplies Landmark, both directly and indirectly, as well as Rustans, which has the same owners as Shopwise.
- Because of the uncertainty inherent in SFFE's application, KNZ engaged New Zealand Trade and Enterprise to obtain information on the three companies involved in SFFE's application, Elite, Shopwise and Landmark. The information obtained did not help clarify the end market circumstances sufficiently to enable KNZ to come to a clear view about

the impact on the overall wealth of New Zealand kiwifruit suppliers, should the application be approved.

- 8.2 Like case should be treated like. The application by SFPE is directly comparable to that of the existing collaborative marketer and should be treated on the same basis. SFPE is being unreasonably denied similar opportunities to enter the market.

Appeal Committee Response

- Each application is considered on its own merits but that necessarily involves a consideration of the existing end market arrangements for the supply of New Zealand grown kiwifruit. Because a later application for a collaborative marketing approval is similar to an already approved collaborative marketing arrangement does not of itself entitle subsequent similar applications to be automatically approved. In the end market circumstances existing at the time a new application is received by the Board must be fully considered including the impact or potential impact upon existing arrangements.
- 8.3 The customer demands a complete range of fruit, which SFPE can deliver. This provides the opportunity to expand a market and sell a greater volume of kiwifruit.

Appeal Committee Response

- The Appeal Committee understands that this submission refers to some customers in the food supply industry, both retail and wholesale, preferring to have a supplier with a complete range of fruit. SFPE wishes to be in a position where it can supply a wider range of fruit than currently being supplied by it, by having access to New Zealand grown kiwifruit to add to its basket of fruit. This is not a sufficient objective of itself as a reason for approval of the proposed collaborative marketing programme. To add New Zealand grown kiwifruit to its basket of fruit requires that

SFFE have a collaborative marketing approval from the Board under Regulation 28 of the Regulations.

- In order to obtain such an approval from the Board an applicant must satisfy the regulatory requirements for export in collaboration with Zespri and with the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers.

Outcome of the Appeal

Although the Appeal Committee does not consider it is necessary for an applicant for a collaborative marketing approval to collaborate with an existing collaborative marketer in the same market, it is necessary for the Board and its collaborative marketing committees to consider the arrangements currently in place in a particular market for the sale of New Zealand grown kiwifruit. Without doing so it would not be possible to come to a proper decision about the impact on the overall wealth of New Zealand kiwifruit suppliers. Had SFFE undertaken discussions with Zespri before submitting its application it would have become aware of the detail of the other collaborative marketing arrangements and could have identified the possibilities of growing the volume of New Zealand grown kiwifruit into that market, in a collaborative manner. This may well have led to the identification of a collaborative marketing opportunity involving a clarification and rationalisation of the marketing of New Zealand grown kiwifruit in the Philippines.

The Appeal Committee notes with some disappointment that what on the face of it appears to be an opportunity to reconsider the Philippines market for New Zealand grown kiwifruit has been lost through SFFE's failure to enter into discussions with Zespri in a considered manner, based on collaboration, and with a focus on increasing the overall wealth of New Zealand kiwifruit suppliers.

The Appeal is not upheld.

For and on behalf of the Appeal Committee

Sir Brian Elwood
Chairman