KIWIFRUIT EXPORT REGULATIONS 1999

IN THE MATTER OF	the Enforcement Regime of the Export Authorisation issued pursuant to regulation 33(1) by Kiwifruit New Zealand to Zespri Group Limited ("Zespri")
AND	
IN THE MATTER OF	a complaint of unjustifiable discrimination made by [redacted] ("the complainant") Pursuant to clause 6.1.1 of that Export Authorisation
BOARD	Peter J Trapski (Chairman) Hendrik J Pieters Malcolm J Cartwright Bruce H Abrahams Terry Richards
REMEDIES DECISION	24 July 2001

REMEDIES DECISION OF KIWIFRUIT NEW ZEALAND

Background

In it's decision of 31 May 2001 the Board upheld a complaint of unjustifiable discrimination made by the complainant pursuant to clause 6.1.1 of the Export Authorisation that Zespri had failed to commence negotiations with him for the purchase of his Tomua crop until the middle of February 2001 when it had commenced negotiations in respect of other varieties of kiwifruit some months earlier.

The Board has now considered what enforcement action under clause 6.3 of the Export Authorisation should be taken, if any.

The Export Authorisation

Clause 6.3 of the Export Authorisation sets out the types of orders that the Board can make. It says: -

> *Where NZKB determines that ZGL has failed to comply with any matter, NZKB may decide that no enforcement action should be taken or may make any one or more of the following orders:*
>
> *a) issue a private warning or reprimand;*
>
> *b) issue a public warning or reprimand;*
>
> *c) impose a financial penalty;*
>
> *d) order the payment of compensation in accordance with clause 6.3.5;*
>
> *e) require ZGL to do any specified thing for the purpose of remedying any non-compliance;*
>
> *f) make a cease and desist order restraining non-compliant conduct;*
>
> *g) make orders providing for any other reasonable remedies, undertakings, or penalties that NZKB considers appropriate.*

The complainant has sought compensation. Clause 6.3.5(a) of the Export Authorisations states: -

> *NZKB may order the payment of any compensation as follows:*
>
> *a) to any supplier who has suffered loss directly arising from a failure to comply with the non-discrimination rule;*

The Claims

In seeking compensation the complainant says that the impact on him has been:

a) the total loss of fruit on 343 of his 473 mature Tomua vines, the fruit on these vines having been removed during December 2000;

b) the loss of all fruit below the drop wire, inside the first wire and around the trunk on the remaining 130 female vines;

c) the poor fruit quality on 130 vines that he cropped because he was not prepared to risk investing in thinning, insect control or pruning of a crop for which he was unable to negotiate terms of supply.

d) considerable time and energy in pursuing Zespri at both an emotional cost and physical cost in time away from his core business.

e) considerable time and effort in the preparation and presentation of his complaint to the Board.

He also says that he would have been able to produce greater quantities of Tomua fruit of better quality if Zespri had commenced negotiations in a timely manner.

He has submitted details of the reduction in his crop that he claims is attributable to the delay in negotiations. He says that his Tomua vines were all pruned and tied in July, then notch grafted with a Hort 16A graft with the intention of taking a full crop of Tomua to harvest in 2001, but that after Zespri refused to negotiate terms of supply in 2000 he made the decision to minimise his losses and he started cutting back the Tomua leaders. He says that he felt that he should "simplify his orchard management of the Tomua vines" and "mitigate his losses and not spend any more effort growing Tomua". He did not apply any pre-blossom sprays nor put bees into the orchard and he removed all canes below the drop wire. He then stripped out all of the new fruit and new Tomua cane coming off the leaders and removed the flowers on 2/3 of his 1.55 ha of Tomua, leaving him with a crop of approximately 2,000 trays.

He has provided a detailed break down of the financial implications of these actions and he claims that these losses are attributable to Zespri's delay in negotiating with him while they were negotiating with other suppliers.

Zespri on the other hand has told the Board that all the complainant's fruit (1,159 trays) that was submitted was accepted and that it was was received by week 15 so that in accordance with the licence he will receive 150% of net return attributable to growers for Hayward Class 1 for his fruit; that he has suffered no fruit loss directly arising for its failure to commence negotiations with him; and that all his fruit has all been sold on the New Zealand market. In addition, it says that the Service Level Agreement was altered to allow the complainant to sell and receive the proceeds from the sale of his Class II fruit.

Zespri says however that it is prepared to issue a written apology for the delay in entering into negotiations with the complainant and will do so within seven days of any such order from the Board.

The Board takes the view that the complainant's actions in not spending effort growing Tomua, in not applying sprays and not introducing bees into his orchard, and in trimming and cutting back of his vines at the end of the 2000

year were inappropriate to proper horticultural practice and inappropriate to the complainant's duty to mitigate any loss of production that he thought that he may sustain, such that any loss which he in fact sustained could not be said to be a loss directly arising form Zespri's unjustifiable discrimination. Any loss that he may have sustained was entirely due to his own actions, or to his lack of action.

Furthermore it appears that the complainant received full value for the crop that he presented and that he sustained no loss in that regard.

The Board also notes that Zespri allowed the complainant to vary the terms of his licence by permitting him to market his own Class II crop to give him a positive return as opposed to it taking and dumping that fruit.

But in any case, and more importantly, the Board notes that clause 14.4 of the complainant's licence states: -

> *Neither KNZ [now ZGL] nor ZIL will be responsible for any loss of profits, economic or other consequential loss you or any other party may incur as a result of the operation of this agreement or your exercise of any of the rights it grants to you.*

This term of the complainant's licence seems to determine conclusively his claim for compensation and the Board must reject it.

Decision

The Board hereby

- issues a public reprimand to Zespri and
- requires Zespri to make a written apology to the complainant for failing to commence negotiations with him in an appropriate manner within seven days of this order.

In accordance with Clause 6.3.9 of the Export Authorisation this decision is final and binding on all affected persons.

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IN THE MATTER OF	a complaint of unjustifiable discrimination made by [redacted] ("the complainant") pursuant to clause 6.1.1 of that Export Authorisation.
BOARD	Peter J Trapski (Chairman) Hendrik J Pieters Malcolm J Cartwright Bruce H Abrahams Terry Richards
DECISION	31 May 2001

DECISION OF KIWIFRUIT NEW ZEALAND

Background

The complainant grows kiwifruit of the Tomua variety under a grower licence issued by the New Zealand Kiwifruit Marketing Board in 1998 ("the licence"). Zespri Group Limited ("Zespri") stands in the shoes of the former Kiwifruit Marketing Board by virtue of the provisions of section 21(3) of the Kiwifruit Industry Restructuring Act 1999 and of clause 12 of the licence itself.

The Complaint

The complainant claims that Zespri has unjustifiably discriminated against him in two respects:

- first in failing to commence negotiations with him for the purchase of his Tomua crop until the middle of February 2001, when it had commenced negotiations in respect of other varieties of kiwifruit many months earlier, and secondly

- in raising the brix level required before his Tomua could be harvested from 6.2 brix to 7.0 brix.

The Licence

Clause 4.3 of the licence, reinforced by clause 6.1, obliges the complainant to supply all of his Tomua fruit to Zespri, or a person who receives the prior written approval of Zespri. The sole exception to that obligation is fruit that the complainant destroys on his property. And clause 5.1 obliges the complainant to negotiate in good faith with Zespri to agree the terms of sale of his fruit; there is no express counter obligation on Zespri.

Importantly, clause 5.2 of the licence provides that for fruit bought by Zespri or to its order under contract of sale no later than the end of ISO week 15 each season (up to and including the 2007 season) which meets the Class 1 or equivalent quality standard, the complainant is to receive no less that 150% of the net return attributable to growers of Hayward Class 1 (or equivalent) for kiwifruit of similar size.

The Regulations

Regulation 9 of the Kiwifruit Export Regulations 1999 states:

> ***Duty not to discriminate unjustifiably*** *– ZGL, and its directors and managers, must not unjustifiably discriminate amongst suppliers and potential suppliers in respect of –*
> *(a) A decision on whether to purchase kiwifruit; or*
> *(b) The terms of the purchase contract.*

Regulation 10 then says:

> ***Justifiable discrimination*** *– (1) Discrimination (or the extent of the discrimination) is justifiable if it is on commercial grounds.*
> *(2) A commercial ground includes, but is not limited to, matters relating to product features, quality, quantity, timing, location, risk, or potential returns.*

Is the Complainant a Supplier

As a preliminary matter Zespri has asked whether the complainant was a Supplier within the terms of those regulations.

Regulation 2 of the regulations defines a Supplier. It says:

> *"Supplier" means as a person from whom ZGL acquires the property kiwifruit in New Zealand.*

It is noted that the regulations use the word "property" rather than "title". This wording has its counterpart in the Sale of Goods Act 1908, which applies to the sale of kiwifruit, kiwifruit being "goods" as defined in that act. Section 2 of that act defines a seller as a person who sells, or *"agrees to sell goods"*. Section 3(1) provides that a contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the

property in goods to the buyer for a price. Section 14 then provides that in a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is an implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell, he will have the right to sell the goods at the time when the property is to pass. Finally section 60(2) of the Sale of Goods Act provides that the rules of common law, except in so far as they are inconsistent with the express provisions of the Act, and in particular the rules relating to the law of principal and agent continue to apply to contracts for the sale of goods.

It is the right of every person to appoint an agent to do whatever the principal authorises the agent to do, and in such case the acts of the agent are just as effective as if it was the principal personally that was doing that act.

To apply all that to the kiwifruit industry, it seems that those 13 or so entities with which Zespri contracts as "Suppliers" each season, have the right to pass property in kiwifruit to Zespri themselves, or as agent for a grower. In either situation they deal with Zespri as Suppliers in their own right, or as entities which will have the right to pass that property at a later date, either themselves, or as agents for growers. When those Suppliers act as agent for a grower, the principal, the grower, still remains the principal and retains his or her identity as Supplier within the meaning of the regulations.

But that aside, we can think only that this was the intention of the legislator, that a grower is a Supplier, and if that needs any elaboration we refer to the statement – provided for us by Zespri – made by the Select Committee in its report of August 1999 on the Apple and Pear Industry Restructuring Bill -

> *Secondly, the non-discrimination rule will only permit ENZA to discriminate between growers on commercial grounds.*

The underlining is ours, but regulations 2, 9 and 10 of the Kiwifruit Export Regulations 1999 are in exactly the same terms as the corresponding regulations in the Apple & Pear Export Regulations 1999.

If the only persons who could be discriminated against under regulation 9 of the regulations were the 13 or so entities that enter into formal contracts with Zespri, then the whole effect of the application of regulations 8 and 9 would be greatly reduced, to the extent that their providing *"appropriate protection of ZGL shareholders and suppliers"* in terms of regulation 8(c) would be all but nullified.

We must add that up to the point when the principal or grower actually becomes a supplier and passes property to Zespri, he or she must be a *"potential supplier"*, and therefore a Supplier in terms of regulation 9.

We believe that the complainant is a Supplier for the purposes of regulation 9.

The Export of Tomua for Consumption in Australia

Zespri has also suggested that since Tomua is being purchased this season for sale only within New Zealand or for consumption in Australia, regulations 9 and 10 do not

apply. They say that section 26(1) of the Kiwifruit Industry Restructuring Act 1999 enables regulations to be made for purposes that include:

> (a) *Restricting the export of kiwifruit otherwise than for consumption in Australia, and*
> (b) *Restricting discrimination among suppliers of kiwifruit for export to commercial grounds.*

and that the Kiwifruit Export Regulation 1999 are confined by that enabling provision, so that the non-discrimination rule in regulation 9 cannot apply to suppliers of kiwifruit for the local or the Australian market. They also say that as the Export Authorisation does not relate to kiwifruit for consumption in Australia, the enforcement regime that is set out in that Authorisation and in regulation 33(1)(b) cannot apply to a decision to purchase kiwifruit acquired for consumption in Australia.

We cannot accept that these suggestions are effective. Although Zespri is not the only buyer of kiwifruit for sale in New Zealand and Australia - it has competition in both of these markets and in the case of the New Zealand market, is itself restricted by Regulation 11(2) - we cannot accept that Parliament intended that this Board be precluded from examining the terms of a contract for the purchase of kiwifruit for export for consumption in Australia for compliance with regulation 9, if only for the reason that any requirement that the fruit be exported only to Australia might itself be discriminatory.

Furthermore, the complainant does not have the benefit of competitive buyers for his fruit. He must, by the terms of the Zespri licence, sell to Zespri unless Zespri grants a dispensation. In his case, the mischief or very purpose for which regulation 9 was enacted – as declared in regulation 8 – still remains.

The Decision to Raise the Brix Level

As to the complainant's second complaint, we consider that the decision to raise the brix level for Tomua fruit from a level of 6.2, the level at which Hayward Green are harvested, to a level of 7 was clearly discriminatory as between the suppliers of the two varieties, and since Zespri will not purchase fruit harvested at a lower brix level than it now specifies, it clearly relates to a decision whether to purchase.

The issue then becomes whether Zespri's decision to raise the brix level for Tomua is justifiable "on commercial grounds".

Zespri has provided a large amount of scientific and commercial information relating to quality, risk and financial returns for Tomua on which it says that it acted, but it suggests initially that this Board is not empowered to determine the adequacy of those commercial grounds. We agree. It is not for us to investigate the quality or efficacy of Zespri's decisions, or to act as a review authority of the administration of Zespri's commercial activities within the legitimate scope of its jurisdiction. That is for Zespri alone.

But we have no doubt that this Board is able to examine Zespri's decisions in order to determine whether or not they have been made "on commercial grounds" within the meaning of regulation 10, rather that on some other, non-commercial grounds. That is one of the functions of this Board – as set out in regulation 33(1)(b) and confirmed in

clause 6.1.1 of the Export Authorisation. We can and will look at the fact of Zespri's decisions and decide whether they are legitimately within its powers and competency, but we cannot and will not make any attempt to review the quality of those decisions.

Having then considered the grounds for the change as advanced by Zespri, we consider that they are in fact "*commercial grounds*" within the meaning of regulation 10, and whilst the Zespri decision might have had the effect of depriving the complainant of the premium payable under clause 5.2 of his licence (although it appears that this may not have occurred) we are not at all satisfied that Zespri imposed the change in the brix level for that purpose, or for any other non-commercial reason.

Accordingly we are of the view that the complainant was not unjustifiably discriminated against by Zespri in its decision to raise the brix level for Tomua.

Possibly Zespri might have made, and conveyed its decision to do so to the complainant earlier than in fact it did, but we do not think that anything further turns on that at this stage. We can find nothing in the licence that would impose such a requirement, or any requirement to consult with the complainant in regard to any such change, although the altered level would clearly be part of the purchase negotiations required under the complainant's licence.

The Delay In Commencing Negotiations

Turning now to the first complaint, the complainant says that when Zespri announced in June 2000 that it did not intend to market Tomua, he tried immediately to commence negotiations to agree the terms of sale of his fruit, but Zespri responded affirmatively only on 14 February 2001. He says that he persisted in his efforts during the intervening months but without success.

Zespri say that they commenced negotiations with Suppliers for the acquisition of kiwifruit generally for the 2001/2002 season in September 2000. Those negotiations were with the suppliers representative group that comprised persons who supplied kiwifruit to Zespri in the 2000/2001 season. Zespri has also advised that there were no negotiations on the terms of supply for Tomua, other than general discussions on the structure of supply arrangements generally, until 14 February 2001 and that those discussions were with growers of Tomua rather than with recognised Suppliers.

Zespri has also told us that the Zespri Board considered that if the complainant had registered as a Supplier he could have precipitated an early resolution to the supply negotiations. If that is so, then it would have been a simple matter for Zespri, by way of response to one of the complainant's several requests for negotiation, to have told him so. But for whatever reason it seems clear that Zespri did not undertake negotiations for the supply of Tomua, with registered Suppliers or with growers, until 14 February 2001.

Zespri suggests that it's conduct of the negotiation process is not itself the subject of prohibition in regulation 9. Rather it suggests, the non-discrimination rule focuses on the characteristics of an actual decision by Zespri whether to purchase kiwifruit, or the terms of the purchase contract made. This, Zespri says, is reinforced by the fact that regulation 10 could not be given effect to in relation to a negotiations process, because

none of the commercial grounds listed in regulation 10 relate in any way to a negotiation process.

But the complaint is not about the negotiation process. It is about Zespri's delay in commencing negotiations. The negotiations are required by the licence. Their purpose, as stated in clause 5.1 of the licence, is to agree on terms of sale. Their outcome will determine whether the complainant will sell, and whether Zespri will buy his Tomua crop. If there is no agreement either party may cancel the contract. Negotiations cannot be concluded if they are not commenced. The delay in starting negotiations relates to and is therefore *"in respect of a decision on whether to purchase"* or *"in respect of the terms of the purchase contract"* in the words of regulation 9.

Given that there is but one buyer for the complainant's Tomua fruit, unless Zespri gives its approval to sell elsewhere, discriminating against him by leaving the commencement of negotiations of the terms of the sale of Tomua until 5 months after negotiations commenced for the purchase of fruit of other varieties is, in our view, discrimination. It is no answer to say that other Tomua growers were not treated differently when Hayward growers were treated differently. Regulation 9 is directed to discrimination *"among suppliers of kiwifruit"* rather than among suppliers of the same variety of kiwifruit.

We now turn to consider whether that discrimination may be justifiable in terms of regulation 10 because it is *"on commercial grounds"*.

Zespri advises that:

> *The final resolution of limited issues relating to the possible acquisition of Tomua have had to await substantial progress in the generic contract negotiations and these have been very protracted. The confined issues regarding the possible acquisition of Tomua under Supply Contract 2001 have awaited the finalisation of these negotiations.*

but it has not explained why it was necessary to await either substantial progress in the generic contract negotiations or their finalisation before the terms of purchase of Tomua could be negotiated.

Furthermore this advice does appear to be in total conflict with what we are told is the Zespri Board's view, that the complainant's registration as a supplier could have precipitated an early resolution to supply negotiations.

We are not satisfied that Zespri's discrimination was on commercial grounds. It was in our view unjustifiable.