

**KIWIFRUIT EXPORT REGULATIONS 1999 (the “Regulations”)**

**Decision** of the Collaborative Marketing Appeal Committee of Kiwifruit New Zealand (“Appeal Committee”) relating to the approval for Southern Fresh Fruit Exports Limited (“SFFE”) to export kiwifruit to China in collaboration with Zespri Group Limited (“ZGL” or “Zespri”).

**HEARING DATE:** 23 May 2013 (adjourned sine die)

**PRESENT: Appeal Committee**

Sir Brian Elwood

Ruth Lee

Ian Greaves

**Zespri International Limited**

Katherine Evans (Counsel)

Warren Young (Zespri Collaborative Marketing Manager)

**Southern Fresh Fruits Limited**

John Thompson

**KSL Services Limited**

Ross Stevenson

In attendance: Richard Procter (Kiwifruit New Zealand CEO)

**1 The Appeal**

- 1.1 On 2 May 2013, the Kiwifruit New Zealand (“KNZ”) America, Pacific and Rest of Asia Collaborative Marketing Committee issued an approval to SFFE for the export of 100,000 trays of Green Class 1 kiwifruit to China for sale through a single TV shopping channel, associated follow up on line sales, and Shanghai

Supafresh Trading owned Youhuiyuan Shops inside Shanghai First Food Malls and Shanghai Supafresh Trading owned Hibar Juice Bars (the approval). The approval was subject to certain specific and general conditions of approval.

- 1.2 On 15 May 2013 KSL Services Limited (KSL) and SFFE filed a letter of appeal with KNZ notifying “...that it is seeking to appeal the authorisation (issued on 2 May 2013) for the China Collaborative Marketing authorisation ZIL00900000133D ...” on the following basis:

*“(1) Condition one requires that the approval is for “ZESPRI brand kiwifruit only” and that SFFE is accountable for obtaining ZESPRI agreement for use of the ZESPRI brand. At the time of writing, SFFE has not been able to confirm ZESPRI authorisation to use the brand. We see this as a frustration of the arrangement. Consequently, SFFE appeal on the basis that the agreement has been drafted in a manner that provides ZESPRI with veto-powers for the campaign, and a lack of alternative arrangements.*

*(2) Noting that the ZESPRI brand appears to be denied, SFFE request that alternative brands been [sic] authorised, and accordingly, the price point noted in condition five will need be lowered to reflect the lesser equity compared to the ZESPRI brand. An alternative figure for supply out of New Zealand will be supplied once establish [sic] with alternative brands.*

*(3) Noting that ZESPRI brand has been denied, conditions four and five (and potentially condition seven) also become redundant. We request these conditions also be reviewed.”*

- 1.3 During the Hearing only the first ground emerged as being relevant. The Appeal Committee adjourned sine die to enable the parties to file memoranda clarifying:
- Who was the actual appellant (KSL and SFFE to provide), and
  - What were the terms of an arrangement between the collaborative marketer and Zespri for the use of the Zespri brand on fruit being exported pursuant to the approval (Zespri and collaborative marketer to provide jointly).
- 1.4 The approval had been issued in the name of SFFE although the original application for an approval had been filed in the name of KSL.
- 1.5 John Thompson, a Director of SFFE, had appeared as the main advocate for the application throughout the period it was under consideration by KNZ, and had signed and filed the letter of Appeal and had not objected to the approval being issued in the name of SFFE.

## **2 Consideration of the Appeal**

2.1 The Appeal Committee had before it a considerable volume of papers relating to the application and the issue of the approval of the collaborative marketing arrangement by KNZ. Messrs Thompson and Stevenson addressed the Appeal Committee. At the time of the adjournment it had not been necessary for the Zespri representatives to formally address the Committee. The following relevant facts emerged:

- The original application was filed late and outside of the usual time lines for considering collaborative marketing applications for the upcoming 2013-2014 kiwifruit marketing season causing practical difficulties for KNZ and Zespri. However both made special efforts to consider the application even though it was of an unusual nature and involved significant issues which neither had been called on previously to consider. The timeline summary of relevant considerations from the date of the original application on 1 March 2013 is attached as Schedule 1. Throughout the consideration of the application by KNZ the applicant made it clear that obtaining Zespri branded kiwifruit for its proposed collaborative marketing proposal was “preferred”. However by e-mail dated 16 May 2013 to Katherine Evans (Counsel to Zespri) John Thompson wrote: “As discussed, use of the Zespri brand is pivotal to our collaborative marketing application and we are highly motivated to form an arrangement where this works for all parties involved, including China Customs officials.”
- The KNZ collaborative marketing committee considering the original application gave it careful consideration, and appeared concerned at the way the application constantly changed. The papers show that during that consideration a collection of three separate applications and other documents emerged which progressively made up the business case in support of the proposal.
- It is apparent from the detailed and special terms of the approval that the committee was concerned that much of what was being advanced in support of the proposal was provided verbally. This was addressed by setting conditions which made it clear that the committee were requiring more to be

done to protect the robustness and integrity of the proposal as part of the terms on which the approval was issued.

- The Collaborative Marketing Committee had the view that it was SFFE which was to be the actual exporter even though the papers claimed that it was as agent for KSL. During discussions to clarify the role of each party the Appeal Committee indicated that if SFFE was to be the exporter of record then it would need to be the collaborative marketer. There appears to have been no objection raised by either KSL or SFFE either at the time of it meeting with the Collaborative Marketing Committee or after the approval was issued on 2 May 2013.
- The Appeal Committee was concerned that there was no clear record in the papers identifying the respective roles of KSL and SFFE in undertaking the proposed collaborative marketing arrangement. No agreement appeared to have been concluded by SFFE and Zespri with regard to the use of the Zespri brand. These matters were relevant to SFFE being able to export kiwifruit from New Zealand in accord with the terms of the relevant collaborative marketing approval. The Hearing was therefore adjourned sine die to enable the parties to provide the Appeal Committee with two memoranda addressing the two matters addressed in Para numbered 1.3.
- Subsequently SFFE has provided the Appeal Committee with the following:
  - a) A signed Heads of Agreement between KSL and SFFE dated 25 May 2013, confirming SFFE as the collaborative marketer.
  - b) A signed Memorandum of Understanding dated 31 May 2013 between SFFE and Zespri relating to the use of the Zespri brand on agreed terms.

### **3. Outcome of the Appeal**

- 3.1 The Appeal Committee is satisfied that the two documents referred to above reasonably meet its request for the memoranda referred to in Para 2.
- 3.2 As agreement has been reached between SFFE and Zespri as to the use of the Zespri brand, the grounds for Appeal no longer exist. Accordingly the Appeal is dismissed.

- 3.3 The Appeal Committee believes that as further information is now available which was not available to the Collaborative Marketing Committee considering the applications, SFFE may wish it to consider the new information. As an approval has already been issued, such new information may constitute a variation to the approved application, or may amount to a new application. Should SFFE wish the approval to be further considered, it would be for the Collaborative Marketing Committee, not the Appeal Committee, to undertake.

**For and on behalf of the Kiwifruit New Zealand Appeal Committee**



Sir Brian Elwood

**Chairman**

**Dated: 7 June 2013**

**Observations**

The Appeal Committee records the following observations to assist the parties.

1. The China market for premium kiwifruit is being developed by Zespri in a carefully planned and organised manner with considerable success in terms of volume and returns. Brand Zespri has achieved market recognition and value after considerable investment of time and grower/shareholder money, in respect of which any collaborative marketing proposals into China should have proper regard. China has considerable potential as a market for premium New Zealand grown kiwifruit and should be nurtured carefully over coming years so as to enhance the overall wealth of New Zealand kiwifruit suppliers.
2. It is a Regulatory requirement that the purpose of collaborative marketing is to enable KNZ to require Zespri to enter into collaborative marketing arrangements for the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers. KNZ adopts a broad approach to what might facilitate or achieve an increase in the overall wealth of those suppliers but at the same time needs to

be mindful of the risks that may affect that wealth adversely. A collaborative marketing arrangement must be undertaken in collaboration with Zespri.

3. An applicant for a collaborative marketing approval must satisfy KNZ on both grounds, achieving an increase in overall wealth of kiwifruit suppliers and undertaking it in collaboration with Zespri. This entails considerations other than just the profit able to be generated by a collaborative marketer for the entity holding a collaborative marketing approval. The exercise can and needs to be profitable for the approval holder but also needs to contribute to increasing the overall wealth of New Zealand kiwifruit suppliers. The overall common good of growers therefore assumes importance in KNZ deciding whether to approve a collaborative marketing arrangement. The significant success of the New Zealand kiwifruit industry to date has been mandated under the integrated industry structure achieved through the Kiwifruit Export Regulations 1999.
4. It is for an applicant to satisfy KNZ that its collaborative marketing proposal will achieve the Regulatory purpose.
5. In that light the applicant must provide KNZ with full and detailed information of what is proposed, backed where appropriate with supporting documentation especially so with proposals into developing or emerging markets, presented to it in a coherent form such that all aspects of the application can be considered together as a whole.
6. The more complicated or unusual the proposal the earlier the application should be filed with KNZ. In this case the application was filed far too late for the coming marketing season causing logistical problems with processing and engaging with affected parties to iron out difficulties or resolving misunderstandings. In hindsight the application could perhaps have been deferred for more measured consideration with a start date in the 2014-2015 season.
7. Collaborative marketing is not a way by which the Regulations can be avoided or negated.
8. There appear to have been a number of misunderstandings on behalf of the promoters of this application which have caused unnecessary pressures and complications. There were numerous and progressive changes made to the application. All of these should have been addressed in its formulation. The applicant was not made to make changes. Had there not been changes the application would most likely have not been approved as failing to meet the

Regulatory requirements. KNZ did not put in conditions which made it necessary for KSL to appeal. Conditions were included in the approval because the application as formulated was inadequate to meet the Regulatory requirements. It is unusual for the applicant to at a late stage suggest that it did not notice that the approval was issued in the name of SFPE when the document is clear and the matter of who was to be the exporter was discussed by the Committee during meetings with the parties and they being advised that the exporter needed to be the collaborative marketer. The exporter needed to be able to meet the contractual obligations inherent in being granted an approval.

9. The use of the Zespri brand is not a matter that can be enforced through a collaborative marketing approval. The applicant requested Zespri branded fruit. The use of the brand is a matter of contractual agreement with the brand holder. A collaborative marketing approval relates to the export of New Zealand grown kiwifruit. Zespri appear to have acted appropriately in this regard. The brand has integrity and value. Zespri have no right of veto in respect to collaborative marketing approvals. Only KNZ can issue collaborative marketing approvals and Zespri must enter into a contract with the approval holder consistent with the approval.

## **Schedule 1**

### **Time sequence SFFE/KSL Collaborative Marketing Application**

1. 1 March 2013 - Original application received
2. 1 March 2013 – queried basis of purchase – FOB?
3. 2 March 2013 – wrote to SFFE re Regulation 28(2)(a) and “incomplete” application
4. 4 March 2013 – KSL Accounts received
5. 12 March 2013 – updated Part B and C submitted, together with photos and notice of videos
6. 18 March 2013 – Asking SFFE whether they wished to reconsider application or for KNZ to proceed on basis of re-submitted application
7. 18 March 2013 – confirmation “...Application is complete and ... it should proceed.”
8. 19 March 2013 – applications forwarded to Zespri
9. 12 April 2013 – Zespri response referred to SFFE
10. 19 April 2013, 9am – additional information handed to RJP
11. 19 April 2013 – CM Meeting
12. 22 April 2013 – acknowledgement of additional information tabled at CMC meeting, and offer to meet again 10am on 29 April 2013.
13. 22 April 2013 – updated Appendix A received (based on US\$9.54), retail to CIF price reconciliation (as put on whiteboard at CMC Meeting 22 April 2013).
14. 24 April 2013 – Updated Part B and C received
15. 29 April 2013 - CMC Meeting (2) – SFFE confirmed as CM
16. [29 April 2013?] – JT confirmed 100,000 minimum trays
17. 30 April 2013 - SFFE confirmed RMD298 price per tray, for Oscar French Green and Italian Jingold brand kiwifruit
18. 2 May 2013 – CMC decision approval issued
19. 13 May 2013 – Separate KSL Appeal notice (although not intended to be an Appeal Notice – see 15/5 email) and Variation notice received
20. 15 May 2013 – Appeal notice withdrawn
21. 15 May 2013 – Mark Bayly met with RJP to talk about approval and possible variations
22. 15 May 2013 – Zespri letter to SFFE re brand and duty calculations
23. 15 May 2013 – KSL/SFFE Appeal received
24. 16 May 2013 – Email from SFFE, saying “Zespri brand is pivotal to our collaborative marketing application...”
25. 23 May 2013, 3.30 pm – CM Appeal Hearing held and adjourned (at the meeting Zespri tabled their email of 22 May 2013 to SFFE)
26. 29 May 2013 - KSL and SFFE Heads of Agreement received, and relevance queried
27. 30 May 2013 - Copy of Zespri letter to SFFE received