



European Union

Community Plant Variety Office

**Case A 023/2002**

## **DECISION**

Concerning the Appeal lodged by

Genplant B.V., represented by its director A.N. Moolenaar, Loosterweg 33,  
2215 TM Voorhout, The Netherlands

Procedural representative:

Mr. L.J. van Vleet of Hortis Holland, PO Box 1072, Rijswijk ZH, The Netherlands

further party of the proceedings

Community Plant Variety Office, represented by its President B. Kiewiet

Procedural representative: Vice-President J. Elena

### **Relating to Community plant variety right application No 1999/1677**

Variety denomination:

**BCT9916BEG**

Species: *Begonia* L.*rex*. Putz

On 8 October 2003, the Board of Appeal of the Community Plant Variety Office, composed of G. Winkler (Chairman), A. Bould and V. Silvey (Members), gave the following decision:

**The appeal is refused**

## Facts

On 22 November 1999 BCT BIO Chemical Technologies AG, predecessor in title of the appellant since 16 February 2000, filed an application for a Community plant variety right for the denomination BCT9916BEG, which belongs to the species *Begonia L.rex*. Putz.

The variety has been marketed since January 1999 in The Netherlands, but not outside the territory of the European Union.

The technical examination was carried out by the Bundessortenamt in Hanover, Germany. The report of the technical examination, dated 2 July 2001, concluded that the candidate variety was not distinct from the reference variety "Comtesse Louise Erdody". According to an annex to the report the Bundessortenamt obtained the variety "Comtesse Louise Erdody" in October 1998 from Dr. Kramer at the Botanical Garden in Heidelberg. Dr. Kramer had obtained the original material in 1994 as *Begonia rex* from Nothelfer's (commercial) nursery in Speyer. Dr. Kramer attributed the denomination "Comtesse Louise Erdody" to the variety after completing a thorough search of the published literature on *Begonia* varieties. However Dr. Kramer accepts that there is still a small element of doubt about the accuracy of this conclusion.

It was also noted in the annex that BCT9916BEG is not distinct from the variety BCT9801BEG which has been marketed in The Netherlands under the denomination "Escargot" since January 1999. But no reference was made to the lack of distinctness from the variety BCT9801BEG, which, at the time, was still the subject of an appeal against a decision to refuse the variety taken by the Raad for Kwekersrecht and had already been refused a grant of Community rights. No appeal was made against this decision, although the appellant had requested the decision be delayed pending the outcome of the appeal made to the Raad.

In its decision No R 301 taken on 3 June 2002 the relevant Committee of the Community Plant Variety Office (hereinafter: the Office) refused the plant variety application based on Art. 61 (2) lit. b), Art. 7 (1) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (hereinafter: CR). It was held that the candidate variety was not sufficiently distinct from the reference variety "Comtesse Louise Erdody".

On 15 August 2002, the successor in title of the applicant lodged an appeal against the decision, and duly paid the appeal fees.

As the Office did not grant interlocutory revision it remitted the case to the Board of Appeal in accordance with Art. 70 (2) CR.

The appeal against the decision that the variety was not distinct under Article 7 CR was at first not challenged from a technical point of view, but was based only on the contention that the variety "Comtesse Louise Erdody" was not in common knowledge at the time of the submission of the application to the CPVO for the grant of a Plant Breeder's Right. The appellant claimed that:

- It could not be established that the variety taken as reference by the testing authority and marked "Comtesse Louise Erdody" was in fact the variety "Comtesse Louise Erdody".
- The variety taken as reference by the testing authority and marked "Comtesse Louise Erdody" is not a variety in common knowledge.

Only during the oral hearing the appellant claimed that:

- BCT9916BEG is clearly distinct from the variety taken as reference by the testing authority and marked "Comtesse Louise Erdody".
- BCT9916BEG is clearly distinct from the applicant's variety BCT9801BEG, which was also used for comparison by the testing authority.
- BCT9916BEG has been selected for 100% curved leaves and compact habit suitable for production in number 12 pots. It is important that the variety should be produced under these conditions and not the usual DUS growing conditions in order to obtain a clear expression of the characteristics that enable distinctness to be established between BCT9916BEG, BCT9801BEG and "Comtesse Louise Erdody".
- It is not clearly stated in the examination report that the three varieties BCT9801BEG, BCT9916BEG and the material marked "Comtesse Louise Erdody" are not distinct from each other.

With reference to the decision taken recently by the Raad voor het Kwekersrecht to refuse the appeal against BCT9801BEG the appellant said that he had not had time to study the decision in detail but the new information concerning the marketing of

the variety "Comtesse Louise Erdody" from 1994 to 2000 by Nothelfer should be treated with caution as they have a commercial interest in the marketing of *Begonia rex*. It was also likely that a further appeal would be made against the decision.

The appellant applied for

the cancellation of the decision of the Committee of the Community Plant Variety Office and for the conduct of another examination for the candidate variety BCT9916BEG under the correct commercial growing conditions for *Begonia rex* varieties.

The Office applied for

the dismissal of the appeal.

It argued that the variety marked as "Comtesse Louise Erdody" by the Botanical Garden in Heidelberg and the Bundessortenamt in the DUS test, fulfils the requirements for a variety in common knowledge, since it is grown in a Botanical Garden to which the general public has access. The fact that the Bundessortenamt engages the Botanical Garden for its purposes supports this view. The material supplied to the Bundessortenamt by the Botanical Garden was authentic material of the variety marked as "Comtesse Louise Erdody". The variety meets the UPOV definition of a variety and any lingering doubts about the correctness of this denomination are not critical to the definition of common knowledge.

New information has emerged since the original decision. In particular the recent decision taken by the Raad voor het Kwekersrecht that establishes a link between Nothelfer's nursery that has marketed the variety since 1994, the supply of this material to the Botanical Garden and the Bundessortenamt reinforces the argument that the variety marked as "Comtesse Louise Erdody" is in common knowledge.

The claim now being made that special growing conditions were required for the DUS test was not mentioned in the original application for variety protection, or at any stage during the conduct of the tests, although there was ample opportunity for this to be done. Furthermore no appeal was made against the decision that

BCT9916BEG was not clearly distinct from "Comtesse Louise Erdody" or BCT9801BEG.

The documentation submitted to the CPVO in support of the appeal against the decision on BCT9916BEG was based largely on the documents submitted to the Raad for Kwekersrecht in relation to BCT9801BEG, the decision of the Garden Plants Department of the Raad and the report of the Appeal Department of the Raad setting out the case for the Garden Plants department to reach a new decision.

The Board of Appeal found some of the information in the documentation submitted confusing. In particular the Board wished to establish clearly the date at which the applicant obtained plant material from Dr. Kramer and the selection procedure followed in relation to the development of BCT9801 and BCT9916. The Board was informed by the appellant during the oral hearing that vegetative plant material was given to the breeder by Dr. Kramer in June 1997 and not in late 1997 or late 1997/early 1998 as variously stated in the documentation. Selection was exclusively from vegetatively propagated material obtained by taking 1cm square leaf cuttings and not by crossing and selection as stated in the appeal. Propagation was carried out by the plant production specialists Limaplant in The Netherlands. Selection was done by the breeder after a few weeks as soon as it was possible to assess the desired characteristics. In the case of BCT9801 the objective was to obtain 100% of plants with curved leaves as opposed to the 50% curved leaves in the original material. For BCT9916 the object was to maintain 100% curved leaves and also to achieve a much more compact habit of growth so that the variety would be suitable for commercialisation in pot size 12. It was stated that about 30,000 plants were examined and rejected during the selection process. A number of plants selected as BCT9801 were sent to Dr. Kramer and it was claimed that Dr. Kramer agreed that BCT9801 could be distinguished from "Comtesse Louise Erdody" when the two varieties were grown together at the Botanical Garden in Heidelberg. In the case of BCT9916 the breeder claimed that the distinctive characteristics were masked by the growing conditions that were used in the DUS test. He said that the conditions that are used for the commercial production of BCT9916 should have been used to obtain the optimum expression of the characteristics for which the variety had been selected.

## Grounds

The appeal is admissible but not well founded.

The disputed decision stands up to legal examination since the variety BCT9916BEG has not been shown to be distinct from the reference variety "Comtesse Louise Erdody" (Art. 61 (2) lit. b), Art. 7 (1) CR).

In accordance with Art. 7 (1) CR a variety shall be deemed to be distinct, if it is clearly distinguishable by reference to the expression of the characteristics that result from a particular genotype or combination of genotypes from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Art. 51 CR.

The source of the plant material of the reference variety used by the testing authority was the Botanical Garden in Heidelberg, which obtained the original plant material from Nothelfer's nursery in Speyer. The reference variety was denominated "Comtesse Louise Erdody" after a detailed examination of the published literature on *Begonia rex* carried out by Dr. Kramer of the Botanical Garden in Heidelberg. It can be left undecided whether the reference variety is correctly named "Comtesse Louise Erdody" or not. The relevant point is whether "Comtesse Louise Erdody" was a variety in common knowledge on the date of the application for a grant of Plant Breeder's Rights.

The variety "Comtesse Louise Erdody" was disposed of both by offering for sale by Nothelfer's nursery between 1994 and 2000, and also by its supply to and maintenance in the Botanical Garden to which there was public access. Therefore the criteria for common knowledge are met. This conclusion is supported by UPOV TGP/3.2., dated 15 August 2002, 3.2.(c) which reads: "Specific aspects which should be considered to establish common knowledge include, among others: ... commercialization of propagating ... material of the variety .....; existence of living plant material in publicly accessible plant collections."

So there is no reasonable doubt about the identity of the material supplied by the Botanical Garden. At no time during the conduct of the DUS tests did the breeder

question the authenticity of the reference material. On the contrary he was eager to demonstrate that the reference material and BCT9916BEG were distinct when visits were made to see the tests being conducted by the Bundessortenamt.

In pleading its case to the Board of Appeal the appellant requested that a new series of DUS tests should be conducted. It now disputes the decision that BCT9916BEG is not distinct from "Comtesse Louise Erdody" or BCT9801BEG because the growing conditions used in the DUS tests did not allow the full expression of the characteristics for which BCT9916BEG and BCT9801BEG were selected. However, the applicant did not indicate any special growing conditions in making the application for a Community right (Technical Questionnaire 8.2.). When confronted by the Bundessortenamt on its premises with the absence of clear distinctness, the breeder neither mentioned that different growing conditions would have shown the specific characteristics of BCT9916BEG in comparison to "Comtesse Louise Erdody", nor asked for another test under different growing conditions. Furthermore the appellant did not object to the decision that BCT9916BEG was not distinct under Article 7(1)(CR) in the documentation submitted in support of his appeal. Therefore the Board does not see any relevant circumstance to not consider the examination report of the Bundessortenamt to constitute a sufficient basis for the decision taken by the Office. Consequently the appellant is not entitled to claim for the conduct of another examination for the variety of BCT9916BEG.

Winkler

Bould