



KIWIFRUIT EXPORT REGULATIONS 1999 (the “Regulations”)

Decision of the Collaborative Marketing Appeal Committee of Kiwifruit New Zealand (“the Appeal Committee”) relating to an appeal from the decision of the South East Asia, China and India Collaborative Marketing Committee (the “Committee”) declining the Application by KSL Services Limited (“KSL”) to export kiwifruit to China in collaboration with Zespri Group Limited (“ZGL” or “Zespri”).

HEARING DATE: 17 March 2014

PRESENT: Kiwifruit New Zealand Board (Appeal Committee)

Sir Brian Elwood

Ruth Lee

Alister Hawkey

KSL Services Limited

Ross Stevenson

Colin Stevenson

Zespri Group Limited

Katherine Evans

In attendance: Richard Procter

1. Introduction

- 1.1 In October 2013, KSL applied to Kiwifruit New Zealand (KNZ) to export 101,940 tray equivalents Hayward green class 1, sizes 27-36, and 50,944 Gold 9 (Charm) to be supplied to distributor Shenzhen Yuanxing Fruit Company Limited (Shenzhen) for supply to the Fresion Fruit store chain (Fresion).
- 1.2 KNZ delegated to the Committee authority to consider and decide the application.
- 1.3 The Committee declined the application, and issued its reasons on 31 January 2014.
- 1.4 By letter dated 12 February 2012, KSL appealed the Committee decision.
- 1.5 The Appeal Committee heard the Appeal on the 17 March 2014.
- 1.6 The general background to the Regulatory provisions applicable to collaborative marketing applications is set out in Paragraphs 2 to 4 of the KNZ decision made in respect to three appeals by Turners & Growers Limited in respect of applications to export kiwifruit to Japan, Mexico and the USA, heard on 5 May 2009. A copy of those paragraphs is attached as an Appendix to this decision for the information of KSL.

2. KSL Appeal

- 2.1 The details of the KSL Appeal are set out in the letter dated 12 February 2014 referred to in paragraph 1.4 above. In essence the appeal centred around the following matters:
 - That the Committee failed in its duty to fully research the facts and data available to it in order that it make a fair and balanced decision;
 - That the Committee appears to have deliberately ignored critical evidence tabled at the hearing, potentially in order to protect Zespri or its agents from further legal redress in China;
 - The Committee has made irrelevant considerations in respect of the principle requirements of the Kiwifruit Export Regulations 1999 (the Regulations) regarding collaborative marketing;

- Zespri China and world-wide optimisation strategy is not part of either “increasing overall wealth” or “collaboration with Zespri” regulatory requirements;
- Facts that outlets can purchase from Zespri is not part of the regulatory requirements.

3. The Committee Decision

3.1 The KSL application was declined by the Committee for the reasons set out in its decision dated 31 January 2014.

3.2 In summary, the reasons were:

- In the 2014-15 season, the availability of green and gold New Zealand grown kiwifruit is expected to fall significantly short of world-wide demand. While on the face of it, additional outlets would appear to be advantageous, there was no dispute that in China particularly and world-wide generally, Zespri was supply, not demand constrained and could sell more than it expects to have available.
- Currently Shenzhen purchase NZ kiwifruit from the wholesale market. Shenzhen apparently do not wish to purchase NZ grown kiwifruit direct from Zespri’s distributor, Golden Wing Mau, instead through this proposed collaborative marketing arrangement are seeking direct access for supply to a growing retail chain and internet provider in a manner that would parallel Zespri’s own distributor arrangements. Zespri already supply into this area of China. It appeared that the proposed arrangement was for an alternative parallel supply, sourced either by way of substitution of that available to Zespri’s distributor, or by diversion of supply from elsewhere. No information was put before the Committee as to how this might or might not increase the overall wealth of New Zealand kiwifruit suppliers.
- While KSL expressed an expectation that costs and/or commissions would be reduced if the proposed arrangement was approved, it was not clear as to how these cost savings might arise, or who the beneficiary would be. While there is obviously potential for eliminating commissions in the supply chain to Fusion, other than a reference to

profit sharing, there is nothing in the application that suggests how this would result in an increase in the overall wealth of NZ kiwifruit suppliers.

4 The Appeal Committee's Consideration of the Appeal

- 4.1 Subsequent to the filing of the Appeal, Colin Stevenson on behalf of KSL in an email dated 14 March 2014 to KNZ's Chairman gave notice that the applicants position was that the appeal hearing must proceed as a re-hearing de novo in order to comply with the rules of natural justice. The reason for this was that there was no adequate record of what transpired at the Committee "hearing" and that there was no written record of that 'hearing'.
- 4.2 The KNZ Chairman by email dated 14 March 2014 advised Mr Stevenson that the meeting with the Committee was not a "hearing" but was part of an administrative process to give applicants an opportunity to meet with the Committee to elaborate on any matters referred to in their application and for Committee Members to ask questions.
- 4.3 The appeal falls into two categories:
 - (a) matters relating to the manner in which the Committee has made its decision (process matters), and
 - (b) whether the Committee has in reaching its decision had regard to matters which are not part of the requirements of the Regulations (Regulatory matters).
- 4.4 Mr Stevenson was advised by the Chairman that the appeal should proceed on 17 March 2014 as planned in accord with usual procedures in respect to the matters raised in the notice of appeal and not as a re-hearing de novo. The primary reason for this was because KNZ had delegated KSL's collaborative marketing application to the Committee to consider and decide. The appeal process was not an avenue through which the application could be put again to another group of KNZ directors.
- 4.5 At the meeting with the Appeal Committee on 17 March 2014, Messrs Ross and Colin Stevenson spoke, and Colin Stevenson in particular spoke to a written paper which to a degree could be seen as related to process and regulatory matters but also to others not directly related to the matters raised in the Notice of Appeal. Although Members of the Appeal Committee

encouraged Ross and Colin Stevenson to focus on the detail of the appeal grounds, the impression created was of an attempt to have the application re-considered.

- 4.6 The written paper and the verbal submissions did not address substantively the issues raised in the Notice of Appeal. As a result the Appeal Committee is left with a series of broad allegations which are described as the grounds of appeal, three of which involve process matters and two of which raise Regulatory matters. These will be considered later in this determination but the Appeal Committee notes that the material placed before it by KSL and the verbal submissions made to it did not clarify or substantiate the grounds for the Appeal as outlined in the Notice of Appeal. Rather an attempt was made to have the Appeal Committee consider matters which had already been put before the Committee and taken into account in reaching its decision.
- 4.7 Zespri provided the Appeal Committee with a written response to the notice of appeal and this was made available to KSL ahead of the meeting with the Appeal Committee.
- 4.8 Katherine Evans spoke briefly to the Appeal Committee in elaboration of Zespri's written response and highlighted that no relevant evidence had been provided by KSL in support of the grounds in its notice of appeal.
- 4.9 Following an adjournment to allow Zespri time to respond to some of the matters raised in the paper provided to the Appeal Committee by Ross and Colin Stevenson, Zespri provided a written response to that paper, dated 24 March 2014, and this was made available to KSL for its information. Subsequently KSL by email dated 1 April 2014 forwarded a four page response dated 31 March 2014 to Zespri's response of 24 March 2014 although that response had only been forwarded to KSL for information. KSL were not being given an opportunity to re-state or expand on its original presentation to the Appeal Committee. Notwithstanding, the Appeal Committee is of the view that neither the Zespri nor KSL responses added anything further of significance to the relevant matters which it needed to consider in order to determine the outcome of the appeal. The Appeal Committee proceeded on the basis of what was before it at the hearing.

4.10 The Appeal Committee in the circumstances referred to above, set out to identify from the written and verbal submissions made on behalf of KSL what matters had relevance to the grounds for appeal.

- (a) First ground of appeal: That “the Committee failed in its duty to fully research the facts and data available to it in order that it make a fair and balanced decision.”

This ground for appeal suggested that the Committee had a duty to undertake research of the facts and data supplied by the applicant which it failed to do. It implies the Committee must undertake specific research in order that it can come to a fair and balanced decision. In the written paper presented to the Appeal Committee reference was made briefly that KSL’s lower commission structure and rebating proposal would return more to growers. This was a matter which the Committee needed to consider in the totality of the proposal as presented to it. The Committee did so but after considering the KSL application documents, listening to what had been said in support of the application and considering the Zespri detailed submissions opposing the application had come to the view that there was nothing in the application demonstrating how the proposed collaborative marketing arrangement would result in an increase in the overall wealth of New Zealand kiwifruit suppliers. That was the consequence of considering and weighing all the relevant factors. The Committee also needed to consider the risks to supplier wealth which could follow if the application was granted. The China market was important to the future of the kiwifruit industry, it was being developed in a considered way by Zespri, fruit was available to the KSL customer through Zespri established channels and in the current season there was going to be a shortage of fruit supply creating unusual market dynamics in China and the rest of the world. It was a challenging environment in which to balance the competing interests of an individual applicant and the overall wealth of suppliers. This the Committee had to do and did. KSL did not succeed in persuading the Committee that it had established a

business case justifying a finding that the proposal would increase the overall wealth of suppliers. In the Appeal Committee's view it is not reasonable to expect the Committee to undertake its own independent research into the facts and the data provided by KSL in an endeavour to see if such an increase in wealth might result if a collaborative marketing approval was given. The responsibility rests with the applicant to clearly demonstrate that what it proposes will achieve the Regulatory purpose "of increasing the overall wealth of New Zealand kiwifruit suppliers." The Committee was not satisfied in the circumstances that KSL had demonstrated how the Regulatory purpose of collaborative marketing would result if the application was approved. In the Appeal Committee's view the Committee had no duty to go further with its own research into the facts and data provided by the applicant. It was entitled to make its decision on what was provided to it by KSL and Zespri and members wide knowledge of the industry.

This ground for appeal is not upheld.

- (b) Second ground of appeal: "The Committee appears to have deliberately ignored critical evidence tabled at the meeting, potentially in order to protect Zespri or its agents from further legal redress in China."

This ground of appeal has serious overtones which were not addressed or explained in any meaningful way either in the written material or verbal submissions to the Appeal Committee. There was a brief reference to corruption in the supply of kiwifruit by Golden Wing Mau (GWM) one of Zespri's distributors in Southern China being tied to the supply of apples contrary to anti-competitive rules. But whatever the actual position, it was but an allegation and was not a matter for the Committee to determine. New and expanded distribution arrangements have been put in place by Zespri for the coming marketing season and the KSL proposed customer

Shenzhen (already having in past seasons acquired Zespri branded fruit) will have multiple channels (including GWM) from which to choose to continue to purchase Zespri branded fruit. The Committee had an obligation to consider the merits or relevance of the evidence provided by the applicant and the weight given to it. Allegations of corruption in China were for others to consider. The question for the Committee was whether what the applicant was proposing for its collaborative marketing arrangement would increase the overall wealth of New Zealand kiwifruit suppliers. That required a wide ranging consideration of many factors including those highlighted by Zespri in its submission. The allegations as presented were an unfortunate diversion from what had to be considered. The Appeal Committee just observes that the well publicised matters which Zespri faced in China with customs issues have been addressed, Zespri continues to export fruit to China without interruption, has put in place new distribution arrangements, and continues to develop the market. KSL did not identify any incident where the Committee ignored “critical evidence”, let alone did so deliberately. The Appeal Committee is of the view that there is no foundation for this ground for appeal.

The ground for appeal is not upheld.

- (c) Third ground of appeal: That “the Committee has made irrelevant considerations in respect of the principle requirements of the 1999 Kiwifruit Regulations regarding collaborative marketing.”

The Appeal Committee has considered this ground for appeal as in fact meaning that KSL considers the Committee took into account irrelevant matters when considering whether the Regulatory purpose of collaborative marketing would be achieved if its application was approved.

If there was evidence that the Committee had so taken into account irrelevant matters then it would be appropriate for the Appeal Committee to refer the application back to the Committee for further

consideration. What KSL appears to be challenging is the Zespri submission that “fruit is available by existing distribution channels” because “the fact that outlets can purchase from a Zespri supplier is not part of the regulatory requirements.”

What the Committee did in weighing the evidence before it was to identify issues relevant to considering whether what was proposed by KSL would achieve an increase in the overall wealth of New Zealand kiwifruit suppliers. Fundamentally the Committee was faced with a proposition whereby another independent supply chain was to be established by KSL in addition to those already operated by Zespri, supplying in the main similar Zespri branded fruit. This in Zespri’s view was going to introduce a system of parallel imports of New Zealand Zespri branded kiwifruit into a region of China where adequate distribution/availability already exists.

In a detailed submission to the Committee Zespri outlined a number of concerns about the KSL proposal all of which had as a focus risks to the creation of wealth through its planned and ongoing development of the China market for New Zealand grown kiwifruit. We record just two observations from the Zespri submission to which the Committee needed to give consideration:

“Zespri’s distribution strategy for China is based on achieving short, medium and long term wealth creation for New Zealand suppliers by ensuring stable and progressive development of China’s regional territories, where the concentration of population provides the opportunity to maximise results with the existing Zespri sales and marketing infrastructure.”

“It would be simple to drive volume into this massive market, but long term value will be compromised if an undisciplined approach is allowed to create uncoordinated distribution channels, unfocused marketing spend and subsequent price volatility.”

In the Appeal Committee’s view it was appropriate for the Committee to have regard to these matters which even if not spelled out as a Regulatory purpose are germane to considering the question whether a collaborative marketing proposal meets the

Regulatory purpose of increasing the overall wealth of New Zealand kiwifruit suppliers.

The ground for appeal is not upheld.

- (d) Fourth ground of appeal: That “Zespri China and world-wide optimisation strategy is not part of either “increasing overall wealth” or “collaboration with Zespri” regulatory requirements.”

Given the substance of the Zespri submission on these matters it was appropriate for the Committee to have given them significant weight as they are relevant when considering the question whether a collaborative marketing proposal meets the Regulatory purpose of increasing the overall wealth of New Zealand kiwifruit suppliers. They are also matters to which an applicant should have regard when formulating a proposal and entering into collaboration discussions with Zespri. In the Appeal Committee’s view the optimisation strategy is an essential part of the Zespri marketing plan world-wide, including China, to create wealth for New Zealand kiwifruit suppliers. Approval of a one-off collaborative marketing proposal in an important developing market like China, without proper regard to the overall Zespri world market strategy for the substantial New Zealand fruit crop would likely create a risk to supplier wealth. It is in the context of whether a specific collaborative marketing proposal will achieve the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers, that the optimisation strategy assumes particular relevance. In a supply constrained environment for Zespri to supply an additional marketing outlet would mean less fruit available for it to allocate to other parts of the market with consequent ripple effect. Zespri has the necessary information and wider perspective to make the best calls in this regard through its optimisation strategy. To service an existing customer for New Zealand fruit through direct supply by a new marketer with a firm allocation of fruit to be supplied only to that customer would send the wrong signals to the market. KSL did not elaborate on this ground of appeal.

The ground of appeal is not upheld.

- (e) Fifth ground of appeal: “Facts that outlets can purchase from Zespri – is not part of the Regulatory Requirements.”

The fact that Zespri branded fruit is available to Shenzhen through the Zespri supply chain but proposed to be changed and serviced by KSL if its collaborative marketing application is approved, was a relevant factor before the Committee when considering whether the collaborative marketing proposal met the Regulatory purpose of increasing the overall wealth of New Zealand kiwifruit suppliers. This would create if approved, a substitution of fruit supplies from Zespri appointed distributors by a KSL distributor Shenzhen and onto Fresion. The Committee were clearly not persuaded that this change would increase the overall wealth of New Zealand suppliers and entailed risks to that wealth.

KSL did not elaborate on this ground of appeal.

The ground of appeal is not upheld.

The Committee decision declining the Collaborative Marketing Application of KSL stands.

For and on behalf of the Kiwifruit New Zealand Appeal Committee

Sir Brian Elwood



Chairman

Dated: 9 April 2014

Appendix

Extract of Paragraphs 2 to 4 of the KNZ decision made in respect to 3 appeals by Turners & Growers Limited in respect of applications to export kiwifruit to Japan, Mexico and the USA, heard on 5 May 2009:

2. Regulatory provisions applicable to collaborative marketing

- 2.1 Collaborative marketing of New Zealand grown kiwifruit is authorised by Part 4 of the Regulations.
- 2.2 Regulation 24 sets out the purpose of Part 4 as "... to enable the Board to require ZGL to enter into collaborative marketing arrangements for the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers."
- 2.3 A "Supplier" for the purposes of the Regulations is defined as "...a person from whom ZGL acquires the property in kiwifruit grown in New Zealand:". See Regulation 2.
- 2.4 A "Collaborative marketing arrangement" is defined as "... an arrangement by which a person may export New Zealand grown kiwifruit in collaboration with ZGL:". See Regulation 2.
- 2.5 Regulation 25 states, "The powers and functions of the Board under this Part [Part 4] are to be exercised in a manner that seeks to best achieve the purpose in regulation 24."
- 2.6 Regulation 26 enables the Board, to "...no later than 1 month after the commencement of each kiwifruit season, direct ZGL to make a certain volume of kiwifruit available for collaborative marketing arrangements in that current season."
- 2.7 Regulation 28(2) provides that the Board, in making a decision on an application made under Regulation 27 for a collaborative marketing approval:
 - "(a) May before deciding whether to approve the application indicate to the applicant possible changes to the application which, if included, would improve the prospects of the application being approved; and
 - (b) May, in approving an application, impose any reasonable and necessary conditions;"

3. Regulatory regime for the export of New Zealand kiwifruit

- 3.1 Regulation 3 imposes an export ban on the export of kiwifruit from New Zealand “...otherwise than for consumption in Australia except as authorised or approved by the Board in accordance with these regulations.”
- 3.2 Regulation 4 (1) requires that “(1) The Board must authorise ZGL to export kiwifruit.”
- 3.3 Part 4 of the Regulations enables the Board to receive and consider applications for collaborative marketing approvals and require ZGL to enter into collaborative marketing arrangements which the Board approves.

4. Effect of the Regulatory regime

- 4.1 The Regulations create what is commonly known as a “single desk” export regime for the export of kiwifruit from New Zealand other than for consumption in Australia.
- 4.2 ZGL is effectively that single desk, allowing for the consolidation of the New Zealand kiwifruit crop which is to be exported to other than Australia for consumption in that country, to be largely channelled through a single source of supply. This consolidation has allowed for the development of the Zespri brand for kiwifruit and the Zespri system for handling kiwifruit from orchard gate to overseas buyers.
- 4.3 The Zespri system has focused upon the market requirement for kiwifruit and enables New Zealand kiwifruit to be sold into the high end or premium grade fruit market place to the advantage of kiwifruit suppliers. Individual kiwifruit growers whose fruit is to be exported are required to comply with the general quality standards set by Zespri affecting such matters as fruit size profile and dry matter content. This has been supported by brand development and in market promotional expenditure. Zespri is the leading internationally recognised brand for kiwifruit. The marketing advantage is that New Zealand grown kiwifruit is available in global markets in good quantities and of consistent quality. Consequently New Zealand kiwifruit sold through the Zespri system sells at premium prices. Generally supply and demand for New Zealand kiwifruit is in balance and an increasing crop volume has been sold in

the face of increased world wide production of kiwifruit often marketed at lower prices than that obtained by Zespri.

- 4.4 The volume of New Zealand kiwifruit marketed through Zespri reached approximately 100 million trays during the 2008-2009 season. The Zespri strategy is to maintain tight control over the in market distribution channel, as much as possible giving distributors the benefit of exclusive access to New Zealand kiwifruit. In turn Zespri requires a commitment to New Zealand kiwifruit, in the form of for example dedicated staff, cool store capacity and where possible the handling of only New Zealand kiwifruit. In addition, Zespri also develop relationships with the major retail chains, assisting to build customer demand with in store and other promotions. In combination there is a demand push and a demand pull which helps build price premiums. If there are alternative supply channels of the same sourced fruit, this balance can be undermined particularly in the very competitive market between the same and different fruits. The major retail chains in particular focus on Class 1 fruit and know that significant volumes of New Zealand kiwifruit are available from a single source of consistent quality and size and backed by a controlled and monitored supply chain and in market service and promotional expenditure.
- 4.5 Although New Zealand grown kiwifruit is the subject of a single desk marketing regime through the export authorisation granted to Zespri for export other than for consumption in Australia, Zespri “must enter into a contract with the collaborative marketing approval holder consistent with the collaborative marketing approval.” issued by the Board (see Regulation 29)
- 4.6 Thus although the Board must authorise Zespri to export kiwifruit it can issue collaborative marketing approvals under Part 4 of the Regulations.
- 4.7 The Board therefore has the capacity to issue collaborative marketing approvals as defined by the Regulations and Zespri is required to enter into a contract with the approval holder. Zespri’s consent or agreement to a collaborative marketing approval is not a requirement of the Regulations or of the Board when considering an application for a collaborative marketing approval.
- 4.8 Generally what is an essential pre-requisite to the Board issuing a collaborative marketing approval is an applicant’s ability to satisfy the Board that the collaborative marketing arrangements being proposed will achieve the

purpose set out in Regulation 24 “of increasing the overall wealth of New Zealand kiwifruit suppliers.” This requires the Board to take:

1. a broadly based approach to the collective short and long term interests of New Zealand kiwifruit suppliers rather than to the specific interests of individual suppliers or groups of suppliers,
2. recognition of the single desk export regime prescribed by the Regulations,
3. cognizance of the operation of the Zespri market strategy in implementing that single desk export regime, and
4. account of the extent to which the proposed arrangement is or can be one that is “in collaboration with ZGL”.

4.9 The Board must finally come to the view that increasing the overall wealth of New Zealand kiwifruit suppliers will (or will likely) result from its approval of a particular collaborative marketing arrangement.

4.10 The Board responsibility in this regard is not an easy one. There can be and sometimes is a differing perspective of what will increase the overall wealth of New Zealand kiwifruit suppliers. The Board is a body with extensive experience of the New Zealand kiwifruit industry and the differing views within that industry and has noted the widely held support for the single desk regime upon which the industry is currently based. Recognition of that single desk structure and what it has achieved for New Zealand kiwifruit suppliers is a factor that properly must be carefully weighed by the Board when considering a collaborative marketing application, as an undermining of that marketing structure may have negative consequences for overall supplier wealth.

4.11 The Boards approach has been to encourage would be collaborative marketers to engage with Zespri from an early stage in the development of collaborative marketing arrangements. This is because any collaborative marketing arrangement approved by the Board entails the export of New Zealand grown kiwifruit “ in collaboration with Zespri.” The Board interprets the collaboration required as meaning to work with Zespri on an arrangement for the export of New Zealand grown kiwifruit with the purpose of increasing the overall wealth of New Zealand kiwifruit suppliers.

4.12 There have been occasions when the Board has approved collaborative marketing applications contrary to Zespri’s wishes because the applicant has

demonstrated to the Board's satisfaction that the overall wealth of NZ kiwifruit suppliers will be increased, The Board is constantly on guard to ensure that Zespri considers properly and with an open mind the collaborative marketing proposals which are put to it. The Board has adequate powers to require Zespri to enter into collaborative marketing arrangements which it approves. See Regulation 29. The Board may also indicate possible changes to an application which would improve the prospects of the application being approved: see Regulation 28 (2) (a); and impose any reasonable and necessary conditions: see Regulation 28 (2) (b).

- 4.13 The Board does not consider an undertaking or intention to collaborate with Zespri after a collaborative marketing approval has been issued to be the collaboration required by the Regulations. The arrangements for collaboration need to be identified preferably before the proposal is considered by the Board because unless clearly identified there could be risks to the purpose of increasing the overall wealth of kiwifruit suppliers. The more complete is the level of collaboration the more likely it is that the proposal if approved would increase the overall wealth of New Zealand kiwifruit suppliers by removing uncertainties or concerns that what is proposed may for example result in the substitution of Zespri branded fruit by other fruit without an increase in the overall wealth of New Zealand kiwifruit suppliers.