Case A 003/2007
Case A 004/2007

DECISION

Concerning the Appeal A 003/2007 lodged by

SNC Elaris, 75, Avenue Jean Joxé, 49100 Angers, France,

Represented by Mr Jean Pierre Foissey, 4/6 Passage des Ateliers,
F-06800 Cagnes sur Mer,

Appellant 1,

and

Concerning the Appeal A 004/2007 lodged by

Brookfield New Zealand Limited, 11, Endsleigh Rd Havelock North, New Zealand,

Represented by Mr Mirko Eller, Voggler, Grüner & Partner, Via Carducci 8,
IT-39100-Bolzano,

Appellant 2,

and

Schniga Srl, Via Pengal 9, IT-39100 Bolzano,

Represented by Mr Stefano Borrini, Societa Italiana Brevetti SPA,
Piazza Di Pietra 39, IT-00186 Roma

Applicant,
Relating to Community plant variety right application No 18759 and
objections 06-021 and 06-022

Variety denomination:
GALA SCHNITZER

Species: Malus Mill.

gave the following decision:

On 21 November 2007, the Board of Appeal of the Community Plant Variety Office,
composed of G. Winkler (Chairman), J.M. Rosa Perez and D. Reheul (Members),

1. The decisions No EU 18759, OBJ 06-021 and OBJ 06-22 of 26 February 2007 are cancelled.
2. The application 1999/0033 is rejected.
3. The applicant shall bear the costs according Article 85 of the Basic Regulation.
Facts

On 18 January 1999, Konsortium Südtiroler Baumschulen, the legal predecessor of the current Applicant, filed an application regarding an apple of the species *Malus Mill.*, initially under the designation of Schniga. The designation was subsequently changed to Gala Schnitzer.

The Community Plant Variety Office (‘the Office’) appointed the Wurzen testing station of the *Bundessortenamt* [Federal Plant Variety Office] in Germany to carry out the technical examination.

In a letter of 26 January 1999, the Office requested that the Applicant hand over plant material to the testing station by no later than 15 March 1999. This letter states, inter alia: ‘The sender is responsible for all carriage incurred, and for the proper delivery of the plant material, including all the necessary phytosanitary and customs requirements’.

Only the material was delivered within the time limit. It arrived at the testing station in good condition. However, the health certificate was missing. Therefore, in a letter of 25 March 1999, the Applicant was notified that the ‘necessary health certificate’ was missing, and was requested to submit this ‘essential document’ ‘as soon as possible’. The testing station began examining the variety without waiting for the document to arrive.

A few days before 4 May 2001, the Applicant informed the responsible examiner at Wurzen that it was impossible to provide the health certificate. It had emerged that the material which it had sent at the beginning of the examination proceedings was virus infected.

The Office thereupon completely destroyed the material and permitted the Applicant to submit new material for a new examination. The health document required for this purpose was supplied.
As a result of the new examination, it was found that the candidate variety Gala Schnitzer was clearly distinguishable from the reference variety Baigent and moreover was stable and uniform.

During the examination proceedings, the appellants objected to the application on 5 May 2006.

By decision No EU 18759 of 26 February 2007, the Applicant was granted a Community plant variety right for the variety Gala Schnitzer. The appellants’ objections were dismissed by decisions OBJ 06-021 and OBJ 06-022 on the same date.

The appellants filed notice of appeal on 11 April 2007.

As grounds, they argued – as already stated in the opposition proceedings before the Office – that the Office had not been authorised to permit the Applicant to submit new plant material. Rather, the Office had been obliged to refuse the application in accordance with Article 61(1)(b) in conjunction with Article 55(4) of Council Regulation (EC) No 2100/94 of 27 July 1994 (hereinafter ‘CR’). Moreover, it was not possible to distinguish the candidate variety from the reference variety, Baigent.

The appellants request

the cancellation of decisions Nos EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007 and the refusal of application No 1999/0033.

The Applicant and the President of the Office apply

for the dismissal of the appeals.
The President of the Office asserts that he believed that he was authorised within the scope of his powers of discretion to permit the Applicant to supply new virus-free material for a new examination.

The Office took the view that the wording of the letter of 26 January 1999, ‘including the necessary phytosanitary requirements’, and the wording ‘health certificate’ in the reminder letter of 25 March 1999, was perhaps liable to be misunderstood. The Applicant might well not have been able to recognise beyond doubt that this meant the document confirming that the material was not only free of viruses that were externally visible but also of latent viruses that were not externally recognisable. The Applicant had therefore acted in good faith when it supplied the material, which was in good condition externally. The fact that, as later emerged, the material had actually been infected by viruses could therefore not be allowed to be detrimental to the Applicant. The Office had therefore permitted the Applicant to submit new, healthy material. It had thus ‘consented to non-submission’ according to Article 61(1)(b) CR.

When questioned by the Board, the Office confirmed that it was the Office’s standard practice to request the health certificate in all cases. This is necessary in order to obtain comparable examination results, since it is true that viruses can significantly influence the phenotype of a plant. Therefore, a plant variety right is on no account granted without a health certificate, and therefore in this case the Office also insisted that the health document be submitted ‘as soon as possible’.

Furthermore, the Office stated that the examination of the material nowadays does not start until the health certificate is available. As a result of technical progress, anno 2007, such a certificate can be obtained quickly, whereas at the time of the contested application (1999) it took much more time to conduct an analysis to identify viruses. For this reason, the examination had been started before the certificate was received, since in comparable cases the certificate had always been submitted subsequently.

Additionally, the Office had conceded when asked that there had to date been no misunderstandings on the part of the Applicant with respect to the significance of the health certificate.

The Applicant essentially endorses the comments made by the President of the Office. Since it did not itself file the application in 1999, it supposes that the initial
applicant probably did not know that the material also had to be free from latent viruses.

However during the oral proceedings it became clear that the initial applicant was fully aware of the presence of viruses in his material since the material had been offered to a specialized lab already in 1996; the lab identified two viruses and hence a health certificate could not be handed over. Moreover thermotherapy (a method to get rid of the viruses) failed to deliver virus-free material. So when the initial applicant applied the candidate variety on 18 January 1999 and received the request for a health certificate from the Office, a health certificate was not available and not due to become available owing to the persistent presence of two well identified viruses.

**Grounds**

The appeals are admissible and well-founded.

Under the circumstances, the Office was not authorised to permit the Applicant to submit new material for a new examination. There is no legal basis for doing so. In particular, even the president’s right to make discretionary decisions did not constitute justification for permitting this. There is no scope to exercise discretion if the Office is obliged to undertake an action prescribed by the CR.

Article 61(1)(b) CR reads:
‘The Office shall refuse applications for a Community plant variety right if and as soon as it establishes that the applicant has not complied with a rule or request pursuant to Article 55(4) […] within the time limit laid down, unless the Office has consented to non-submission’.

In accordance with this provision, the Office may not decide at its own discretion whether to fulfil this obligation or not, since it is a ‘must’ provision, not a ‘can’ provision.
The preconditions for refusal were fulfilled.

According to Article 55(4) CR, ‘The Office shall determine, through general rules or through requests in individual cases, when, where and in what quantities and qualities the material for the technical examination and reference samples are to be submitted.’

In accordance with the aforementioned provision, the Office had requested that the Applicant submit the material along with the health certificate by 15 March 1999. No objection should be made to the fact that the Office did not refuse the application immediately after the expiry of the deadline because the deadline for submission of the health document had been missed, but filed a new request for the submission of this document to the Applicant. Notification should be provided in a written document that should be delivered deadlines which, if missed, entail a legal disadvantage (cf. Article 79 CR). Since the letter of 26 January 1999 was sent without forms and it is possible that it could not be proved that the Applicant had received it (cf. Article 65 ff of Commission Regulation (EC) No 1239/95 of 31 May 1995, hereinafter ‘ComR’), it could not by itself give rise to a refusal of the application. It is true that the letter of 15 March 1999 was not accompanied by forms, but the delivery defect was remedied, since it can be seen without any doubt from the correspondence between the Office and the Applicant that this letter had reached its addressee (cf. Article 68 ComR).

The reminder letter of 15 March 1999 does not set a deadline in due form. ‘As soon as possible’ is an indication which defines not a fixed point in time, but an open-ended period of time. In this case, it was therefore not (no longer) necessary for the Office to remedy this defect, since it was clear at the beginning of May 2001 that the document requested could never have been submitted due to the viral infection of the material submitted.

The point had thus been reached at which the application should have been refused pursuant to Article 61(1)(b) CR.
In so far as the Office relies on the fact that it ‘consented to non-submission’ within the meaning of the aforementioned provision, the Board of Appeal is unable to concur with it.

‘Consented to non-submission’ relates not to the health document requested, but, as the reference to Article 55(4) CR demonstrates, to the plant material of the candidate variety for the technical examination. It was not possible to forgo the submission of the health certificate, and it also was not forgone.

When the Office opines that it could have forgone the submission of material, in such a manner that the defective material is ‘magicked away’ or treated as not having been submitted, the Board is unable to concur with the Office.

The Office is obliged to request material from every applicant pursuant to Article 55(4) CR. It is required for the examination, and a positive result of the examination for the applicant is once more a necessary condition for the grant of the property right. Therefore, the Office can only consent to a non-submission of material in exceptional cases, i.e. when, pursuant to Article 27 ComR, the Office acknowledges and accepts an examination report which has already been drawn up as sufficient basis for a decision.

In contrast, Article 55(4) CR does not provide a legal basis for repeated submission of plant material. An omission inevitably results in refusal of the application pursuant to Article 61(1)(b) CR.

The submission of plant material after the deadline has passed or the submission of new material is only possible in exceptional cases by way of reinstatement [restitutio in integrum] in accordance with Article 80 CR.

In permitting the late submission of healthy material, the Office obviously allowed itself to be guided by general considerations of equitableness. It probably intended to accommodate the Applicant, who had allegedly submitted unsuitable material in good faith.
These considerations do not justify allowing the Applicant to submit new material at a later date.

The Applicant is responsible for its material being in a healthy condition. Should it happen that the material, for example, only arrives at the testing station after the deadline has passed, or should it prove to be unsuitable for testing, for example due to viral infection, and these circumstances are not the fault of the Applicant, then the Applicant is not defenceless.

For these cases, Article 80 CR provides the possibility of restitutio in integrum. It reads: ‘Where, in spite of having taken all due care in the particular circumstances, the applicant [...] has been unable to observe a time limit vis-à-vis the Office, his rights shall, upon application, be restored if his failure to respect the time limit has resulted directly, by virtue of this Regulation, in the loss of any right [...].’

Such an application is admissible if it is filed within two months, or at the latest one year, after the impediment that caused the deadline to be missed has ceased to operate. In this case, the Applicant had realised around the end of April 2001 that it would never be able to supply the requested health certificate, after it had learned that the material was infected by viruses.

The Applicant filed no such application at any time. However, the Office prevented such an application by allowing the submission of new material without an application having been filed, and so the Applicant cannot be accused of not filing the application. Thus, although the two-month period never began to run, it is nevertheless now impossible for the application to be filed, since in accordance with Article 80(2) CR the period of one year has also elapsed. The period of one year is a preclusive period that cannot be extended under any circumstances, even for reasons of equitableness. This is intended to prevent rights remaining in the balance for too long.

In principle, the Office cannot restore an applicant’s rights without an application having been filed.

In exceptional cases, an application may be forgone if it is obvious to the Office, from the files or in some other way, that the party that made the omission missed the
deadline without breaching its duties of care. For example, this covers cases in which the Office learns from the media that the material could not reach its destination in good time as a result of a strike or thunderstorm, or that it was subsequently destroyed by hail at the testing facility. The Office's supposition that the Applicant understood the request for the health certificate to the effect that the material only had to be free of externally visible viruses is not on its own sufficient for an application for restitutio in integrum to be forgone, since this does not prove that the Applicant was actually mistaken and that it submitted unsuitable material through a lack of knowledge that was not its fault.

Moreover, an application for restitutio in integrum would have been unfounded. The party requesting restitutio in integrum must substantiate the circumstances justifying this. The Applicant failed to prove convincingly that it had submitted unsuitable material despite taking the care that could reasonably be expected of it. It never commented on the issue of what idea it associated with the term 'health certificate'. It thus did not prove convincingly that it was misled in this respect. Rather, it must be assumed that the Applicant, like all other applicants, is familiar with the health certificate, since, as the Office stated, all other applicants were aware that a health certificate must confirm that the material might not be even latently infected by viruses. The original applicant was experienced in the field of plant variety rights, including in particular the export of plant material to other countries within the Community. Moreover, no remarks have been made by the applicant in the scope of its communication with the Office that indicate a lack of knowledge of the meaning of the term 'health certificate'. On the contrary, it emerged during the oral proceedings that the applicant at that time had already requested a health certificate from a competent authority before the application was filed, and finally applied for another health certificate after the Office requested, by letter of 26 January 1999, that the Applicant submit such a certificate. The applicant at the time in question thus filed its application at a time when, as a result of the previously determined viral infection and the dubious effectiveness of the thermotherapy, it must have taken into account the possibility that the material was not free of latent viruses. This constitutes a breach of its duties of care by the applicant at that time. This strategy of applying 'on the off-chance' is not within the spirit envisaged by the legislature, which assumes that all applicants will submit
variety material which can be examined. If the ‘adventurer’ is unlucky because the risk of which it is aware materialises and the unsuitability of the material comes to light, it may not be rewarded for its premature application by being granted an early priority date while being permitted to submit new material. This would be to the detriment of third parties. Therefore, in such cases the application must be refused and the applicant instructed to file a new application if this is still meaningful (on the basis of novelty).

The decision as to costs is based on Article 85 CR.

Winkler

Rosa Perez