

CPVO case-law 1995-2015



Summaries of decisions and judgments of the Board of Appeal,
the General Court and the Court of
Justice of the European Union



CPVO

Community Plant Variety Office

Case-law 1995-2015

***Europe Direct is a service to help you find answers
to your questions about the European Union***

Freephone number (*):

00 800 6 7 8 9 10 11

(* The information given is free, as are most calls (though some operators, phone boxes or hotels may charge you).

More information on the European Union is available on the Internet (<http://europa.eu>).

Luxembourg: Publications Office of the European Union, 2015

Print ISBN 978-92-9152-159-3 doi:10.2803/159316 TG-04-15-259-EN-C
PDF ISBN 978-92-9152-158-6 doi:10.2803/22610 TG-04-15-259-EN-N

© European Union, 2015

Reproduction is authorised provided the source is acknowledged.

Printed in Italy

PRINTED ON WHITE CHLORINE-FREE PAPER

Editorial Committee:

Alexander Von Mühlendahl, J.D., LL.M.

Attorney at law, Bardehle Pagenberg Partnerschaft mbB
Visiting Professor, Queen Mary University of London
1994-2005 Vice-President, Office for Harmonization in the Internal
Market (Trade Marks and Designs)

Bart Kiewiet, LL.M., Legal Consultant

of Counsel, Vondst Advocaten, Amsterdam
PVR Consultant, D Young & Co, London
1996-2011 President of the Community Plant Variety Office

Spyros Maniatis

Professor of Intellectual Property Law
Head, Centre for Commercial Law Studies
Queen Mary University of London

Project leader:

Paraskevi Kollia, PhD student, CCLS

Queen Mary University of London

Project contributor:

Emanuela Gambini, PhD student, CCLS

Queen Mary University of London

To have access to all the judgments, please visit the CPVO webpage: www.europa.eu

CONTENTS

1. FOREWORDS	5
2. SUMMARIES	8
2.1. Board of Appeal	8
2.2. Court of Justice of the European Union	69
2.2.1. General Court	69
2.2.2. Court of Justice	79
3. TABLES OF DECISIONS	84
3.1. Decisions reached by the Board of Appeal of the CPVO (1999-2015) (<i>listed by decision date</i>)	84
3.2. Decisions appealed to the Court of Justice of the European Union: General Court and Court of Justice (2006-2015) (<i>listed by decision date</i>)	96
4. LIST OF CASES	99
4.1. CPVO Board of Appeal: chronological list of decisions	99
4.2. Court of Justice of the European Union	100
4.2.1. General Court: Chronological list of judgments	100
4.2.2. Court of Justice: Chronological list of judgments	101
5. COMPOSITION OF THE BOARD OF APPEAL OF THE CPVO	102
5.1. List of qualified Chairs of the Board of Appeal (1997-2017)	102
5.2. List of qualified members of the Board of Appeal (1996-2016)	102
MAIN ACRONYMS AND ABBREVIATIONS	104

1. FOREWORDS



Martin Ekvad

The year 2015 is an exciting one for the CPVO as we celebrate 20 years of protecting new plant varieties in the EU. Our efforts to mark this special occasion allow the CPVO to reflect on past accomplishments such as the establishment and jurisprudence of the Board of Appeal, and on future challenges, one of which is to provide applicants with legal certainty and transparency. The Board will continue to play a very important role in this respect.

The CPVO is, on a regular basis, faced with the challenges of decisions on matters not regulated in detail in the law and how to rule in cases where different principles and interests collide. In this respect the Board of Appeal has given the CPVO, as well as applicants, important guidance on how to settle cases. The Board is constantly testing and often challenging the regulatory framework — offering clarification, highlighting weaknesses and ensuring a culture of excellence.

The Board has been given an important responsibility by the legislator, a responsibility which has been confirmed by the Court of Justice of the European Union. In a landmark case the Court of Justice stated that appraisals of scientific and technical complexity justify a limited scope of judicial review by the courts. In practice this means that the Board of Appeal is, in principle, the last instance to review such matters, which, in my view, amplifies the importance of its work.

This booklet is part of increasing efforts by the CPVO to encourage familiarity with the EU plant variety right system and to create awareness of the rules governing the system. You may access all the cases mentioned in this booklet in full text, as well as other plant variety-related cases, in the case-law database on the website of the CPVO.

It gives me great pleasure to thank and congratulate all those who have contributed to the work and achievements in relation to the activities of the Board of Appeal over the past 20 years and I will, in particular, mention the Chairs of the Board, Mrs Gabriele Winkler and Mr Paul van der Kooij, and the Vice-Chairs, Mr Dimitrios Christodoulou, Mr Tim Millett and Mrs Sari Haukka, as well as all the members of the Board, listed in the booklet, and last but not least, Mrs Véronique Doreau, Secretary of the Board.

I would also like to take this opportunity to especially thank Mrs Paraskevi Kollia, project leader, and Mrs Emanuela Gambini, project contributor, for having drafted the summaries and Mr Bart Kiewiet, Mr Alexander von Mühlendahl and Professor Spyros Maniatis for their work in editing this booklet. I am sure you will all agree that they did an excellent job!

Wishing you a most enjoyable read,

Martin Ekvad
President of the CPVO



Paul van der Kooij

In 2015 the Community Plant Variety Office celebrates its 20th anniversary. This book provides an overview of the decisions of its Board of Appeal, as well as decisions on further appeals to the General Court and the Court of Justice, up to and including May 2015. In this period, the Board of Appeal handed down a total of 56 decisions, or on average fewer than three appeals per year. That is a relatively (indeed, very) low number of appeals, certainly when compared to the total number of applications filed with the Office during these two decades: more than 52 000.

If we can conclude anything from these figures, I think it is that the EU plant variety protection system works well. Both the Office and the examination offices in the Member States are well equipped and highly dedicated to carrying out the duties entrusted to them. Most of the appeal cases concern the requirements of distinctness, uniformity and stability, and are thus broadly reflective of the important daily work carried out by the first instance authorities.

Certainly by 2015, a number of formal issues the Board had been called upon to deal with in the past (for example, concerning the late payment of fees, or the admissibility of appeals) seem to have been resolved. The electronic application tools now in use may also prevent errors from occurring, as will, no doubt, the growing awareness among plant breeders of the peculiarities of the system. At the same time, the cases remitted to the Board have become steadily more complicated over the years, and the appeal files are sometimes dauntingly voluminous.

To me it seems that the provisions laid down in Council Regulation (EC) No 2100/94 (the 'Regulation') and in Commission Regulation (EC) No 874/2009 (the 'Implementing Regulation'), as well as those laid down in the technical guidelines and protocols, provide a sufficient degree of flexibility for the Office and the examination offices in order to fulfil their tasks: at every stage of the procedure there is ample room to take into account the specific circumstances of the case at hand.

Are there any challenges remaining for the years ahead of us? As far as the Board of Appeal is concerned, we must make sure that an adequate quantity of (legally and technically) qualified members remain available, and that they also possess good linguistic skills, taking into account both the average size of the appeal files and the fact that translation of an entire dossier would make proceedings far too expensive. In line with this, it may be that a modified language regime such as the one adopted at the Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) in Alicante deserves further consideration.

With these thoughts in mind, I am confident that the Board of Appeal will be able to perform its duties in the next decade!

Paul van der Kooij

Chair of the Board of Appeal (2007-present)



Gabriele Winkler

The celebrations of the 20th anniversary of the Community Plant Variety Office and my appointment as first President of the Board of Appeal in 1995 give reason for some reflections. I then felt highly honoured, and at the same time challenged, to take the chair of the Board of Appeal.

I was pleasantly surprised to find out that particularly the Basic Regulation, the Implementing Regulation and the Fees Regulation had obviously been influenced by German law. Thus the regulations were familiar to me because of my long-lasting experience as a judge at the German Federal Patent Court, where I dealt inter alia with patent and trademark law. As presiding judge and — before this — as a lawyer, oral proceedings had been my daily duties. With this background I used the opportunity to familiarise myself with all the specifics of plant varieties, their biology and the testing proceedings. Thanks to the kind invitation of the German *Bundessortenamt*, I spent a most interesting day there, in the fields and greenhouses, to get more detailed information for my task in Angers.

At work, I highly appreciated the special regulation — different from German law — that the Office is party to the appeal proceedings. This is advantageous for all participants of the appeal proceedings. The Board of Appeal enormously benefits from the presence of the representative of the Office, normally the head of the legal department, occasionally accompanied by the examiner, who are able to answer newly arising questions of the other participants and to give further explanations relevant to the issue. The practice of taking part in the appeal proceedings regularly results in well-founded arguments. Mainly during my second presidential term the statements of the Office became more and more sophisticated.

The parties, normally represented by lawyers, acquainted themselves quickly with the proceedings. The practice of the lawyers, although not compulsory, to present their pleadings in written form is quite helpful, as the language of proceedings is usually the mother tongue of only one of the members of the Board. So they can all concentrate on listening attentively to the pleadings without being forced to make notes at the same time.

Of course it happens, as in other legal fields too, that an appellant tries to bedazzle the Board by producing wafts of mist with loads of papers. The aim seems to be to induce the Board to decide in favour of the appellant and so to avoid a further appeal to the General Court and ultimately to the Court of Justice of the European Union. I recall that the Board was never impressed by such tactics.

I am looking back over 10 fascinating years at the Office in lovely Angers. Whenever I am now happily gardening at home, I let my mind thankfully wander to my excellent colleagues of the Board and at the Office, who all supported my work helpfully and amicably.

May the Office and its staff stay in full bloom forever!

Gabriele Winkler

Chair of the Board of Appeal (1997-2007)

2. SUMMARIES

2.1. Board of Appeal

'Jubileum'

Case A 002/1998; Swedish University of Agricultural Sciences vs CPVO

14/9/1999

KEYWORDS: payment, appeal fees, collection, registered letter

RESULT: The appeal was deemed not to be filed.

BACKGROUND: Concerning the 'Jubileum' variety of the *Prunus domestica* L. species, a CPVR application was filed but the variety was found to be lacking novelty. The applicant appealed and paid one third of the appeal fees. The Office referred the case to the Board of Appeal and advised the applicant to pay the remainder of the appeal fees within one month. Four months later, the Office advised the applicant by registered mail of the consequences of the failure to pay the appeal fees. The fees were not paid.

DECISION: The appeal was deemed not to have been filed as a legal consequence of non-payment of the fees within one month of the CPVO's request (Art. 83(2) and Art. 113(2) of the Regulation). The Office's request was sent by registered mail, so it was deemed to have been served, and the applicant's representative was deemed to have refused to collect it (Art. 65(4) of the Implementing Regulation). The registered mail was available for the representative to collect and, after expiry of the collection deadline, it was returned to the Office. Other registered letters did arrive at the relevant address, and the representative was aware that a letter was to be expected after a phone conversation with the Office.

CONCLUSION: As the remaining appeal fees were not paid in time, the appeal was deemed not to have been filed.

‘Enara’

Case A 001/1999; Novartis Seeds B.V. vs CPVO

25/1/2000

KEYWORDS: special growing conditions, value for cultivation and use, distinctness, appeal fees

RESULT: The appeal is admissible and partly well founded.

BACKGROUND: A CPVR application was filed for the ‘Enara’ variety of the *Lactuca sativa* L. species. Together with the ‘Eduerne’ variety, ‘Enara’ was accepted for registration in the marketing catalogue in the Netherlands. The varieties were also filed for registration in Spain. The Spanish authorities refused registration for ‘Enara’, finding that it was not sufficiently distinct from the ‘Eduerne’ variety.

The CPVR application for ‘Enara’ was refused for lack of distinctness (Art. 61(2)(a), 54(1) and 7(1) of the Regulation), as any alleged differences between ‘Enara’ and ‘Eduerne’ related to value for cultivation and use (VCU) characteristics, which are not part of the distinctness, uniformity and stability (DUS) characteristics laid down in the relevant International Union for the Protection of New Varieties of Plants (UPOV) guidelines.

The successor in title of the applicant, Novartis Seeds B.V., lodged an appeal against the decision. The appellant argued that additional DUS characteristics differentiated the two varieties, which would become apparent if the varieties were examined for one more year under optimal growing conditions in northern Europe, since these were not apparent under the high light conditions of Mediterranean areas. It also pointed to differentiating characteristics that, in its opinion, already distinguished the two varieties. The Office used the floodgates argument against allowing further examinations in a third country and noted that the applicant failed to ask for particular growing conditions in the technical questionnaire. The characteristics pointed to by the appellant were related to VCU or performance, but not to DUS.

DECISION: The Board of Appeal ruled that a third examination report in northern Europe was not justified under normal circumstances and the Spanish examination data were correctly taken into account for distinctness purposes. Both ‘Eduerne’ and ‘Enara’ were part of common knowledge as a result of their inclusion in the catalogue (‘Eduerne’) and as a result of being marketed (‘Enara’) in the Netherlands. ‘Eduerne’ had priority over ‘Enara’ under Spanish law and was common knowledge in the Netherlands, so it could be used as a reference variety for ‘Enara’ (part 1).

National examination reports may indeed be taken into account by the CPVO, except if they are inadequate or contradictory, in which case the CPVR cannot be granted, as the right is in force in the whole of the EU. However, in the case where it is not excluded that different testing conditions would better exemplify any DUS differences, Art. 57(3) of the Regulation authorises the Office to ask for a complementary report to be conducted, based on the original seed sample (part 2). This being the case here, the Board of Appeal ordered the CPVO to request from the Spanish testing authorities a complementary examination under specified conditions.

The appeal fees were not refunded to the appellant, despite the partial success of the appeal, because the success was due to facts not available at the time of the initial decision and the appellant did not mention the special growing conditions in the technical questionnaire (part 3).

CONCLUSION: A complementary examination of one test cycle based on the original seed sample was ordered. No order for the refund of the appeal fees was made.

'Llover'

Case A 002/1999; De Faveri Tullio vs CPVO

19/5/2000

KEYWORDS: commercialisation, common knowledge, distinctness, national PVR

RESULT: After the interim decision was granted, the appeal was withdrawn.

BACKGROUND: The 'Llover' rose variety was granted a CPVR. The 'Selly' rose variety was part of common knowledge through its commercialisation in Italy prior to 'Llover's' application, of which the CPVO was not aware. As a result, the Office did not conduct a comparison of the two varieties and granted a CPVR for 'Llover'.

The 'Selly' right holder appealed against the grant of the title, arguing that the decision to grant a CPVR to 'Llover' should be declared null and void, as the two varieties were not distinct and 'Selly' had been regularly sold in Italy for two and a half years. The Office noted that, had it known about 'Selly's' commercialisation, it would have included it in the DUS examination.

DECISION: The Board of Appeal ordered a direct comparison of the two varieties with original material provided by the parties so that distinctness of 'Llover' could be judged.

CONCLUSION: The appeal was withdrawn without a final decision being taken.

‘Estrade’

Case A 002/2000; Svalöf Weibull AB vs CPVO

27/3/2001

KEYWORDS: distinctness, uniformity, different examination reports from two examination offices

RESULT: The appeal is dismissed.

BACKGROUND: Concerning the ‘Estrade’ variety of the *Brassica napus* species, applications were filed in the United Kingdom and in Sweden before an application for a CPVR was made. The CPVO based its negative decision on the UK examination report, which had been prepared by the German Office. The CPVO concluded that the variety was not uniform or distinct from three known varieties. Thus the application was rejected for non-distinctiveness. This decision was appealed. The appellant argued that the CPVO should have used the — positive — Swedish examination report instead of the UK/German reports. It argued that there was no reason to use the examination results of the national office where the first application had been filed and noted that the UK Ministry of Agriculture also found morphological differences between the varieties in the VCU tests. It attributed the differences between the tests to the spacing, which in the German tests was wider, while in Sweden the plants were closer together, more like actual commercial circumstances. The Office submitted that it relied on the German tests, as they were based on direct side-by-side comparisons rather than comparisons as performed by the Swedish authorities based on knowledge of the general behaviour of plants.

DECISION: According to the Board of Appeal, both tests are to be given appropriate weight, so the Office faced contradictory results. It must take into account all relevant facts and data and is not bound by any of the national authorities’ results. The Board of Appeal noted that the burden of proof is on the applicant. Since the German tests were based on direct side-by-side comparisons, they were more reliable. The Office had not seen the test scores of the Swedish results, and the British tests were VCU tests, so not of the same rigour as DUS tests. Finally, the alleged DUS differences invoked by the appellant supposed to show distinctness differed by only one point (on a continuous 10-point scale), which was not necessarily enough to establish clear distinctness, as Art. 7 of the Regulation requires. The third parameter, earliness of maturity, differed by two points on this scale, but was not one that forms part of the recommended UPOV test scheme. So the results can be reasonably interpreted as supporting the contested decision.

CONCLUSION: As the variety was considered to be not distinct, the Board of Appeal dismissed the appeal.

'Branglow'

Case A 004/2000; Hubert Brandkamp vs CPVO

6/12/2001

KEYWORDS: fees, procedures, time limit, serving documents

RESULT: The appeal is admissible and well founded.

BACKGROUND: The CPVR holder of the 'Branglow' variety of the *Chrysanthemum* species failed to pay the annual fee. The Office asked him to pay the fee plus the surcharge, but he failed to do so. As a consequence the right was cancelled.

The right holder appealed and also paid the annual fee plus surcharge with several months of delay. He argued that in respect of a large number of rights owned by him, there were doubts about which accounts had been paid and which had not. He argued that the non-payment of fees was due to a misunderstanding and incapacity to reach the Office. He apologised for exceeding the time limit allowed for payment and requested that the cancellation decision be annulled. The CPVO argued that the fee should have been paid within one month of the letter informing the proprietor of the lack of timely payment, so the CPVR was correctly cancelled.

DECISION: The Board of Appeal ruled that, in principle, the Office may cancel a CPVR for non-payment of the fees (part I). However, exceeding the time limit for payment could not result in the CPVR cancellation in this case, as the Office notifications did not set a time limit within which to pay the fee and surcharge. The appellant denied having received the first letter, sent by ordinary mail, which normally is sufficient to assume service of the letter (part I.1).

The next letter requesting payment was properly served but also failed to set a time limit (part 2). It is service of the letter, actual or presumed, that sets the deadline running, which according to the Office's rules cannot be less than one month, if the decision brings about a legal disadvantage. Art. 13(3) of the Implementing Regulation provides that the one-month time limit starts running from the date when the letter was sent and not the date when the recipient was presumed to have knowledge thereof, thus diminishing the time the recipient had to act upon it. According to the Board of Appeal, this contravened the rule of law and the principle of equality of treatment. Taking into account the international nature of the Office, parties will have different times to react to the letter, thus rendering the time limit unequal.

Finally, the Board of Appeal decided not to refund the appeal fees as this would not be equitable based on the circumstances (part II). The appellant failed to comply with his renewal fee deadline and his general behaviour showed a breach of his duty of reasonable care. It was not the Office's calculation of a different time limit that caused the appeal. Thus, appeal costs could have been avoided if the appellant had exercised his duty of care.

CONCLUSION: The Board of Appeal annulled the decision of the CPVO but did not order the refund of the appeal fees.

'Egypt'

Case A 005/2000; Mak-Leek Inc. vs CPVO, Board of Appeal

28/5/2002

KEYWORDS: *force majeure*, procedures, *restitutio in integrum*

RESULT: The appeal is admissible, but not well founded.

BACKGROUND: After applying for a Dutch PVR and withdrawing the application for not fulfilling the technical conditions of the propagating material, the appellant applied for a CPVR for its *Lilium* L. 'Egypt' variety. The propagating material to be submitted for testing had to be 90 % free of a specified *Lilium* virus, but the material that the appellant submitted did not fulfil this condition. He asked for a postponement of the technical examination, as his stock of non-infected bulbs had been destroyed in a fire. This application was refused. Subsequently, his application for a CPVR was also refused for failing to submit propagating material for examination or to give any reasons for asking for a postponement. The request for a postponement was made orally, whilst it was made clear by the Office that a written application should be submitted within the deadline. The appellant asked for a new deadline to submit material for testing and appealed, arguing that the Office should have allowed an extension of the deadline, since the fire was an instance of *force majeure*. Moreover, he asked for a postponement of the technical examination before the time limit for submitting the propagating material had expired. The Office argued that the appellant was not entitled to extend the deadline, as he had not made an application for *restitutio in integrum*, pursuant to Art. 80 of the Regulation. An application for postponement must be made before the end of the period fixed for submitting the propagating material. This time limitation is necessary since postponement could prove problematic when assessing the distinctness of other varieties tested and compared to the candidate variety, which was of common knowledge. A situation could arise where a right granted for another variety must be repealed if it subsequently emerges that it was indistinguishable from the appellant's variety.

DECISION: The Board of Appeal ruled that the appellant was not entitled to a new deadline. It failed to submit appropriate material for testing and also failed to submit a written application for extension of the testing deadline within the time limit to make up for the loss of his material in stock. Thus, it had only inadequately complied with the request to submit propagating material of a particular type and quality in that the bulbs were not disease free and therefore could not be used for examination. A time limit for effecting an act is deemed not to be observed not only when the requested act does not occur, but also when the act is effected so incompletely that its purpose cannot be pursued.

Regarding the fire, the Office exceptionally granted the appellant the possibility to request in writing a new deadline to complete the act in question. For reasons of legal certainty, only applications made in writing are valid in proceedings before authorities and courts (Art. 57 of the Implementing Regulation). The decision of the President of the CPVO as to which postponement applications are granted is purely within his discretion, and only reviewable by the Board of Appeal in case of misuse of this discretion, which is evidently not the case here.

Regarding *restitutio in integrum*, the appellant did not submit an admissible application; also, the applicant did not exercise the procedural care expected.

CONCLUSION: The appeal is refused.

‘Maribelle Red’ — ‘Maribelle Mauve’ — ‘Maribelle Bronze’

Cases A 001/2002, A 002/2002, A 003/2002; Pieters Joseph en Luc B.V.B.A. vs CPVO

1/4/2003

KEYWORDS: common knowledge, distinct, fair hearing, novelty

RESULT: The appeal is admissible, but dismissed.

BACKGROUND: The appellant applied for a CPVR for the *Chrysanthemum* varieties ‘Maribelle Red’, ‘Maribelle Mauve’ and ‘Maribelle Bronze’. DUS tests showed that the varieties were not stable or distinct from some reference varieties, which were part of common knowledge, and were also bred by the applicant. The latter appealed on the basis that the reference varieties’ applications had been withdrawn, thus were not part of common knowledge, even though they had been marketed with his consent in the EU territory. In his view, the new varieties were distinct, as they were stable, unlike the reference varieties. Also he argued that he did not have access to the examination reports, thus his right to a fair hearing was infringed. The CPVO argued that the fact that the varieties in question had been marketed was crucial for their becoming part of common knowledge. The varieties were also not new or distinct from the reference varieties, and stability does not play a role in the distinctness judgment.

DECISION: The Board of Appeal found that the varieties were identical in all aspects except for stability, which is irrelevant for distinctness purposes. A variety can be a distinct, uniform and stable plant grouping without, however, fulfilling the requirements for CPVR protection. Stability is an independent criterion for protection, observable after years of plant propagation, which cannot be a distinguishing factor, because it is not expressed. Secondly, the marketing of the reference varieties for more than a year prior to the date of filing the CPVR application rendered them part of common knowledge, and thus destroyed novelty for the ‘Maribelle’ varieties. Finally, no right to a fair hearing has been infringed, as the appellant had all reasonable access to information, as prescribed by relevant regulations.

CONCLUSION: The Board of Appeal found no reason to reverse the CPVO’s decision and rejected the appeal.

'Santis 99'

Case A 005/2002; Syngenta Seeds B.V. vs CPVO

2/4/2003

KEYWORDS: distinctness, vegetative propagation, seed propagation, reference material

RESULT: The appeal is admissible, but refused.

BACKGROUND: An application was filed for the 'Santis 99' variety of the *Sanvitalia* Lam. species. The DUS examination found that the variety lacked distinctness compared to the 'Aztekengold' reference variety. 'Aztekengold' was originally propagated by seed but later the producer developed clones and reproduced the plant through vegetative propagation, i.e. cuttings. The seed-reproduced 'Aztekengold' variety was part of common knowledge, but the appellant argued that the material of the reference variety, reproducible through cuttings, was not the same as the 'Aztekengold' variety marketed before the filing of the 'Santis 99' application. At the time of the application no variety with the particular characteristics of 'Santis 99' existed in the market. According to the applicant, the reference material of 'Aztekengold' was an illegal copy of 'Santis 99', given that copying is easy and fast in propagation through cuttings and there was ample time to obtain an illegal copy. The CPVO argued that it is immaterial whether the reference material was true to the seed-reproduced variety or the variety reproduced through cuttings and that the appellant's allegations were not substantiated.

DECISION: In a brief decision, the Board of Appeal confirmed the contested decision and dismissed the appeal. The decisive question was whether 'Aztekengold' was part of common knowledge at the time of the filing of the application. No reasonable doubt existed as to the identity of the reference material. The arguments of the appellant were based on mere suspicion with no substantiating evidence. The result of the technical examination regarding distinctness is undisputed.

CONCLUSION: The CPVO decision is confirmed.

'BR9'

Case A 017/2002; Sakata Seed Corporation vs SVS Holland B.V. and CPVO

3/4/2003

KEYWORDS: breeding activities, common knowledge, distinctness

RESULT: The appeal is admissible but rejected.

BACKGROUND: A CPVR application was filed for the 'BR9' variety of the *Brassica oleracea* L. convar. *botrytis* (L.) Alef. var. *cymosa* Duch species and after the technical examination the right was granted. An appeal was lodged by Sakata based on non-entitlement, as it claimed it was Sakata that bred the variety in question. In an exchange of hybrid seeds, Sakata had transferred its hybrids 'Marathon' and 'Greenbelt' to Asgrow, a US company later acquired by SVS, the 'BR9' title holder. After the identification of pure parental lines of 'Marathon' and 'Greenbelt', which it crossed, a hybrid variety strongly similar to 'Marathon' was developed. According to Sakata, SVS identified inbred lines, which it sowed and named 'BR9', so it was not entitled to a right for the variety, as it did not carry out any breeding activities in the meaning of Article 11(1) of the Regulation. Sakata obtained a US patent on 'BC-403' for an inbred broccoli line, which it claims corresponds to 'BR9'. SVS claimed that Asgrow was indeed entitled to use the seeds in breeding programmes, evaluating and developing varieties, as the exchange was done under no restricting terms and conditions. The parental lines were derived legally and this was a common occurrence in the breeding community. Regarding the US patent, it is not self-evident that Sakata is the breeder of the variety, or that it is identical to 'BR9'. The CPVO submitted that Sakata offered no conclusive evidence for its entitlement to 'BR9', but simply presented arguments. If the CPVO had known of the existence of the US patent, it would have included the variety in the technical examination of 'BR9'.

DECISION: The Board of Appeal did not see any evidence that SVS was not entitled to the CPVR. 'BR9' was judged to be distinct from 'Marathon' while the claims and description of the US patent did not reveal the identity of the two varieties. On the contrary, conclusive evidence was offered by SVS that 'BR9' cannot be 'Marathon's' parent.

Concerning the entitlement of the right, the Board of Appeal noted that the concept of breeding does not necessarily imply inventing something totally new but includes the planting, selection and growing of pre-existing material and its development into a finished variety. Asgrow lawfully possessed the material provided by Sakata and carried out typical breeding activities, like planting, growing, selecting atypical plants, testing the efficiency of the self-incompatibility system and ensuring that the variety was homozygous. This was sufficient to constitute breeding within the meaning of Art. 11 of the Regulation.

CONCLUSION: The Board of Appeal found the appellant's submissions unsubstantiated, rejected the appeal and ordered it to bear the cost incurred by the holder.

'Inuit'

Case A 018/2002; Hubert Brandkamp vs CPVO

14/5/2003

KEYWORDS: distinctness

RESULT: The appeal is admissible, but rejected.

BACKGROUND: The appellant applied for CPVR protection for the 'Inuit' variety belonging to the *Sutera diffusus* hort. species, reproduced through vegetative propagation using cuttings. The examination in regard to the reference 'Novasnow' variety revealed that 'Inuit' was not distinct from 'Novasnow', despite slight differences regarding the colour of the foliage. After a negative examination report, the appellant expressed his view on the differences between the two varieties and requested the grant of the right or a second testing. Nevertheless the CPVR application was rejected on the ground that the perceived differences were not great enough to establish distinctness, after which point the material submitted was destroyed. An appeal was lodged on the ground that 'Inuit' had smaller and darker foliage and smaller flowers compared to 'Novasnow'. The appellant claimed that those differences had been observed at several places where both varieties were grown. The CPVO argued that one note of difference in one state of expression of the plant is not sufficient to establish distinctness, as the test results showed, while a second testing would not prove otherwise, especially given the fact that the examination was executed properly.

DECISION: The Board of Appeal ruled that the differences between the two varieties merely meant that 'Inuit' constitutes itself a variety, thus in principle is amenable to CPVR protection. The Regulation makes it clear, though, that for a variety to receive protection, it has to be distinct, i.e. clearly distinguishable from any other variety. Given the fact that the award of a CPVR is an 'extensive monopoly right' 'prevailing within the community of free competition' it has to be awarded only if the plant variety world is enriched with a new variety. Furthermore, the differences between varieties have to be clear so that third parties know with certainty whether they encroach upon a CPVR. A table with relevant characteristics able to distinguish each one of the *Sutera* species varieties from the others has been produced in accordance with UPOV guidelines, similar to such tables of other species. The foliage colour was not one of the distinguishing characteristics. Regarding the characteristics included in the table, Inuit presented no differences to 'Novasnow'. The appellant's view is subjective and not substantiated through evidence, and there is nothing to suggest that the examination reports were faulty. Results of other testing institutes also cannot put the current result into doubt, as it is not known whether the tests were carried out on the same material or under the same conditions (part I.1).

The Board of Appeal also concluded that the appellant has no right to a second examination, as the examination report constituted a sufficient basis for a decision (part 2.I). The Board of Appeal also noted that, contrary to CPVO practice, submitted plant material should be kept as a precaution until a legal decision has become final, in case a decision is contested.

CONCLUSION: The Board of Appeal found no grounds justifying a reversal of the CPVO decision or to order a second testing.

'Terexotic' — 'Terwish' — 'Terroros' — Terseries' — 'Tersanne' — 'Tervirgin'

Cases A 008, 009, 010, 011, 012, 013/2002; Terra Nigra Holding B.V. vs CPVO

15/5/2003

KEYWORDS: fees, surcharge, cancellation

RESULT: The appeal is admissible, but unfounded.

BACKGROUND: The appellant holds around 100 CPVRs of the *Gerbera* L. species, among which for the varieties 'Terexotic', 'Terwish', 'Terroros', 'Terseries', 'Tersanne', 'Tervirgin'. The appellant failed to pay the second year annual fees for the above rights, and for other rights. The CPVO informed him that a surcharge would be imposed on the fees, and that the rights would be cancelled if the fees and surcharge were not paid by a specific date, a condition the appellant failed to satisfy. The same procedure was repeated for the third year's annual fees and the CPVO informed the appellant about the fees and the surcharge. Subsequently, the appellant transferred to the CPVO a fraction of the fees it owed without stating the purpose of the transfer. The CPVO inquired about it but received no answer. The CPVO announced the prospective cancellation of the rights if the outstanding fees and surcharges were not paid. The appellant again failed to pay. The CPVO sent a detailed letter with the outstanding fees, set a deadline for payment, served the letter, but received no response. After the deadline, the rights in question plus 37 other rights were cancelled. The appellant appealed and requested the maintenance of the rights, and claimed that part of the transferred fees were to satisfy the second year's annual fees plus surcharges, with the third annual fees plus surcharges still remaining outstanding. The CPVO remitted the case to the Board of Appeal, as it saw no reason to maintain the rights in question, even though the cancellation of rights in case of absence of timely payment is optional.

DECISION: The Board of Appeal reviewed the relevant rules and found that the CPVO had complied with the relevant provisions. The second year's annual fees were not considered paid until the appellant stated this was the purpose of the transferred money, quite some time after the passing of the deadline. The request for payment was served by registered letter and the appellant had the time within which to act. The appellant failed to take note of the detailed specification of the owed fees, and late payment of the second year's annual fees did not extinguish his owed fees. The Board of Appeal did not consider it equitable to maintain the rights as there were no extenuating circumstances. The CPVO showed extreme leniency and the appellant exercised no due diligence despite its experience in matters relating to CPVR.

CONCLUSION: The rights were cancelled with effect *in futurum*, so all remaining fees are still owed to the CPVO.

Breeder's reference 'BCT9916BEG'

Case A 023/2002; Genplant B.V. vs CPVO

8/10/2003

KEYWORDS: common knowledge, distinctness, marketing, public access, second testing

RESULT: Appeal is admissible but not well founded.

BACKGROUND: The appellant's predecessor filed an application for the 'BCT9916BEG' variety belonging to the *Begonia rex* Putz. species. The technical examination concluded that it was not distinct from the reference variety 'Comtesse Louise Erdody', whose denomination and identity was slightly in doubt. The variety was held in a botanical garden, where it was obtained by a commercial nursery. The candidate variety was also not distinct from a second reference variety, 'BCT9801BEG', which had already been refused a CPVR and a Dutch PVR. The application was refused, and the successor of the applicant appealed on the grounds that the reference variety 'Comtesse Louise Erdody' was not in common knowledge at the time of the application. It also expressed doubts on whether the reference variety had indeed the characteristics described in the literature and argued distinctness of the candidate variety, which would become apparent if it were grown and tested in specific conditions. The CPVO argued that the 'Comtesse Louise Erdody' variety is in common knowledge, as it was obtained from a botanical garden, to which the public has access and the material is authentic, despite doubts of its denomination. The variety had also been marketed by a German company between 1994 and 2000. The request to grow the variety under specific conditions was only made after the conduct of the tests. Concerning distinctness, the Office relied on the examination report and argued that the appellant did not bring any new information which could challenge the negative conclusions of the DUS report made by the competent testing station.

DECISION: The Board requested clarifications regarding the development procedure of the 'BCT9916BEG' and 'BCT9801BEG' varieties. It then ruled that the variety in question is not distinct from 'Comtesse Louise Erdody'. The doubts as to the denomination of the variety did not matter, as the crucial question is whether it was in common knowledge. Years of marketing and public access at the botanical garden show that it was.

On the request of a second testing under special conditions so that its full characteristics could be expressed and distinctness established, the Board of Appeal ruled that there is no sufficient basis for ordering one, as the technical examination was conducted properly and the appellant failed to bring this matter up in the various stages during the examination and before the results, when it had ample opportunity.

CONCLUSION: The Board of Appeal allowed the CPVO decision to stand and found no need to order a second testing.

'Jonabel'

Case A 031/2002; G. van Gelder B.V. vs CPVO

8/12/2003

KEYWORDS: distinctness, common knowledge, identity

RESULT: The appeal is admissible, but not well founded.

BACKGROUND: A CPVR application and Dutch PVR application were made for the 'Jonabel' variety belonging to the *Apple Malus* Mill. species. The variety has been marketed in the Netherlands and is a mutation of the 'Jonagold' variety, most similar to the 'Jored' variety. 'Jored' had been protected by a PVR in Belgium and a CPVR until it was revoked on grounds of lack of novelty. The technical examination for 'Jonabel' of the Dutch application concluded that it is not distinct from 'Jored'; the applicant appealed on the ground that the examination report had not been executed properly. The CPVO used the results of the same report and the applicant asked for its decision to be stayed until the end of the appeal procedure in the Netherlands. The Dutch PVR was finally awarded, the CPVO was informed, but it rejected the application on the basis that 'Jonabel' was not distinct from 'Jored', which was part of common knowledge. The applicant appealed and brought forward evidence supporting the fact that the material used and tested as 'Jored', the object of a Belgian PVR, was in fact of the 'King Jonagold' variety. Proceedings were pursued in Belgium to annul the CPVR, after which it would not be possible to regard 'Jored' as a generally known reference variety for 'Jonabel'. The appellant argued that the CPVO did not sufficiently take into account the decision of the Dutch Board of Appeal granting a PVR for 'Jonabel' in the Netherlands. The CPVO argued that 'Jored' was without any doubt generally known, as it had been sold before the application date for 'Jonabel', so any cancellation of the Belgian PVR would change nothing in that respect. The Office also pointed out that the 'King Jonagold' variety was in common knowledge at the time of the 'Jonabel' application as a result of its inclusion in the reference collection of the testing station.

DECISION: The Board of Appeal noted that the award of a Dutch PVR was not binding on the Office, which had to examine whether its own requirements for protection were met. After following the appellant's evidence and argument on the true identity of 'Jored', which is in fact 'King Jonagold', the Board of Appeal concluded that the variety known as 'Jored' is indeed part of common knowledge and 'Jonabel' is not distinct from it. Therefore, no CPVR can be granted for 'Jonabel' and no new technical examination needs to be ordered to establish whether 'Jonabel' is distinct from the true 'Jored' variety, as 'Jonabel' can in any case not be clearly distinguished from the variety marketed as 'Jored', which is 'King Jonagold'.

CONCLUSION: The Board of Appeal found the candidate variety to lack distinctness and no circumstances established to request another examination.

'V209R'

Case A 021/2002; Nickerson S.A. vs CPVO

9/12/2003

KEYWORDS: fees, surcharge, cancellation, discretion, restoration

RESULT: The appeal is admissible but not well founded.

BACKGROUND: The 'V209R' variety of the *Helianthus annuus* L. species was protected by a CPVR, for which the second year annual fees were not paid. The Office warned the right holder, Verneuil Recherche, that the right would be cancelled if the fees plus the surcharge were not paid within the given deadline of one month following receipt of the letter; albeit, the fees were only paid after the cancellation of the right. The successor in title of the original right holder appealed the cancellation decision arguing that the non-payment of the fees was not deliberate, but was overlooked during complex negotiations for the takeover of Verneuil Recherche. It claimed that the optional nature of Art. 21(2) of the Regulation allows the CPVO the discretion not to cancel rights for non-payment under particular circumstances where it is equitable to do so. The appellant claimed that the re-organisation and merging activities constituted such particular circumstances. The CPVO argued that there were no mitigating circumstances for excusing the appellant's lack of diligence, especially since it had been warned numerous times of the consequences of non-payment.

DECISION: The Board of Appeal ruled that the Office followed the correct procedure regarding the payment of annual fees and surcharge and notification of the right holder, there had not been any misuse of power by the President of the CPVO, and there were no circumstances which rendered it equitable to restore the right. Whilst not doubting the complexity of the negotiations, the Board of Appeal noticed that the appellant company consists of experienced businessmen, especially active in the plant variety field, no strangers to the Office and its way of work. The careless attitude of the applicant in paying late even the first annual fee, before any merger, showed that no discretionary decision should be taken in favour of the restoration of the CPVR.

CONCLUSION: The appellant failed to show the care necessary towards its obligations to the Office, so the CPVR cancellation stands.

'Probril'

Case A 003/2003; Prophyl Pty Ltd and Swane Bros Pty Ltd vs CPVO

4/6/2004

KEYWORDS: resubmission of material, right of being heard, uniformity

RESULT: The appeal is admissible, but not well founded.

BACKGROUND: The appellant filed a CPVR application for the 'Probril' variety of the *Rosa L.* species, which is a sort of 'Proberg', for which an application was also filed at the same time. The test report concluded that the variety was not uniform, so the CPVO rejected the application. An appeal was lodged against that decision.

The appeal was based on the ground that the two abovementioned varieties were protected in other parts of the world, like Australia, New Zealand, South Africa and the United States. Secondly, any uniformity problems had been resolved by the applicants after the material was sent to the examination office, so any problem detected was due to inadvertent mixing of the initial test material. The appellants also argued that internal problems in the testing centre may have resulted in the lack of uniformity, and noted that the 'Proberg' variety was allowed a second testing period so the appellants asked for the resubmission of material for 'Probril' as well. They also noted that their right to be heard was infringed, as they were not invited to the testing trial. The CPVO argued that the fact of parallel protection elsewhere is immaterial and that the appellants did not actually dispute the test finding.

DECISION: The Board of Appeal confirmed that the CPVO guidelines and procedures are independent from those of other jurisdictions and the CPVO is not obliged to accept their findings, as their systems are different, even though they are all UPOV-based systems (para. 1).

The second ground, the Board of Appeal held, was based on a misunderstanding of the Regulation: the material submitted is supposed to fulfil all criteria for protection on the date of the application, not after further breeding activities improve the variety after the application with the goal of resubmission. It is the responsibility of the applicant to provide the Office with the correct candidate variety at the time of the application, as resubmission is only allowed in exceptional circumstances (para. 2).

The argument that the testing station faced problems and this influenced the testing of the candidate variety is not substantiated (para. 3).

The further testing of 'Proberg' also does not affect the candidate variety, as circumstances are different for each variety. Specifically, the 'Proberg' variety showed much less disuniformity, and further tests were to be conducted in a different testing station, so it was not certain whether the original material could be transferred there successfully (para. 4).

Finally, not being invited to the trial is a procedural mistake; however, in this specific case, this mistake did not in any event affect the decision of the Office since the appellants never contested the DUS report as such (para. 5).

CONCLUSION: The Board of Appeal found no basis to overturn the Office's decision.

‘Silver Edge’

Case A 004/2003; David R. Tristram vs CPVO

4/6/2004

KEYWORDS: resubmission of material, uniformity, variegated plants, testing conditions

RESULT: The appeal is admissible but rejected.

BACKGROUND: A CPVR application was submitted for the ‘Silver Edge’ variety belonging to the *Lavandula vera* species, which had already received a plant patent in the United States. The first interim report of the plant testing showed signs of similarity with another variety and possible symptoms of a disease. The second interim report confirmed distinctness but noted that the variety was neither uniform nor stable. The applicant remarked that the disease symptoms and the testing conditions might be responsible for these results and proposed retesting.

The CPVO refused the application on non-uniformity. The appellant appealed and submitted that all chimeras were capable of reversion, depending on the inherent stability and growing conditions. He also argued that the amount of reversion noted was due to the growing conditions, which the testing failed to take into account, as the testing station was only 100 km from the Mediterranean. This affected the proper growth of his variegated lavender variety, which performs better in northern Europe. The candidate variety could only fairly be tested in northern Europe. The CPVO noted that the number of deviating plants was too high and that the testing station was the one designated for lavender for the CPVR.

DECISION: According to the Board of Appeal, the UPOV guidelines for uniformity purposes provide that only one off-type out of 35 plants is allowed for a variety to be deemed uniform. The nature of variegated plants and varieties, though, which is the subject of the contested application, makes it impossible to follow this proportion, so differentiated instructions need to be agreed on that allow more off-types, something which has not happened yet, even though discussions are ongoing in the UPOV. The Board of Appeal found that even allowing for a higher standard of off-types, the candidate variety still would lack uniformity and stability.

Regarding the question of further tests, the Board of Appeal stated that under Art. 57(3) of the Regulation, the Office may provide for a complementary examination if it considers that the examination report does not constitute a sufficient basis for a decision. The Board of Appeal found that the test had been carried out in an appropriate manner, both indoors and outdoors. The appellant has not doubted the test finding as such. Moreover, another similar variegated lavender variety had passed the DUS examination during the same period.

Finally, the Board of Appeal did not consider testing the plant in different conditions was appropriate, as the CPVR should be valid in the whole of the EU. It also paid attention to the fact that the applicant had not mentioned any specific conditions for testing in the relevant part of the technical questionnaire submitted with his application. As a result, the Board of Appeal concluded that there were no extenuating circumstances to examine the variety for a second time, so allowing the appellant to submit new material would be unequal treatment compared to other applicants.

CONCLUSION: The appeal was dismissed.

‘Sunglow Blue’ — ‘Sunglow White’

Cases A 005 and 006/2003; Van Zanten Plants B.V. vs Sunglow Flowers Pty. Ltd and CPVO

28/9/2004

KEYWORDS: admissibility, direct and individual concern, distinctness, uniformity, stability

RESULT: The appeal is admissible, the CPVO decision is cancelled. The case is remitted for a new decision based on a new testing cycle for the two varieties.

BACKGROUND: Applications were filed for the ‘Sunglow Blue’ and ‘Sunglow White’ varieties of *Limonium* L. with the corresponding reference varieties being ‘Misty Blue’ and ‘Misty White’ respectively. Because of a flowering delay and a technical mistake of the examination office, the examination was delayed for two growing cycles and the testing continued in a greenhouse environment. In the end, the examination centre reported that distinctness could not be proven. The Office did not consider this to be a sufficient basis to render a decision and continued the examination for yet another growing cycle. The applicant’s representative visited the trial and noticed differentiating characteristics between the candidate and the reference varieties, after which point the examination officer notified the CPVO that the varieties were indeed distinct (uniformity and stability were deemed not to be an issue). CPVRs were awarded. The appellant lodged an appeal, which it claimed was admissible because the contested decisions were of direct and individual concern, as it held the worldwide distribution rights of the reference varieties. It argued that the conduct of the tests was illegal in respect of the number of growing cycles effectuated and the number and age of plants used. It also argued that the varieties were not distinct, uniform or stable and applied for the cancellation of the decision. The CPVR holder and the CPVO denied that the appellant was directly or individually concerned to lodge an appeal and argued it should have lodged an objection instead. The Office also denied there was any breach of the testing rules.

DECISION: The Board of Appeal recognised the appellant’s right to lodge an appeal, on the basis that, if the appellant’s argument were true, there would be confusion in the relevant market, whilst the appellant would have to defend its rights against the granted CPVR. The appellant cannot be excluded from the right of appeal on the grounds that he did not lodge any objection during the application proceedings. An objection serves a different purpose and the only legal remedy if the decision does not stand is indeed the appeal (part 1).

The duration of the examination was justified according to the circumstances of the case and provided for by the Regulation and UPOV guidelines, since the initial tests did not satisfy the condition of normal growth and did not produce reliable data (part 2). However, the Board of Appeal had several doubts in relation to the results of the technical examinations. Each aspect alone might not be sufficient to allow the appeal but, taking all the facts into account, the available data did not allow a decision on DUS. Especially the fact that the examination office reduced the number of plants for the later tests, since it considered that conclusions on uniformity and stability could be drawn from initial tests, contravened the relevant technical protocol, so these test reports did not constitute a sufficient basis on which to reach a decision. The grant of the CPVR was further put into doubt because of contradictory data given by the applicant and the office, transplanting and the passage of time.

CONCLUSION: A new test was ordered to be performed under proper circumstances with the correct number of plants. The costs of the examination were to be borne by the Office. The parties were ordered to bear their respective costs and expenses in relation to the appeal.

'Phasion'

Case A 001/2004; Keith E. Kirsten (Pty) Ltd vs CPVO

16/12/2004

KEYWORDS: entitlement, breeder, discovery, variety development

RESULT: The appeal is admissible, but rejected.

BACKGROUND: A CPVR was granted for the 'Phasion' variety of *Canna* L. to Jan Harm Potgier. The right was later transferred to Keith E. Kirsten (Pty) Ltd.

A petition for a declaration of nullity was submitted by a third party, Mr W. K. Hayward, on the grounds of lack of novelty and distinctness. The Office found that the owner of the right holder, Mr Kirsten, was actually not the breeder, as stated at the application and annulled the right as a result of the right holder's account of how Mr Kirsten came to know the variety. He was shown the 'Phasion' plants by a nurseryman in his private garden. He found that these plants belonged to a *Canna* L. variety which was different from anything that he had seen. The nurseryman gave some rhizomes of these plants to Mr Kirsten, which he reproduced.

The holder filed an appeal against the annulment of his right. In the appeal procedure the main issue was whether Kirsten had discovered the variety. The appellant argued that the term 'discover' was interpreted too narrowly by the CPVO, that his actions did constitute breeding in the sense of the Regulation and the International Convention for the Protection of New Varieties of Plants (UPOV Convention). In his opinion the CPVO had misinterpreted the events as well as the relevant UPOV guidelines. The appellant also submitted that multiple discoverers are envisaged by the system, so defining the term 'discoverer' as 'to be the first to find or observe' was wrong. He had spotted the variety unaided and unexpectedly, evaluated its uniqueness and developed it in order to make it available to the general public. The appellant submitted that the Office had the burden to prove that he is not the breeder. The Office, for its part, disputed the meaning of 'discovery' given by the appellant and argued, amongst other things, that the private nurseryman must have been aware of the 'Phasion' variety and shown it to the appellant.

DECISION: The Board of Appeal clarified that the burden of proving discovery rests with the appellant, as it is he who claims entitlement, in accordance with a well-established axiom of procedural law. The Board of Appeal traced back the legislative history of the term 'discover' to find out that it did not mean identifying a variety as having commercial potential, but rather coming across a variety by search or by chance, being conscious that it is a new variety which was unknown to the discoverer and which in his opinion is unknown to other persons as well. In this context, the additional notion that the variety may have commercial potential is not relevant. It is possible for the same variety to be discovered by two or more persons independently, at different times in the same location, or in different locations. Even taking this broad view of the term, the Board of Appeal was not convinced that the appellant was truthful, given his contradictory statements before the South African court and the Board of Appeal. Finally, the appellant's actions of 'breeding, selecting and growing' did not in the opinion of the Board of Appeal constitute breeding activities resulting in a new and distinct variety.

CONCLUSION: The Board of Appeal confirmed the decision of the CPVO.

'Natasja King'

**Case A 006/2004; Gebrs. Van der Knaap B.V. vs CPVO, Kwekerij J. de Groot B.V., third party
15/6/2005**

KEYWORDS: distinctness, trial, propagating material

RESULT: The appeal is admissible, but rejected.

BACKGROUND: The appellant filed an objection during the DUS examinations against the grant of a CPVR for the 'Natasja King' variety belonging to the *Ficus benjamina* L. species on the ground that the candidate variety was not clearly distinguishable from its 'Marole' variety, protected by a Dutch PVR. The testing centre had already found distinctness and a second comparison test had the same results. The Office granted the right to the applicant, third party in this appeal procedure. The appellant applied for the annulment of this decision. He argued that the 'Marole' material used for the comparison was no longer representative of the variety. The age of the 'Marole' plant (11 years old) in comparison to the 'Natasja King' plant meant that the dwarfing influence of tissue culture was visible in the latter and not at all in the former; therefore, identical material should be used for the trial. The appellant had conducted such trials himself and could spot no clear difference. The appellant requested the conduct of further DUS tests. The right holder noted that the appellant did not dispute the distinctness finding itself. The Office remarked that the 'Marole' material used conformed to the official PVR description. It also submitted that the plant material used was comparable for both varieties and that it could not take into account the appellant's private tests.

DECISION: The Board of Appeal found the appeal admissible as the PVR holder of 'Marole' is directly and individually concerned by the CPVR grant for 'Natasja King' (para. 1.1). The Board of Appeal held that the examiner took all relevant steps to ensure that the 'Marole' material bred true to type (para. 2.1). The Board of Appeal also rejected the appellant's argument on the different nature of the plant material, noting that the examiner had precisely taken specific precautions of effectuating several cycles of reproduction. The Board of Appeal was not convinced by the appellant's assertion that the influence of tissue culture was not totally eliminated by the repeated cycles of propagation by cuttings, as no corresponding evidence was offered (para. 2.2). The trial carried out by the appellant was correctly not taken into account by the Office, and the Office correctly relied solely on the trial performed by the entrusted and responsible examiner instead of a trial performed by an interested party (para. 2.3). Finally, the appellant did not dispute the finding of distinctness (para. 2.4).

CONCLUSION: The Board of Appeal found no reason to overturn the CPVO decision and ordered the appellant to bear the costs.

‘Walfrason’

Case A 005/2004; David R. Tristram vs CPVO

16/6/2005

KEYWORDS: appeal requirements, distinctness, soil, disease, retesting, uniformity, growing conditions

RESULT: The appeal is admissible. The case is remitted to the competent body of the Office for a further examination and decision regarding uniformity.

BACKGROUND: The CPVR application for the ‘Walfrason’ variety of the *Erysimum* species was rejected, on the basis of non-uniformity. The negative examination report had been communicated to the applicant, with photographs attached, who commented on it by letter which never reached the Office. After learning of the rejection of his application, he contacted the Office explaining that the appearance of non-uniformity was due to a disease, something that he had made clear in his commenting letter. It was obvious to him that the variations were due to some technical problem, as of the two rows planted side by side, one was completely healthy and the other looked very sick. He appealed asserting that the variety is uniform in large commercial production and that the apparent variation was due to ground conditions, and not to a genotypic difference. The Office argued that the deadline for lodging an appeal had already expired, while the letter expressing disagreement with the CPVO rejecting his application cannot be deemed to be a notice of appeal, whose content is clearly defined under Art. 45 of the Implementing Regulation.

DECISION: According to the Board of Appeal, the crucial factor for a statement to be deemed an appeal is that the Office is aware that the applicant wishes to see the contested decision reviewed and amended by the Office. The term ‘appeal’ need not be used. The identity of the applicant, the correct file reference and the part of the decision being contested are all clear from the appellant’s letter, which was also received within the appeal deadline (part 1).

The Board of Appeal was not persuaded that the trial had been carried out *lege artis*, thus its results could not constitute a sufficient basis for a decision. Most probably, it was compactness or drought of the soil that resulted in the appearance of non-uniformity between the two rows of plants and not pests, diseases or genetically caused distinctness (part 2).

CONCLUSION: The Board of Appeal concluded that the Office had to arrange for the variety to be retested at a different testing location. The plants should be grown in a block design, not in rows. The soil should be demonstrably free from club root. The only plant which survived from the previous trial should be compared with the new sample at a distance large enough to avoid transfer of pests or diseases. Finally, the appellant should be invited to visit the trial in the case of a negative test result. The refund of the appeal fees was ordered.

'Ginpent'

Case A 004/2004; Vegetal Progress S.r.l. vs Ambrogio Giovanni and CPVO

18/7/2005

KEYWORDS: denomination, confusion, trademark law, species name, abbreviation

RESULT: The appeal is admissible but rejected.

BACKGROUND: The 'Ginpent' variety of the *Gynostemma pentaphyllum* species was granted a CPVR, against which the appellant lodged an objection on the ground that the variety denomination was contrary to the relevant provisions of the Regulation. The CPVR was maintained. An appeal was lodged by the appellant, a company that marketed the 'Quiba' variety of the same species. It argued that it was affected by the decision of the Office. The appellant submitted that the denomination in question is a mere abbreviation of the species name, and as in trademark law, generic designations should not be allowed. He also noted that 'Ginpent' is indistinguishable from 'Gynostemma Pentaphyllum'; confusion could be caused between the name 'Ginpent' as a denomination of a variety and the general name of the species as well as other varieties of the species. The variety should therefore be given another denomination (Art. 63(3)(c), (d), and (f) of the Regulation). He requested that the variety denomination be amended. The right holder and the Office argued that the name is not generally known in the market as an abbreviation of the species name, so it cannot cause confusion. They also argued that it cannot be mistaken for the botanical name of the species.

DECISION: The Office's decision is directed at the holder and not the appellant. However, the latter is directly and individually affected by it, since he had long been marketing the 'Quiba' variety of the same species, and if his concerns prove to be correct, confusion could be caused between the variety with the contested denomination and his variety.

The first provision (Art. 63(3)(c) of the Regulation) that the appellant invoked is manifestly not applicable, as it aims at avoiding confusion between one variety denomination and another, and not between a variety denomination and a species name.

The second provision (Art. 63(3)(d) of the Regulation) concerns denominations which may be confused with designations commonly used for goods or that have to be kept free under other legislation. This is the case for the species denomination, but not for the abbreviated and combined form of 'Ginpent'. The Board of Appeal acknowledged that the species name must be left free and could therefore not be used as a denomination. However, there was no evidence that it is common practice to shorten and combine the species name to form a variety denomination. For consumers familiar with the species name, they would understand the factual reference, and still not get confused, but would consider it a fanciful name.

Moreover, the holder may market the variety under his trademark (also 'Ginpent') as long as the denomination is readily distinguishable (Art. 17(1) of the Regulation).

Finally, the ground that a variety denomination cannot be granted if it is liable to mislead or to cause confusion concerning the characteristics of the variety is not well founded, since 'Ginpent' and 'Gynostemma pentaphyllum' cannot be confused with each other (Art. 63(3)(f) of the Regulation).

CONCLUSION: As the Board of Appeal found no basis to amend the variety denomination, the appeal was dismissed. The appellant was ordered to bear the costs of the appeal proceedings.

‘Nadorcott’

Case A 001/2005; Federación de Cooperativas Agrarias de la Comunidad Valenciana (Fecoav) vs Nador Cott Protection SARL and CPVO

8/11/2005

KEYWORDS: direct and individual concern, principle of administration of justice, *audi alteram partem*

RESULT: The appeal is rejected as inadmissible.

BACKGROUND: The CPVO granted a CPVR for the *Citrus L.* ‘Nadorcott’ variety, bred and developed by Mr Nadori and assigned to Mr Maistre and then to Nador Cott SARL. Fecoav (a Spanish federation of farming cooperatives) appealed the decision alleging the invalidity of the CPVR on grounds of lack of novelty and distinctness. Also, the federation argued that the assignments are void, and even if not, they constitute an abuse of rights. Nador Cott and the CPVO argue that the appeal is inadmissible, as Fecoav is a federation of cooperatives and its legal situation is not affected by the CPVR grant. Fecoav does not represent a specific farmer, and it would be unsatisfactory to extend the right of appeal to federations of unions of farmers. Fecoav argued that it is directly and individually concerned by the grant as it would restrict Fecoav if it intended to supply material to its members; also it represents Spanish growers, whose selling price depends on the grant of the CPVR. The federation requested an extension in time to provide complete documentation showing that it is directly and individually affected by the decision, as it claimed that the Board of Appeal had neglected to inform it about the deficiencies found in the appeal concerning admissibility pursuant to Art. 49(1) of the Implementing Regulation.

DECISION: The Board of Appeal held that Art. 49 of the Implementing Regulation does not require or allow the Board of Appeal to prejudge issues that are contested between the parties. This flows from the principles of the administration of justice, in particular the rule of *audi alteram partem*, and from the system of the appeal procedure laid down in the Regulation. Since the question of admissibility is complex, it requires the Board of Appeal to hear the parties fully. On Fecoav’s request to produce more documents, the Board of Appeal ruled that it had been fully informed on the circumstances of the hearing and no change has been effectuated, therefore no second hearing would be arranged. The documents Fecoav wished to furnish, as far as they concern powers of attorney granted to it by farmers, were considered irrelevant for the outcome of the appeal. Insofar as they concern the contract for the exploitation of the contested variety, it would also serve no meaningful purpose for the course of the appeal (part 2).

On the hypothetical scenario that Fecoav supplied reproductive plant material to its members, it would have to prove direct and individual concern, which is not the case for a dealer in reproductive material. The contested decision did not affect Fecoav by reason of attributes which are peculiar to it or by circumstances where it is distinguished individually as the addressee of the decision. Fecoav also argued that it is concerned by the decision because it represents the interests of the growers. The Board of Appeal held that the growers are only affected by the decision insofar as they pay royalties for using the protected variety. There is no evidence that Fecoav represents most citrus growers in its region. Even if it were so, according to Court of Justice case-law, an association representing a category is not considered to be individually concerned by a measure affecting the general interests of the category (part 3).

CONCLUSION: Fecoav’s request to produce more documents is rejected, as is the appeal, which is found inadmissible. The appellant is ordered to bear the costs of the appeal proceedings. An appeal was lodged before the General Court (Case T-95/06). The decision of the CPVO was confirmed.

‘Sumcol 01’

Case A 003/2004; Ralf Schröder vs CPVO

2/5/2006

KEYWORDS: distinctness, taking of evidence, common knowledge

RESULT: The appeal is admissible, but rejected.

BACKGROUND: A CPVR application was filed for the ‘Sumcol 01’ variety. After some discussion it was agreed between parties that the variety belonged to the *Plectranthus ornatus* (= *comosus*) species. The first DUS examination resulted in non-distinctness, but there was no evidence of the reference variety being commercialised and of common knowledge, so the examination needed to be repeated. In the search for another reference variety, the examiner approached a staff member of a South African botanical garden for help in identifying whether the candidate variety belonged to *P. comosus*. The staff member sent plants from his private garden as reference material. The second DUS examination found non-distinctiveness in relation to that reference variety.

The CPVO rejected the application due to lack of distinctness. The applicant appealed. The appellant mainly put forward that the reference variety was not of common knowledge since it came from a private garden. The appellant also submitted evidence that the original variety breeder had transferred to him the entitlement to submit the application and to be granted the CPVR in his own name. He also submitted that the plants used as a reference variety did, in fact, belong to the candidate variety, ‘Sumcol 01’, as that variety was being marketed in several countries in southern Africa after his application for a CPVR had been submitted.

The Office argued that the reference variety used was appropriate and that the differences noticed were clearly caused by genetic factors. The expert evidence used by the member of the South African botanical garden was indisputably credible. Finally, the transfer of entitlement to the variety was dubious.

DECISION: Concerning entitlement to apply for the CPVR, the Board of Appeal ruled that there was no reason to suspect abuse of the law regarding the transfer of the right to obtain CPVR protection and the right to priority of the CPVR application.

Secondly, regarding distinctness, the argument of the appellant that ‘Sumcol 01’ was compared to itself and not another variety of common knowledge did not convince the Board of Appeal. After examining the relevant evidence, the Board of Appeal concluded that the appellant had failed to provide any proof concerning ‘Sumcol 01’'s availability in South Africa. The Board of Appeal reached the conclusion that the reference variety was distinct from ‘Sumcol 01’ but not clearly distinguishable.

CONCLUSION: The Board of Appeal found no grounds to set aside the Office’s decision and considered the candidate variety to be lacking distinctness. An application for annulment was lodged before the General Court (Case T-187/06), which was dismissed. Upon a further appeal to the Court of Justice (Case C-38/09 P), the decision of the General Court was confirmed. Furthermore, separate requests for the taxation of costs were the subject of orders by the General Court (Case T-187/06 DEP) and the Court of Justice (Case C-38/09 P-DEP).

'Thunderbolt'

Case A 007/2005; Hawkrigde Farms Inc vs CPVO and Warmerdam Petrus, third party

7/7/2006

KEYWORDS: distinctness, reference variety, denomination, marketing, common knowledge

RESULT: The appeal is admissible and well founded. The candidate variety is awarded a CPVR.

BACKGROUND: An objection was made regarding the grant to the third party in this procedure of a CPVR for the 'Thunderbolt' variety belonging to the *Hosta sieboldiana* (Hook.) Engl. species. The objection was based on the absence of distinctness. The reference variety pointed to by the objector was indisputably not distinct from the candidate variety. This variety was unnamed, but allegedly cultivated and sold by the objector, selected from the 'Great Expectations' variety. In essence, it had given the name of the genuine 'Great Expectations' variety to the new variety it had developed. After the examination, the candidate variety was found to be indisputably distinct from the original 'Great Expectations' and 'American Great Expectations' varieties, but the Office refused the CPVR application on the grounds that it was indistinguishable from the reference variety, which had wrongly been referred to as the 'Great Expectations' variety. The applicant appealed and argued that the reference variety was not of common knowledge because it had not been marketed prior to the date of application. The objector argued that newly developed varieties originating from already known varieties were treated under the name of the already known varieties, and this fact was also known to customers. He had marketed the reference variety under the older 'Great Expectations' denomination before the relevant date.

DECISION: It could not be proven that the reference variety was a matter of common knowledge on the date of the application. The Board of Appeal accepted that the candidate variety is not distinct from the reference variety and is distinct from the 'American Expectations' and 'Great American Expectations' varieties. The objector did not discharge the burden of proving that the reference variety was of common knowledge, as he could not prove that the reference variety was being marketed prior to the relevant point in time. He did not prove that his customers intended to order the reference variety under the name of the genuine 'Great Expectations' variety nor that the reference variety was indeed furnished instead of the genuine 'Great Expectations' variety. What is decisive is that the clients intended to order the variety under the denomination 'Great Expectations'. Confusion may arise under the given facts, but it was still not proven that the reference variety was supplied instead of the original 'Great Expectations' variety.

CONCLUSION: The candidate variety was granted a CPVR. The objector was ordered to bear the costs of the appeal proceedings and the appeal fee was to be reimbursed.

'Moreya'

Case A 004/2005; Danzinger 'Dan' Flower Farm vs CPVO

13/10/2006

KEYWORDS: novelty, mixture of varieties, priority date, fees, domicile, seat

RESULT: The appeal is admissible and the CPVR is annulled.

BACKGROUND: An application was filed for the 'Moreya' variety belonging to the *Gypsophila* L. species claiming priority from an application in Israel, duly confirmed by the relevant Council. An objection was filed on the grounds of absence of novelty, based on the fact that the variety had been sold in a mixture with two other varieties under the name 'Morstars', confirmed, inter alia, by a transcript of court proceedings in Israel, and also in an auction in the Netherlands. Evidence was submitted that the candidate variety was not distinct from the 'Dangypmini' variety. The Office was not convinced by the evidence and upheld the CPVR, also based on the examination report, which found the candidate variety distinct from the 'Dangypmini' variety. The appellant pointed to the Israeli court proceedings' evidence for claiming non-distinctness, while the Office pointed to the official examination results and claimed that there was not sufficient evidence for establishing absence of novelty.

DECISION: The Board of Appeal accepted the evidence that the sale of the 'Morstars' variety outside the EU more than four years before the application date and within the EU more than one year before the application date in the Netherlands destroyed the novelty of the candidate variety according to Art. 10(1)(a) and (b) of the Regulation. The examination results that found the 'Moreya' variety to be distinct do not alter the finding of absence of novelty. The Board of Appeal also assumed that the sale was with the consent of the breeder, a fact not called into question by the applicant. No other circumstances raised any doubt regarding the sale of the variety with the breeder's consent, either sold on its own or as part of a mixture. The Office's view that novelty is not destroyed because the sale of 'Moreya' was not clear disregards the available information. According to the Board of Appeal, the most convincing evidence was the sale of the variety in the Netherlands more than a year before the priority date.

Finally, the Board of Appeal did not order the 'Moreya' right holder to bear the costs of the proceedings, as his procedural representative did not comply with the requirements of domicile, seat or establishment according to Art. 82 of the Regulation. The address which was given was only a mailbox, where the service of registered letters was not reliable. Consequently, the Board of Appeal stated that the right holder was not represented and therefore was not a party to the proceedings.

CONCLUSION: The novelty requirement is not met, thus the CPVR is annulled. The refund of the appeal fee was ordered.

‘Cowichan’

Case A 001/2007; Agriculture and Agri-Food Canada vs CPVO

11/9/2007

KEYWORDS: novelty, deadline, leniency, first disposal

RESULT: The appeal is admissible, but rejected.

BACKGROUND: The appellant filed a CPVR application for the ‘Cowichan’ variety of the *Rubus idaeus* L. species, which the Office considered to be lacking novelty as the date of first commercialisation in the United States was prior to the four-year period allowed for commercialisation outside the EU before the date of application. The appellant sought a lenient application of the novelty requirement, mainly because the deadline for novelty had only lapsed for eight days, and this delay was due to missing information in the technical questionnaire, which was subsequently completed and submitted to the CPVO. The appellant argued that the first disposal of the variety was not, as initially written, the date he had initially mentioned in the application form (which he claimed was the date of first trial plantings) but a subsequent date, that of the first commercial sales. No evidence could be provided to support this allegation, inter alia due to the fact that many of the relevant documents had been destroyed.

The appellant did not attend the hearing.

DECISION: The Board of Appeal confirmed that the technical questionnaire must be completed fully before an application date can be attributed to an application. The application was duly signed by the appellant’s representative and no convincing evidence was furnished to substantiate the change of date of first disposal. This date had not been rebutted by the appellant and this date was more than four years prior to the application date, so novelty was indeed destroyed. The Board of Appeal ruled that the time limits are to be applied strictly, and even if leniency were to be exercised, there is no justification to do so in this case, where the appellant had ample time to conform to the deadline.

CONCLUSION: The appeal against the rejection of the application for lack of novelty was dismissed. The appellant was ordered to bear the costs of the appeal proceedings.

'Gala Schnitzer' (I)

Cases A 003/2007, A 004/2007; SNC Elaris and Brookfield New Zealand Limited vs Schniga S.r.l. and CPVO

21/11/2007

KEYWORDS: diseased material, health certificate, discretion, *restitutio in integrum*

RESULT: The appeal is admissible and well founded.

BACKGROUND: After a CPVR application for the 'Gala Schnitzer' variety of the *Malus Mill.* species was filed, the applicant was asked to provide material of the candidate variety for DUS testing purposes accompanied by 'the necessary phytosanitary requirements'. In a reminder letter the Office requested a 'health certificate'. Although the applicant failed to supply a health certificate the DUS test was launched. Later it was found out that the material submitted by the applicant was virus infected. It was subsequently destroyed. On his request the applicant was allowed to submit new material with the accompanying health certificate. The second round of DUS tests was successfully passed and the right granted.

Objections were filed, which were dismissed by the Office. The objectors subsequently filed an appeal on the ground that the Office should not have allowed the applicant to submit new material in accordance with Art. 61(1)(b) in conjunction with Art. 55(4) of the Regulation. They also questioned the distinctness finding. The Office and the applicant supported that it was within the President of the CPVO's discretion to allow the resubmission as the applicant could well have understood the requested health certificate to include only externally visible diseases, as the wording of the letters in which the Office requested such a certificate was perhaps liable to be misunderstood. Under current CPVO practice, the examination of an application does not start unless a certificate is included, but at the time of the initial application, the delivery of such a document was time-consuming, which is why the examination started even before one was delivered. In the hearing, it was revealed that the initial applicant was aware of the viruses present in the material submitted.

DECISION: The Board of Appeal held that there is no scope for discretion to be exercised when the course of action is strictly prescribed by the Regulation, as in Art. 61(1)(b) of the Regulation, which is a 'must' provision. A reminder letter sent by the Office to provide a health certificate set no time limit. It became clear that the certificate could not have been provided when the material appeared to be virus infected. At this point, the application should, in the opinion of the Board of Appeal, have been refused. The Office could not have consented to non-submission of the material and treat the defected material as never submitted.

The Board of Appeal further found that it is the applicant's responsibility to provide material that is healthy and otherwise conforms to regulations. If he, through no fault of his own, fails to do so, he can avail himself of *restitutio in integrum* pursuant to Art. 80 of the Regulation. The Office, by its action of allowing the resubmission of new material, precluded the possibility of such a new application being filed. The applicant did not prove that he would have been entitled to submit an application through *restitutio in integrum*, if the deadline had not elapsed. On the contrary, the applicant breached his duties of care by submitting material that he must have suspected was not free of viral infection. Allowing him to secure an early priority date while having time to submit new material would be detrimental to third parties.

CONCLUSION: The CPVO decisions were cancelled and the CPVR application was rejected. The applicant was ordered to bear the costs. A further appeal was lodged before the General Court (Case T-135/08). The decision of the General Court was appealed to the Court of Justice (Case C-534/10 P).

'Lemon Symphony'

Case A 006/2007; Ralf Schröder vs CPVO, Jørn Hansson third party

4/12/2007

KEYWORDS: cancellation procedure, obligation to issue a decision, third party in the cancellation procedure

RESULT: Action admissible, appeal rejected.

BACKGROUND: Mr Jørn Hansson submitted a CPVR application for the 'Lemon Symphony' variety of the *Osteospermum ecklonis* species, which was granted by the Office. In October 2004, the appellant applied for the cancellation of 'Lemon Symphony', claiming it was no longer stable. The Office examined his request and informed him that it did not intend to cancel the CPVR for the variety. Since the appellant requested a formal decision to the effect that the cancellation proceedings had been concluded by a refusal of the cancellation of the right, the Office reiterated its decision by letter. Mr Schröder lodged an appeal against the CPVO's decision. The appellant requested the cancellation of the CPVR for the variety at issue with retrospective effect to the time of the register inspection or alternatively with immediate effect. Moreover, he asked for the postponement of the oral proceedings due to pending nullity and infringement proceedings regarding 'Lemon Symphony'.

DECISION: The Board of Appeal considered the appeal admissible according to Arts 67 and 68, in accordance with which the appellant may appeal a decision addressed to him, in this case a decision taken pursuant to Art. 21 of the Regulation. The Board pointed out that a decision within the meaning of this provision need not necessarily be a formal decision, but can also be a communication if it concerns the rights of the party addressed and was intended to be final (para. I.1).

The Board of Appeal, however, held that the appeal was not well founded because the appellant had no right to obtain the cancellation of the CPVR for 'Lemon Symphony' (para. II). The Board of Appeal noticed that, in order to have a right to obtain a decision by the CPVO, the appellant had to be party to the proceedings (para. 1). Participation in the proceedings is regulated by Art. 1 of the Implementing Regulation, which lists those who are 'parties' in detail and provides that 'The Office may allow participation in the proceedings by any person other than those referred to in paragraph 1 who is directly and individually concerned, upon written request' (para. 1). Since the appellant did not belong to any of the categories listed and did not submit any written request to participate in the proceedings (para. 2), he could not be considered a party. Comparing the English and German versions of the article, the Board explained that 'being party to proceedings' meant that third parties could only participate providing support with the objective of cancellation, but this kind of participation did not give rise to the status of a party (para. 3). As a consequence, the Office was not obliged to take a decision with regard to persons who are not 'parties'. Finally, the Board of Appeal held that the requests for postponement of the proceedings should be refused (paras IV.1, IV.2, IV.3).

CONCLUSION: The appeal was rejected and the appellant was ordered to bear the costs of the appeal proceedings. An action was brought against the decision before the General Court (Case T-133/08), which was joined with the actions against the decisions in A 005/2007, A 007/2007 and A 010/2007 (Cases T-134/08, T-177/08, T-242/09). The decisions in Cases A 005/2007, A 006/2007 and A 007/2007 were set aside on procedural grounds. The decision in Case T-242/09 (A 010/2007) dismissed the appeal as not well founded. An appeal against that decision is pending before the Court of Justice (Case C-542/12 P).

'Lemon Symphony'

Case A 007/2007; Ralf Schröder vs CPVO, Jørn Hansson third party

4/12/2007

KEYWORDS: variety description, direct and individual concern, summons, postponement

RESULT: The appeal is not admissible.

BACKGROUND: Mr Hansson obtained a CPVR for the 'Lemon Symphony' variety belonging to the *Osteospermum ecklonis* species. Eight years later the variety description was adapted due to new guidelines, based on Art. 87(4) of the Regulation with the agreement of the holder of the CPVR. The appellant was informed of the adaptation by the Office. He brought an appeal against the adaptation decision, claiming the adaptation was of direct and individual concern to him, as 'Lemon Symphony' was the reference variety for testing 'Sumost 01', for which he had sought a CPVR. The appellant claimed that, as compared with the initial variety description, his variety was distinct, while with the new one, his variety was deemed not distinct. He requested the annulment of the adaptation decision. He also requested that the oral proceedings be postponed due to pending nullity and infringement proceedings. He also claimed that he had not been properly summoned to attend and that he had conflicting obligations before the Hamburg Regional Court. The right holder and the Office asked for the dismissal of the appeal.

DECISION: Art. 68 of the Regulation accords the right to appeal to persons to whom a decision is directly addressed, which is not the case here. The adaptation of the description is done *ex officio*. Art. 67 of the Regulation accords the right to appeal to persons directly and individually concerned by the decision. The Board of Appeal considered that the appellant also fails to satisfy this precondition. The adaptation of the description did not cause the negative test result. The Office would still have consulted the contested features and values to conduct the test even without the adaptation. The crucial question is rather whether the use of the new description was allowed to be used for the test. This had already been confirmed in a parallel case relating to the 'Sumost 01' variety of the appellant (A 005/2007). Guidelines are amended as recognition of the living and changing nature of plants, and also as a result of the growing breeding sector, which may render the delimitation of new features of varieties necessary (part I).

The argument of the appellant that he was not summoned in due form was rejected, as he agreed on the date of the hearing and he only brought up the delay in delivery of the summons when all other attempts to postpone the hearing had failed (part II.1). The Board of Appeal also held that the current hearing takes priority before other court obligations of the appellant, as the date had been set prior to this (part II.2). Finally, there was no reason to postpone this hearing until the nullity proceedings against 'Lemon Symphony' had been completed because these proceedings did not have an adequate prospect of success (part II.3).

CONCLUSION: The Board of Appeal concluded that there was no ground to admit the appeal and ordered the appellant to bear the costs of the appeal proceedings. An action was brought against the decision before the General Court (Case T-133/08), which was joined with the actions against the decisions in A 005/2007, A 007/2007 and A 010/2007 (Cases T-134/08, T-177/08, T-242/09). The decisions in A 005/2007, A 006/2007 and A 007/2007 were set aside on procedural grounds. The appeal in Case T-242/09 (A 010/2007) was dismissed as not well founded, and an appeal against that decision is pending before the Court of Justice (Case C-546/12 P).

‘Sumost 01’

Case A 005/2007; Ralf Schröder vs CPVO, Jorn Hansson third party

4/12/2007

KEYWORDS: summons to oral proceedings, variety description, distinctness, guidelines, stability, summons, growth regulator

RESULT: The appeal is admissible, but rejected.

BACKGROUND: A CPVR application was filed for the ‘Sumost 01’ variety of the *Osteospermum ecklonis* species. The examination report investigated distinctness from the ‘Lemon Symphony’ variety, already covered by a CPVR. The owner of ‘Lemon Symphony’ filed an objection to the application, claiming non-distinctness, which was also supported by the examination report. The appellant requested cancellation of the ‘Lemon Symphony’ CPVR, arguing non-stability and that ‘Lemon Symphony’ did not match its original variety description any more, as new guidelines on the testing of *Osteosperma* had been introduced. After a verification test, the unaltered existence of ‘Lemon Symphony’ was confirmed as was the non-distinctness of ‘Sumost 01’. As a result, the CPVO rejected the CPVR application for ‘Sumost 01’.

The appellant requested for the hearing to be postponed, claiming he had not been summoned in due form and that he had conflicting obligations. He furthermore argued that postponement was justified pending an infringement of the varieties in question before a German court.

As far as the substance of the case is concerned, the appellant argued, inter alia, that ‘Lemon Symphony’ as described in the original variety description no longer existed, that the differences between ‘Sumost 01’ and the variety description of ‘Lemon Symphony’ justified a finding of distinctness, that the material used for the comparison test was treated with a growth regulator and that, in fact, it was ‘Sumcol 01’ material. The CPVO argued that there was no reason not to rely on the results of the DUS trials. The CPVO and the holder further claimed that even if the variety description of ‘Lemon Symphony’ was not the same as initially, the material of the variety submitted by the holder in the DUS test was of common knowledge since it was on the market. A testing expert submitted that the effect of using the growth regulator had disappeared by the time of testing.

DECISION:

The Board of Appeal held that the appellant was summoned in due form. Although the notice period was not complied with, this deficiency had no consequences as the appellant had already agreed with the date of 4 December 2007 for the oral proceedings. The Board of Appeal wondered how much of a coincidence it was that the appellant brought up the delay in service when all other attempts to delay the hearing had failed (part IV.1). Finally, the appeal proceedings were correctly not stayed in view of the pending nullity proceedings regarding ‘Lemon Symphony’, as this presupposed that there was an adequate prospect of success, which was not the case here (part IV.3.a).

The request to wait for the outcome of pending infringement proceedings had to be refused as well.

The Board of Appeal relied on the testing report, which identified one difference of note between the candidate and the reference variety, to rule that the finding of non-distinctness should be confirmed. The

argument that the 'Lemon Symphony' holder submitted 'Sumcol 01' material instead of material of his own variety is completely unsubstantiated (part I).

The impact of the growth regulator on the treated plant material had disappeared at the time of testing, and the experience of the testing expert as well as the kind of regulator used point to this direction (part II).

Regarding stability of the variety in conjunction with the new guidelines, the Board of Appeal accepted expert evidence that 'Lemon Symphony' had not deviated from the original description, so it was stable. However, the Board of Appeal found the confusion caused by new test guidelines problematic and suggested ways to link the old standards with the new, so that the public can readily understand them (part III).

CONCLUSION: The Board of Appeal rejected the appeal, upheld the CPVO decision and ordered the appellant to bear the costs. An action was brought against the decision before the General Court (Case T-177/08), which was joined with the actions against the decisions in A 006/2007, A 007/2007 and A 010/2007 (Cases T-133/08, T-134/08 and T-242/09).

‘Gasore’

Case A 011/2007; Walloon Agronomic Research Centre (CRA-W) vs CPVO

9/9/2008

KEYWORDS: transfer of CPVR, *restitutio in integrum*, time limit to appeal, *force majeure*

RESULT: Appeal inadmissible, appeal dismissed.

BACKGROUND: The CPVO received a CPVR application for the ‘Gasore’ variety of the *Solanum tuberosum* L. species. In the application, Gembloux Agronomic Research Centre was mentioned as the original breeder. After having ascertained that Sprl BACO was authorised by the breeder to exploit the variety, the CPVO granted the CPVR. Subsequently, Sprl BACO informed the Office that it had assigned all of his rights to the variety to Mr Marc Bauche. As a consequence the Office recorded the change of ownership. The maintenance fees for the variety were paid each year until 2005. Since the annual fee for 2006 had not been paid by Mr Marc Bauche, notwithstanding a reminder sent to him, the CPVO cancelled the protection for ‘Gasore’ and informed the holder about the decision. An appeal against the decision was lodged by CRA-W. The appellant claimed to be the successor of the original breeder of the variety at issue, Gembloux Agronomic Research Centre, and that Mr Bauche was only acting as his representative. For this reason, the appellant argued that he should have been informed by the Office of its decision to cancel the CPVR for the variety. Moreover, the appellant argued that the time limit to appeal started to run when it was informed of the challenged decision and claimed that, under Art. 80 of the Regulation, which refers to the *restitutio in integrum*, and the principle of *force majeure*, the appeal should be deemed admissible.

DECISION: The Board of Appeal concluded that the original breeder had transferred his right to apply for a CPVR to Sprl BACO, which in turn assigned the title to Mr Bauche. The Board of Appeal noticed that the Office, therefore, was right in considering Mr Bauche as the holder of the CPVR and notifying him about the cancellation decision (para. 2).

Furthermore, the Board of Appeal considered the appeal inadmissible, as it was lodged two months after the publication of the cancellation decision in the *Official Gazette of the CPVO*, and thus outside of the time limit provided for in Art. 69 of the Regulation (para. 3). The appellant had been aware of the publication of the cancellation and could not invoke *force majeure* because of Mr Bauche’s death, as it was up to the breeder to make all of the necessary arrangements with the assignees to make sure that it was kept informed and its interests protected. If the appellant failed to make these arrangements, this failure was their own fault and did not involve elements of unavoidability and extraneousness required by a *force majeure* case (para. 4).

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs of the appeal proceedings.

‘Barberina’

Case A 009/2008; Vicente Barber López vs CPVO, Plantones Certificados S.L. (Plantocer) third party

2/12/2008

KEYWORDS: lack of novelty, sale or disposal of variety constituents

RESULT: Appeal admissible, appeal dismissed.

BACKGROUND: The appellant submitted a CPVR application for the ‘Barberina’ variety of the *Citrus L.* species. Shortly after the submission, the CPVO communicated to the appellant that the required technical questionnaire was missing from the application and that he failed to comply with the requirement concerning the sale or disposal of variety constituents to third parties at the appropriate time. The Office granted him a period of two months to reply to the objections. The appellant submitted the technical questionnaire for the variety and, in the enclosed letter, he pointed out that by mistake, in his previous application, he stated that the variety had been sold in 2002. After the CPVO had received further written reassurances that the variety had never been sold by the appellant, it granted a CPVR for ‘Barberina’.

More than one year later, Plantocer filed a request for a declaration of nullity against ‘Barberina’, alleging that it lacked novelty, as there had been a disposal of the material in Spain for sale purposes with the consent of the breeder, occurring more than one year prior to the date on which the application was made. Plantocer explained that it had signed a licence agreement with the appellant in 1999, which established that Plantocer was the exclusive licensee of the appellant for Spain for ‘Barberina’ and the co-owner of the rights for the variety in the rest of the world. Moreover, Plantocer argued that it had a legitimate interest for requesting the nullity of the variety, as the granting of a CPVR for the variety suspended the Spanish PVR for ‘Barberina’. The Office declared the CPVR to be null and void. An appeal followed. The appellant pleaded as grounds for his appeal the inadequacy of the proceedings initiated and that the invalidity decision was not prescribed by CPVO rules. He also alleged manipulation, lack of veracity and falsification of the invoices adduced and declared there were doubts in relation to the data contained in the records and certificates issued by the official bodies responsible for nursery plants. Finally, he noted that the disposal of variety constituents made in 2002 to the public authorities was done for experimental purposes only.

DECISION: The Board of Appeal found the appeal admissible (para. 47), but not well founded (para. 48). Regarding the first ground of appeal, the Board of Appeal pointed out that, in assessing evidence regarding the validity of a CPVR, the Office is entitled to use evidence provided by a third party (para. 55).

The Board of Appeal dismissed the second argument, namely that the request for an invalidation was presented late. The provision referred to by the appellant, Art. 69 of the Regulation, provided for the time limit for appeals, whereas there was no time limit for third parties seeking a decision on nullity (para. 56).

The Board of Appeal recognised that the three invoices presented by Plantocer were deliberately altered in order to protect confidentiality and, therefore, decided not to take them into account as pieces of evidence (para. 57). It confirmed, however, that the data contained in the records and certificates issued by the official bodies for monitoring nursery plants clearly allowed it to be established that the variety was sold for more than one year before the date on which the application was filed (para. 58). Finally, the Board of Appeal concluded that Art. 10 of the Regulation is qualitative and not quantitative in nature. Therefore, the number of sales or disposals was irrelevant (para. 60).

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs of the appeal proceedings.

'Yuval'

Case A 001/2008; Fertiseeds Ltd vs CPVO

4/12/2008

KEYWORDS: procedural representative, non-payment of annual fees, cancellation of Community plant variety right, time limit for appeal

RESULT: Action inadmissible, appeal dismissed.

BACKGROUND: A CPVR application was filed for the 'Yuval' variety of the *Fragaria × ananassa* Dutch species. The appellant, who is domiciled in Israel, initially appointed Mr Abraham Nantel c/o Van der Rosenman B.V. as his procedural representative. During the examination procedure, the procedural representative changed his address several times and most of the CPVO's communications were returned. When the CPVO issued the decision to grant a CPVR on the variety at issue and found out that the CPVR certificate and the relevant debit note for the first annual fee had been returned, it made direct contact with the appellant, without outcome. However, shortly after, Florasale B.V. was appointed as a new procedural representative for the 'Yuval' case. The newly appointed procedural representative transferred the sum due for the first annuity of the variety to the CPVO. As the representative did not pay the second annuity for 'Yuval', the Office sent him a registered letter with advice of delivery, mentioning the possibility of cancellation of the CPVR if the payment of the invoice enclosed with the letter was not received within one month from delivery. Since this letter was also returned to the Office with the mention 'not claimed', the Office got in touch with the representative, and then with the appellant, but no action was taken. The CPVO, finally, issued a decision and cancelled the certificate for 'Yuval'. An appeal was filed.

DECISION: The Board of Appeal noted that, in order to determine whether the appeal is admissible, it is necessary to establish the date of the Office's decision to cancel the certificate for the variety at issue, as it is the starting point of the period within which a valid appeal may be filed (para. 1). According to Art. 69 of the Regulation, 'the notice of appeal shall be filed in writing at the Office within two months of the service of the decision where addressed to the appealing person, or, in the absence thereof, within two months of the publication of the decision ...' (para. 1). The decision was notified with a registered letter with advice of delivery to the procedural representative and returned with the mention 'not claimed' (para. 1). Under Art. 65(3) of the Implementing Regulation, where the service is effected by registered letter, this shall be deemed to have been delivered to the addressee on the 10th day following its posting. Art. 65(4) of the Implementing Regulation, moreover, provides that the service shall be deemed to have been effected even if the addressee refuses to accept the letter or to acknowledge receipt thereof.

Since the notice of appeal was received by the CPVO more than two months after the service of the decision to be appealed, the Board of Appeal concluded that the appeal was inadmissible (para. 1).

CONCLUSION: The appeal was rejected as inadmissible and the appellant was ordered to bear the costs of the appeal proceedings.

See also the parallel Case A 002/2008.

Case A 002/2008; Dr Shamay Izhar, Mr Yosi Sinai, Agrexco Ltd vs CPVO

4/12/2008

KEYWORDS: direct and individual concern, procedural representative, non-payment of annual fees, cancellation of Community plant variety right, time limit for appeal

RESULT: Appeal inadmissible, appeal rejected.

BACKGROUND: A CPVR application was filed for the 'Yuval' variety of the *Fragaria* × *ananassa* Dutch species. The appellant, domiciled in Israel, initially appointed Mr Abraham Nantel c/o Van der Rosenman B.V. as a procedural representative. During the examination procedure, the procedural representative changed his address several times and most of the CPVO's communications were returned. When the CPVO granted a CPVR on the variety and found out that the CPVR certificate and the relevant debit note for the first annual fee had been returned, it made direct contact with the appellant, without outcome. However, shortly after, Florasale B.V. was appointed as a new procedural representative for the 'Yuval' case. The newly appointed procedural representative transferred the sum due for the first annuity of the variety to the CPVO. As the representative did not pay the second annuity for 'Yuval', the Office sent him a registered letter with advice of delivery, mentioning the possibility of cancellation of the CPVR if the payment of the invoice enclosed with the letter was not received within one month from delivery. Since this letter was also returned to the Office with the mention 'not claimed', the Office got in touch with the representative, and then with the appellant, but no action was taken by either of them. The CPVO, finally, cancelled the certificate for 'Yuval'. The proprietor appealed.

DECISION: The Board of Appeal noted that, in order to determine whether the appeal is admissible, it is necessary to establish compliance with Art. 69 and Art. 68 of the Regulation. According to Art. 69 of the Regulation, 'the notice of appeal shall be filed in writing at the Office within two months of the service of the decision where addressed to the appealing person, or, in the absence thereof, within two months of the publication of the decision ...' (para. 1). As the date of service of the decision was 15 October 2007 (date of publication in the *Official Gazette of the CPVO*), a notice of appeal filed on 10 December 2007 was considered timely, filed by the Board of Appeal (para. 1). According to the Board of Appeal, the central issue in the case was whether the Office's decision was of direct and individual concern to the appellants, as required under Art. 68 of the Regulation (para. 2). Although the last appointed procedural representative of the appellants explained that the appellants had signed exclusive licence agreements with the applicant Ferteiseeds, the agreements were not filed with the Board of Appeal, claiming a right to privacy. Only some days before the oral proceedings did the procedural representative transmit to the CPVO an affidavit signed by Mr Shamay Izhar in support of the appeals, which referred to several appendices that were not enclosed (para. 3). The documents in form of appendices were handed over by the procedural representative to the secretary of the Board of Appeal only two days before the decision of the Board of Appeal was due (para. 3). The Board of Appeal remarked that the belated delivery of such crucial documents for the admissibility of the case contrasted with a principle of cooperation between the litigants and the tribunal (para. 4). As the documents were not delivered in time to be examined effectively by the Board of Appeal, it declined to take them into consideration and judged the appeal inadmissible (paras 4 and 5).

CONCLUSION: The appeal was rejected as inadmissible and the appellant was ordered to bear the costs of the appeal proceedings.

‘Lemon Symphony’

Case A 010/2007; Ralf Schröder vs CPVO, Jørn Hansson third party

23/1/2009

KEYWORDS: distinctness, nullity, variety description, cancellation of Community plant variety right

RESULT: Appeal admissible but rejected as not well founded.

BACKGROUND: Mr Jørn Hansson submitted an application for a CPVR for the ‘Lemon Symphony’ variety of the *Osteospermum ecklonis* species, granted by the Office in 1999. In 2001, Mr Schröder submitted an application for the *Osteospermum ecklonis* ‘Sumost 01’ variety, but the application was refused by the Office because the technical examination had shown that the variety was not distinct from ‘Lemon Symphony’. In October 2004, Mr Schröder applied for the invalidation (nullity) of ‘Lemon Symphony’ pursuant to Art. 20 of the Regulation, claiming that CPVR was granted erroneously because ‘Lemon Symphony’ did not exist as a variety when applied for, and was examined on the basis of material which should not have been used for the tests. The Office examined his request and informed him that it did not intend to invalidate the CPVR, reiterating this decision by letter. Mr Schröder lodged an appeal against the CPVO’s decision. The appellant claimed that ‘Lemon Symphony’ was incorrectly tested before the grant of the CPVR, as the tested material did not meet the requirements for the submission of material since it was a budded material and was treated with a growth regulator. Moreover, the appellant noticed that the variety was not tested again until 2001, when it showed a large number of changes in the expression of several characteristics.

DECISION: The Board of Appeal considered the appeal admissible according to Art. 67 and 68, which provide that the appellant may appeal a decision addressed to him with respect to Art. 20 of the Regulation (para. 1). The Board of Appeal pointed out that a decision within the meaning of this provision need not necessarily be a formal decision, but can also be a communication if it has the character of a ruling, regards the rights of the party addressed and is intended to be final (para. 1).

The Board of Appeal held that the appeal was not well founded on several grounds. It concluded that the treatment with a growth regulator did not affect the test, since the type of growth regulator used during propagation tended not to have a persistent effect, as continued control of plant growth required further spraying with growth regulators (para. 4). The Board of Appeal also found the modification of the variety description absolutely justified, since the UPOV introduced, in 2000, guidelines for the *Osteospermum ecklonis* species and the CPVO adopted them. As a consequence, the Office had to modify some of the scales (para. 5). Furthermore, the Board of Appeal pointed out that ‘Lemon Symphony’ was, as such, unique in its morphological characteristics, but also showed a continuous flowering period that was longer and that, at the time of the trial, no reference variety could be found to compare it with (para. 6). Finally, the Board of Appeal noticed that the appellant was not able to indicate the name of any variety that was not distinct from ‘Lemon Symphony’ at the time of application (para. 7).

CONCLUSION: The appeal was rejected and the appellant was ordered to bear the costs of the appeal proceedings. An action was brought against the decision before the General Court (Case T-242/09), which was joined with the actions against the decisions in A 005/2007, A 006/2007 and A 007/2007 (Cases T-133/08, T-134/08 and T-177/08). Whereas the decisions in A 005/2007, A 006/2007 and A 007/2007 were set aside on procedural grounds, the appeal in Case T-242/09 was dismissed as unfounded, and a further appeal is pending before the Court of Justice (Case C-546/12 P).

‘Gold Star’ — Breeder’s reference ‘FACH004’

Cases A 004/2008, A 005/2008; Fachjan B.V. vs CPVO

21/4/2009

KEYWORDS: uniformity, growing conditions, submission of healthy plant material

RESULT: Actions admissible, appeals partially well founded.

BACKGROUND: The decision concerns two varieties, ‘Gold Star’ and ‘FACH004’, of the *Beaucarnea recurvata* Lem. species. The initial testing of the ‘Gold Star’ species resulted in the granting of a CPVR, whereas the testing of ‘FACH004’ resulted in rejection because of lack of uniformity. The ‘Gold Star’ variety was used as reference for ‘FACH004’, and the examination office observed that ‘Gold Star’ was insufficiently uniform for leaf width and width of the yellow margin of the leaf. The CPVO, therefore, warned the appellant that this lack of uniformity could lead to the cancellation of the CPVR already granted. Subsequently, the Office cancelled the CPVR for the ‘Gold Star’ variety. Fachjan lodged an appeal against the decisions.

DECISION: The appellant pleaded for the reversal of the decision on the cancellation of the protection granted for ‘Gold Star’ and for a reversal of the decision concerning ‘FACH004’. Moreover, he asked for a re-examination of the varieties in another, more experienced, trial station, as far as tropical plants are concerned, and for compensation in respect of the actual costs incurred until the appeals were filed.

Although the appellant should have submitted full details on the growing conditions to the CPVO (para. 10), the Board of Appeal found the complaint on the growing conditions to be realistic. Production of these species occurs mainly in Guatemala, Costa Rica, and Chile at an altitude of about 1 200 m (para. 8). The production of these plant varieties in greenhouses, in the Netherlands, was not considered suitable by the Board of Appeal, especially because of the low light conditions during winter (para. 8). Moreover, the Board of Appeal pointed out that the examination office was not able to report on the actual conditions in its greenhouses and did not pay enough attention to the fact that genetically identical material reacted so heterogeneously to the allegedly ‘equal’ test conditions (para. 9). Furthermore, red colouration and unequal growth, which are the result of stress conditions during the examination, like low temperature and dry conditions or bad functioning in the root system, were observed in the plants by the examination office (para. 11). Since the submitted material was visibly healthy and the examination office accepted the material without any complaint, the Board of Appeal found it strange that no further investigation was made to understand the real cause of the problems with the root systems (para. 12).

Consequently, the Board of Appeal cancelled the Office’s decisions and ordered the CPVO to start complementary examinations on both varieties at the expense of the CPVO and the reimbursement of two thirds of the appeal fees to the appellant. The Board of Appeal made it clear that the complementary examinations should be carried out appropriately, in a way that could ensure the normal growth of the plants during the examination. The appellant, however, was required to submit full details on the growing conditions necessary for a successful complementary examination of the material.

CONCLUSION: The appeals were partially well founded. The CPVO had to reimburse two thirds of the appeal fees to the appellant.

'Jewel'

Case A 010/2008; Rusticas del Guadalquivir S.L. vs CPVO

8/10/2009

KEYWORDS: lack of uniformity, growing conditions, quality of plant material

RESULT: Action admissible, appeal well founded.

BACKGROUND: The appellant, representing the University of Florida, applied for a CPVR for the 'Jewel' variety of the *Vaccinium corymbosum* L. species. In 2005, the technical trial started and in the two following years the examination office observed a lack of uniformity in the variety at issue, as one plant out of four lacked anthocyanic colouring in the young branches. Based on UPOV Protocol TG/137/3 for this species and the standard of homogeneity recommended by the UPOV, the CPVO refused to grant a CPVR. An appeal was lodged. The appellant claimed that the agro-climatic conditions under which the trial was carried out were unsuitable for the 'Jewel' variety. The growth of the plants could have been affected by the quality of the material and the growing method applied, which could have caused differences among the plants in terms of the expression of certain characteristics. Finally, the appellant noticed that the protocol applied was unsuitable for testing the varieties of blueberries. The CPVO explained that the agro-climatic conditions of the trial were absolutely suitable for the variety, as 60 % of the varieties tested in these conditions are of the same kind as 'Jewel' and showed a good resistance to the cold. Furthermore, the growing conditions for the DUS examination were perfect; the representative of the appellant, during his visits, had judged the development of the plants to be correct. The quality of the submitted material was satisfactory and, therefore, the inhomogeneity among the plants resulted from a genetic effect.

DECISION: The Board of Appeal considered the appeal admissible and well founded (para. 4), since the conditions of the trial could not, per se, explain the differences observed in the plants, which had been declared to be a different type within the 'Jewel' variety. The examining office's experience and the results obtained with respect to other varieties of the same type clearly showed that the examination of the variety was carried out under conditions which assured a fair assessment of DUS (para. 5). The appellant's hypothesis that the plants could have been mixed up by the examining office is highly unlikely, as the plants provided were individually labelled (para. 5). The appellant's remarks on the protocol were deemed inadmissible, as they concerned parts of the protocol in force at the time when it was complied with by the examining office (para. 5). The Board of Appeal agreed with the CPVO that the relevant characteristics for the DUS examination of the varieties may or may not be included in the protocol. However, the Board of Appeal pointed out that the vade mecum describing the methods of carrying out the DUS examination held that all the characteristics included in the available protocol should be used and that the use of an additional characteristic should be approved, in advance, by the President of the CPVO (para. 5).

The Board of Appeal concluded that the refusal of the 'Jewel' variety was not based on a characteristic applicable to this species and, therefore, the variety could not be considered heterogeneous (para. 6). In the annex, which forms an integral part of the decision, the Board of Appeal decided that the technical examination of the variety, with observation of all the characteristics included in the protocol, was not completed and that, therefore, the examination should be continued to verify whether or not the DUS criteria had been met.

CONCLUSION: The appeal was deemed admissible and well founded. The CPVO was ordered to bear the costs of the proceedings.

‘Santa Fe’

Case A 011/2008; Rusticas del Guadalquivir S.L. vs CPVO

8/10/2009

KEYWORDS: uniformity, growing conditions, quality of plant material

RESULT: Appeal admissible, appeal unfounded and rejected.

BACKGROUND: The appellant, representing the University of Florida, applied for a CPVR for the ‘Santa Fe’ variety of the *Vaccinium corymbosum* L. species. In 2005, the technical trial started and, in the following two years, the examination office observed a lack of uniformity in the ‘Santa Fe’ variety during two seasons. According to UPOV Protocol TG/137/3 for this species and the standard of homogeneity recommended by the UPOV, the CPVO refused to grant the CPVR. An appeal was lodged to overturn the Office’s decision. The appellant claimed that the agro-climatic conditions under which the trial was carried out were unsuitable for the ‘Santa Fe’ variety. Moreover, he pointed out that the growth of the plants could have been affected by the quality of the material and the growing method applied, which could have caused differences among the plants in terms of the expression of certain characteristics. Finally, the appellant noticed that the protocol applied was unsuitable for testing the varieties of blueberries. In reply, the CPVO illustrated that the agro-climatic conditions of the trial were absolutely suitable for the variety, as 60 % of the varieties tested in these conditions are of the same kind as ‘Santa Fe’ and are quite resistant to the cold. Furthermore, the growing conditions for the DUS exam were perfect. Further, the representative of the appellant, during his visits, had judged the development of the plants to be correct. The quality of the submitted material was satisfactory and, therefore, the inhomogeneity among the plants resulted from a genetic effect.

DECISION: The Board of Appeal considered the appeal admissible, but unfounded (para. 4), since the conditions of the trial could not, per se, explain the differences observed in the plants. The examining office’s experience and the results obtained with respect to other varieties of the same type clearly showed that the examination of the variety was carried out under conditions which ensured a fair assessment of DUS (para. 6). The appellant’s hypothesis that the plants could have been mixed up by the examining office was highly unlikely, as the plants provided were individually labelled (para. 6). The appellant’s remarks on the protocol were deemed inadmissible, as they concerned parts of the protocol in force at the time of the CPVR application, which was complied with by the examination office (para. 6). The plants considered different by the examination office, moreover, differed on the basis of a characteristic included in the protocol for examination of this species at the date of the application. The decision of the CPVO was, therefore, confirmed by the Board of Appeal.

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs of the proceedings.

‘Razymo’

Case A 018/2008; Asehor vs Rijk Zwaan Zaadteelt en Zaadhandel B.V. and CPVO

15/3/2010

KEYWORDS: admissibility, lack of novelty

RESULT: Appeal inadmissible.

BACKGROUND: The case concerns the ‘Razymo’ variety of the *Lycopersicon esculentum* Mill. species. Rijk Zwaan Zaadteelt en Zaadhandel B.V. (‘Rijk Zwaan’) applied for a CPVR. Shortly after the Office granted the right, the appellant sent to the Office a document objecting to the application for a CPVR in respect of this variety. The Office informed the appellant that the objection was out of time, since the CPVR had been already granted, but that it could lodge an appeal against the decision if it paid the appeal fees. Since the appellant did not send any response, the Office sent a reminder regarding the appeal, asking for the payment of the first appeal fee, which was eventually paid. The appellant, however, did not send to the Office any document setting out the grounds of appeal. As the Office requested it to confirm whether the document containing the objection to the granting of the CPVR should be regarded as the grounds of appeal, the appellant asserted that it constituted the appeal form. The appellant argued that the appeal was lodged in time and in due form, since it followed the instructions and complied with the deadlines set by the Office and made the payment of the appeal fees. Moreover, it claimed that the variety at issue could not be granted a CPVR as it lacked novelty under Art. 10(1) of the Regulation, having been sold or otherwise disposed of in the Community earlier, one year before the date of the CPVR application. The appellant alleged that it received applications from his members for permission to sow, germinate and grow the variety and there was a transfer of seeds. It also claimed that the variety was exhibited by Rijk Zwaan in Almeria to local farmers and major marketing organisations in Europe in 2006 and, in the following year, the variety was produced by Agricultores Ecologicos SAT.

Rijk Zwaan and the CPVO contended that the appeal was inadmissible, as it was lodged too late, after the expiry of the time limit applicable, and the appellant was not directly and individually concerned by the contested decision. Rijk Zwaan also contested the appellant’s allegations about novelty. It pointed out that the appellant did not provide evidence about the transfer of seed and clarified that it only allowed visitors to look at the trials of the variety, but did not sell or dispose of it.

DECISION: The Board of Appeal held that the document sent by the appellant to the Office objecting to the grant of a CPVR for the variety at issue was clearly a statement of objections and, as an objection, it was submitted out of time, as the CPVR had been granted already. The Board of Appeal explained that it was not within the CPVO’s power to change a statement of objection into an appeal, since the appeal has a different legal basis. The Board of Appeal argued that, according to Art. 69 of the Regulation, the appeal should be lodged within two months after the publication of the Office’s decision. As the appellant did not file notice of appeal within the provided time limit, the appeal was inadmissible.

CONCLUSION: The appeal was dismissed and the appellant had to bear the costs incurred by Rijk Zwaan. The CPVO had to refund the appeal fees to the appellant.

‘Sunrise’ — ‘Coral’ — ‘Candy Cane’

Cases A 001/2010, A 005/2010, A 006/2010; Lyder Enterprises Ltd vs CPVO and Liner Plants NZ Ltd

18/2/2011

KEYWORDS: entitlement, ownership, admissibility, deadline for appeal.

RESULT: Appeal admissible but dismissed.

BACKGROUND: The appeal concerns the ‘Coral’, ‘Candy Cane’ and ‘Sunrise’ varieties of the *Cordyline* Comm. ex R. Br. species. The CPVO received applications for these three varieties, in which Plant Marketing International (‘PMI’) was mentioned as the applicant and Lyder as the breeder. The CPVO sent a notification of deficiencies to the applicant, as the applications did not comply with Art. 11 of the Regulation, according to which the applicant must be the person who bred, or discovered and developed the variety. PMI informed the Office by letter that Lyder was the owner of the variety and, thus, should be considered to be the applicant. In order to prove the ownership of Lyder, PMI submitted a deed of assignment and acceptance of agreement for micro-propagation and production of weaned plants between Duncan and Davies Contracting Ltd (‘DDC’) and Lyder.

Liner Plants NZ (‘Liner’), by letter, objected to the CPVR grant for the varieties in question, alleging that Lyder was not the breeder but that Liner was their rightful owner. Liner argued that the deed of assignment is not an assignment of ownership of plant variety rights and DDC clearly did not intend to transfer these rights, as it did not transfer the mother material concerned. Moreover, the conduct of the relevant parties subsequent to the date of the alleged deed, according to Liner, showed that no plant variety rights were assigned to Lyder.

The CPVO refused the three applications, ruling that the chain of entitlement under Art. 11 of the Regulation had not been established.

Lyder appealed against all three decisions.

DECISION: On the admissibility of the appeal, the Board of Appeal held that the notice of appeal was filed within the time limit (part 1.a). It deemed that the appellant failed to submit the statement of grounds of appeal within the statutory time limit provided for in Art. 69 of the Regulation. The appeal was nevertheless held to be admissible because the CPVO had issued a corrigendum to the three decisions which started a new term for appeal; thus the written statement of grounds had been received in time (part 1.b).

On the substance, the Board of Appeal considered that the deed of assignment did not transfer to Lyder all the rights, interests and benefits held by DDC, but only the rights, interests and benefits pursuant to the agreement. As the agreement did not refer to the transferral of the ownership of the mother material, the CPVO had correctly concluded that Lyder did not own the mother material. Moreover, the fact that the appellant was the beneficial owner of 500 ordinary shares of DDL did not prove that he was the beneficial owner of the majority of the shares of the company. The appellant, therefore, could not legitimately claim to be the owner of the varieties in question via declaration of trust relative to shares of DDC. Finally, the Board of Appeal found that the appellant did not provide any evidence that could have proved that he was

the owner of the D&D *Cordylines*, apart from the attestations of the directors of the companies involved at the time.

The Board of Appeal concluded, therefore, that the Office was justified in upholding the objection to the grant of the CPVR in the three decisions, since the applicant had not sufficiently substantiated his claim with regard to Art. 11 of the Regulation.

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs of the appeal proceedings.

In a parallel case with the same factual setting (A 007/2010), the application was similarly refused, and the refusal was confirmed by the Board of Appeal. An application for annulment was rejected by the General Court (Case 367/11).

‘Southern Splendour’

Case A 007/2010; Lyder Enterprises Ltd vs CPVO, Liner Plants NZ Ltd third party

18/2/2011

KEYWORDS: entitlement, ownership, admissibility, deadline for appeal, novelty

RESULT: Appeal admissible, appeal dismissed.

BACKGROUND: The appeal concerns the ‘Southern Splendour’ variety of the *Cordyline* Comm. ex R. Br. species. The CPVO received an application for the variety, in which PMI was mentioned as the applicant and Lyder as the breeder. The CPVO sent a notification of deficiencies to the applicant, as the applications did not comply with the requirement laid down in Art. 11 of the Regulation, according to which the applicant must be the person who bred, or discovered and developed the variety. PMI informed the Office by letter that Lyder was the owner of the variety and, thus, should be the applicant. In order to prove the ownership of Lyder, PMI submitted a deed of assignment and acceptance of agreement for micro-propagation and production of weaned plants between DDC and Lyder.

Liner Plants NZ objected to the grant of a CPVR for the variety in question, alleging it is the rightful owner of the variety. The objector argued that the deed of assignment is not an assignment of ownership in plant variety rights and DDC did not want to confer these rights as it did not specifically assign the mother material concerned. Moreover, the conduct of the relevant parties subsequent to the date of the alleged deed, according to the objector, showed that no plant variety rights were assigned to Lyder. The CPVO refused the application. Lyder lodged an appeal against the decision.

DECISION: The Board of Appeal found that the notice of appeal was filed within the time limit (para. II.A.1.a). The appellant failed to submit the statement of grounds of appeal within the statutory time limit according to Art. 69 of the Regulation. This did not, however, lead to the inadmissibility of the appeal because the CPVO issued a corrigendum to the decision. This set in motion a new term for appeal. Thus, the written statement of grounds had been received in time (para. II.A.1.b).

On the substance, the Board of Appeal considered that the deed of assignment did not transfer to Lyder all the rights, interests and benefits held by DDC, but only the rights, interests and benefits pursuant to the agreement. As the agreement did not refer to the transferral of the ownership of the mother material, the CPVO had correctly concluded that Lyder did not own the mother material. Moreover, the fact that the appellant was a beneficial owner of 500 ordinary shares of DDL did not prove that he was the beneficial owner of the majority of the shares of the company. The appellant, therefore, could not legitimately claim to be the owner of the variety in question via a declaration of trust relative to shares of DDC. Finally, the Board of Appeal found that the appellant did not provide any evidence that could have proved that he was the owner of the D&D *Cordylines*, apart from the attestations of the directors of the companies involved at the time.

The Board of Appeal concluded, therefore, that the Office was right in upholding the objection to the grant of the CPVR since the applicant had not sufficiently substantiated its claim with regard to Art. 11 of the Regulation.

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs. An application seeking the annulment of the decision was lodged before the General Court (Case T-367/11), which dismissed the application by reasoned order.

Case A 009/2011; Mr Przemyslaw Rogalski vs CPVO

17/1/2012

KEYWORDS: lack of uniformity, growing conditions, variegation

RESULT: Appeal admissible, appeal dismissed.

BACKGROUND: The appellant filed a CPVR application for the ‘Rogbret’ variety of the *Dafne odora* Thunb. ex. Murray species. He submitted material for the DUS trial and, since in the first DUS cycle it was not sufficiently developed, the examination office and the appellant agreed to extend the examination. During the DUS cycles, the examination office observed a lack of uniformity in the plant material submitted, particularly in terms of the variegation characteristics and, therefore, the CPVO decided to reject the application due to lack of uniformity. An appeal was lodged. The appellant contested the rejection of the application on the following grounds. First, he argued that the uniformity criterion was satisfied, pointing out that the candidate variety showed little susceptibility to reverse mutation but to a far lesser degree than what was observed during the DUS examination. He noted that customers were satisfied with the variety and questioned the requirement that the maximum acceptable number of off-types between 6 and 35 could be only one. He pointed out that the variegation in the expression of characteristic 17 (leaf: area of variegation) within three plants was the result of environmental characteristics, such as fertilisation and lack of suitable acid conditions. Finally, he contended that the DUS report was incomplete and non-exhaustive and did not provide any conclusion with regards to stability and distinctness. Moreover, he claimed that the additional examination for assessment of uniformity never took place and requested another DUS examination.

DECISION: The Board of Appeal pointed out that the Office’s decision and the DUS examination should be based only on the material supplied for the DUS examination. Information originating from non-official samples should only be taken into consideration in the DUS examination to assist in understanding the uniformity observed in the official sample, but not to make a judgement on uniformity (part 2.1.1). Furthermore, the Board of Appeal clarified that the statistical approach applied by the examination office to define the tolerance standards for off-type plants is set out in a UPOV recommendation and the risk of declaring that a non-conforming sample is conforming and vice versa is the same for the samples of 6 to 35 plants, with the tolerance of one off-type (part 2.1.2). The examination office observed a number of off-types greater than the number allowed by the UPOV recommendation, so it correctly concluded that the variety lacked uniformity (part 2.1.3). The Board of Appeal, therefore, agreed with the examination office and the CPVO that the uniformity criterion was not satisfied.

As for the variegation, the Board of Appeal noticed that it was assumed that the fertiliser was applied uniformly from one plant to the next in the variety applied for. The conforming and off-type plants were, therefore, judged under the same agronomic conditions, i.e. its nitrogen concentration and exposure to light in the greenhouse (parts 2.2.1 and 2.2.2). Regarding the acid conditions that could be more suitable for the variety, the Board of Appeal clarified that the examination office was informed that the candidate variety had to be grown in these conditions and had the experience to judge which of the characteristics observed in the three off-type plants are due to genetic variation (parts 2.2.3 and 2.2.4). The Board of Appeal stated that the examination office had the responsibility to inform the CPVO as soon as the DUS elements observed were sufficiently reliable for a decision to be made, without having to wait for the end of the DUS cycle. Since the uniformity criterion was not satisfied in the previous DUS trial, the Board

of Appeal confirmed that the CPVO was justified in finding no reason to extend the trial and refusing the application due to lack of uniformity (part 2.3). The Board of Appeal considered, therefore, the variation observed in the three off-types to be associated with genetic variation, not to fluctuation in expression due to environmental characteristics.

Furthermore, the Board of Appeal explained that there was no need to present an exhaustive report, as the Office had verified that the protocol was followed and the variety lacked uniformity. When one of the DUS criteria is not satisfied, it is not necessary to consider the other two criteria (part 2.3.1). Since the uniformity criterion was not satisfied in this case, because of reverse mutation, the criterion of stability could not be likewise satisfied (para. 2.3.1). As the variety exhibited sufficient signs of non-uniformity in the DUS trial, the CPVO was not obliged, in accordance with UPOV recommendations, to undertake another DUS cycle. The Board of Appeal concluded that it was not necessary at that stage of examination of the application to submit an exhaustive report and the report could not be considered incomplete.

CONCLUSION: The appeal was dismissed and the application for a new DUS examination was rejected. The CPVO had to allow the appellant to obtain the technical information relating to the growing method for the DUS trial. The appellant was ordered to bear the costs of the appeal proceedings.

'RYN200574'

Case A 001/2012; Rijn Plant B.V. vs CPVO

10/10/2012

KEYWORDS: Community plant variety rights, surrender

RESULT: Appeal admissible but dismissed.

BACKGROUND: Rijn Plant B.V. held a CPVR on the 'RYN200574' variety of the *Anthurium* Schott species. On 1 July 2011 the CPVO was informed by email that Rijn Plant B.V. wished to surrender its CPVR and the Office required the appellant to provide an original request. The request was received by the Office and the CPVO sent a confirmation letter to the appellant stating that the surrender had been registered on 2 July 2011 and that it would be published on the *Official Gazette of the CPVO*.

On 27 October 2011, in another email, the appellant informed the Office that he wanted to cancel the surrender request, since it was due to a mistake. The President of the CPVO, in a letter, explained to the appellant that, according to Art. 19(3) of the Regulation, a CPVR shall lapse before the expiry of the terms laid down in paragraph 1 or 2, if the holder surrenders it by sending a written declaration to such effect to the Office, and with effect from the day following the day on which the declaration is received by the Office. On the basis of the appellant's request, an entry had been made into the Register of the CPVO and the entry had been published, so that the public could be informed accordingly. The President of the CPVO, therefore, did not see any possibility to reinstate the title.

The appellant sent a further email explaining in detail that the employee who worked for the company and was responsible for CPVRs and the payment of their annual fees misunderstood and noted the commercial name of a variety which was not produced by the company any more. As a result, the decision to terminate the CPVR related to that variety was based on the wrong commercial name. The President of the CPVO, however, decided not to rectify the contested publication and not to reinstate the CPVR. Consequently, Rijn Plant B.V. lodged an appeal. The appellant required the last entry in the Register of the CPVO to be deleted and a modification of the terminated status of the variety into 'granted' again, as the different names of the variety were mixed up by mistake.

DECISION: Although the Board of Appeal recognised that a change of registration or deletion of information should be done if the Register of the CPVO is wrong, it pointed out that the case did not fall within the hypothesis of wrong registration. The Board of Appeal explained that the Register of the CPVO is kept by the Office and is open to public inspection to offer everybody the opportunity to acquire knowledge about protected varieties. Moreover, the Register of the CPVO is kept according to a strict and transparent administrative procedure and all the steps for entries into the register are prescribed by law. The Board of Appeal, therefore, concluded that, even though the appellant made a mistake, the public interest in a reliable register prevailed over the interests of the appellant.

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs of the appeal proceedings.



Lemon Symphony and Sumost, December 2007, CPVO



Sprilecpink, April 2014, CPVO



M02205, oral hearing, November 2014, Angers, France



M02205, members and Secretariat, November 2014, Angers, France



M02205, oral hearing, November 2014, Angers, France



Paul van der Kooij and Gabriele Winkler, Chairs of the Board of Appeal

'Pink Sachsenstern'

Case A 007/2011; Karsten Rannacher vs CPVO, Peter De Langhe third party

23/4/2013

KEYWORDS: Community plant variety right, transfer of ownership

RESULT: Action admissible, CPVR application remitted to CPVO for further prosecution.

BACKGROUND: The case concerns the 'Pink Sachsenstern' variety of the *Rhododendron simsii* Planch. species. The appellant filed an application, which received a provisional filing date only since it lacked information regarding the identity of the applicant. Following a CPVO request, the appellant clarified that the variety, a mutant of the 'Sachsenstern' variety protected for him in Germany and Belgium, had been developed by Mr De Langhe. However, Mr De Langhe had verbally agreed with him to transfer the ownership of the 'Pink Sachsenstern' variety. The verbal agreement was confirmed by the appellant's representative in Belgium, but the Office required the appellant to submit a document proving the transfer of ownership. Even though the appellant failed to respond within the prescribed time limit of one month, the application was not refused.

Afterwards, however, Mr De Langhe filed a notice of objection to the 'Pink Sachsenstern' CPVR on the grounds that it was not distinct from the 'Fluostern' variety for which Mr De Langhe had already filed an application for a CPVR. Subsequently, the Office notified the objection to the appellant and, following an extensive exchange of documents, the CPVO rendered three decisions: the refusal of the application for 'Pink Sachsenstern'; the refusal of the application for the 'Fluostern' variety, while admitting De Langhe's opposition to the application for 'Pink Sachsenstern'; the rejection of Rannacher's opposition to the application for 'Fluostern'. Consequently, three appeals were lodged, but the processing of the appeal was postponed several times, since the parties were negotiating an amicable settlement. The CPVO, finally, received a joint letter from the parties which held that they had agreed that all rights to 'Pink Sachsenstern' and 'Fluostern' would be transferred from De Langhe to Rannacher and two of the appeals would be withdrawn. Regarding Case A 007/2011, which concerned De Langhe's opposition to the appellant's application for 'Pink Sachsenstern', the opposition was withdrawn and the parties jointly asked the Board of Appeal to annul the Office's decision to refuse a CPVR for this variety and, instead, grant the CPVR or remit the case to the CPVO for a decision.

DECISION: The Board of Appeal found the appeal admissible, since it was lodged within the time limit (para. II.A). The Board of Appeal pointed out that the scope of the appeal was only to establish whether the processing of the application could be continued, since the parties agreed to transfer the rights on 'Pink Sachsenstern' to Rannacher, removing the basis of the refusal. From the letter that the parties sent to the Office, it was conclusively established that the appellant was the person entitled to the variety. The Board of Appeal concluded that the application procedure should be continued and there was no need to discuss the appeal against the refusal of the application.

CONCLUSION: The plant variety right application for the 'Pink Sachsenstern' variety was remitted to the CPVO for further prosecution. Each party had to bear his own costs of the appeal proceedings.

'Gala Schnitzer' (II)

Case A 003/2007; SNC Elaris vs CPVO and Schniga S.r.l., Board of Appeal

Case A 004/2007; Brookfield New Zealand Limited vs CPVO and Schinga S.r.l.

20/9/2013

Keywords: applicable protocol and guideline, additional characteristic, distinctness

RESULT: Appeals admissible and well founded.

BACKGROUND: The CPVO received an application for a CPVR for the 'Gala Schnitzer' variety of the *Malus domestica* Borkh. species, submitted by Konsortium Südtiroler Baumschuler ('KSB'), the predecessor of the applicant Schniga. As during the first DUS trials, the material submitted by the applicant proved to be virus infected, the trials were stopped and the material uprooted. The Office decided to restart the DUS trial with new virus-free material to be submitted by the applicant. The trial station sent a final report to the Office, which stated that the variety was uniform and stable and distinct from any other variety. The appellant contested the results presented in the final DUS report. The Office maintained the CPVR. The other party lodged an appeal against the decision of the CPVO granting the CPVR. This decision was annulled by the Board of Appeal while rejecting the CPVR application for 'Gala Schnitzer' (see Cases A 003 and 004/2007 (Gala Schnitzer I)). The decision of the Board of Appeal only dealt with the question of whether the resubmission of plant material had been justified and left the question of whether 'Gala Schnitzer' fulfilled the distinctness condition unanswered.

The Board of Appeal decision was appealed to the General Court. The General Court annulled, by decision of 13 September 2010, the decision of the Board of Appeal. This ruling by the General Court was appealed further to the Court of Justice of the European Union, which dismissed the appeal by decision of 19 December 2012.

As the decision of the Court of Justice left this question open, the issue to be determined still by the Board of Appeal was whether 'Gala Schnitzer' is distinct from the reference 'Baigent' variety. The appellants requested that the CPVR for 'Gala Schnitzer' be cancelled due to lack of distinctness, whereas the CPVO and the applicant pleaded for the appeal to be dismissed.

DECISION: The Board of Appeal found the appeals admissible and held that, with regard to the DUS test of the candidate variety, there had been an infringement of the applicable guideline and protocol due to the fact that the additional characteristic 'fruit: width of stripes', was observed only for one season (para. 30). The consistency of this characteristic was not examined for two seasons, which is a clear infringement of points 22 and 25 of Section II of UPOV Protocol TG/1/2, whereas all the other characteristics prescribed by UPOV Protocol TG/14/8 had been assessed in 2004 and in 2005 (para. 30). As a result of the infringement of the DUS testing procedures by both the testing station and the CPVO, the candidate variety was found by the Board of Appeal to be not legally distinct from the reference variety (para. 31). The Board of Appeal, therefore, judged the appeals well founded and annulled the decisions of the Office regarding CPVR No EU 18759 and objections OBJ 06-021 and OBJ 06-022.

CONCLUSION: The appeals were considered well founded and the decisions under appeal annulled. The Board of Appeal furthermore ruled that the costs of the appeals procedure incurred by the appellant and the applicant should be borne by the CPVO in their entirety. Applications for annulment were lodged before the General Court (Cases T-91/14 and T-92/14).

'Gradivina'

Case A 006/2013; Neath Investments Limited vs CPVO

13/1/2014

KEYWORDS: cancellation procedure, lack of payment of fees.

RESULT: Appeal admissible, but dismissed.

BACKGROUND: The CPVO granted a CPVR to the Portuguese company Setsquare servicios e marketing Lda for the 'Gradivina' variety of the *Malus domestica* Borkh. species. Some months later, the CPVO informed the appellant that the transfer of the rights from the initial holder to the appellant, Neath Investments Limited, had been registered.

In December 2012, the CPVO sent a request of payment for the third annual fees of EUR 300 to the appellant's procedural representative. As the appellant did not pay the fee within the time limit established by Art. 9(2) of the Fees Regulation, the CPVO dispatched a registered mail with acknowledgement of receipt to the representative of the appellant requesting payment of the fee within one month from the day of its reception. Since no payment of the fee had been received by the CPVO, the Office cancelled the CPVR, as provided for in Art. 21 (2)(c) of the Regulation. An appeal was lodged and the appellant made the payment of the annual fee.

DECISION: The appellant claimed he had never received the registered mail for unknown reasons. Moreover, he pointed out that he had paid the fees in the meantime.

The Board of Appeal confirmed that the CPVO bears the burden of proof for establishing that the service of the letter was made to the recipient. The CPVO submitted evidence that the acknowledgement of receipt of the registered mail was signed and returned to the Office. Therefore, the representative could not claim that he did not receive the notification.

The Board of Appeal held that, according to established case-law, the posting of an official communication by registered mail with acknowledgement of receipt is an appropriate means of service, as it enables the establishment, with certainty, of the date from which a time limit starts to run. Furthermore, in the present case, the appellant did not claim that the acknowledgement of receipt was signed by a non-authorized person. The Board of Appeal added that the existence of a valid notification by registered mail with acknowledgement of receipt is not conditional on providing the evidence of the effective knowledge by the recipient of the letter. In order to be validly notified, a communication must be served to the recipient and it suffices that he has been placed in the position to get knowledge of the content of the said communication. The acknowledgement of receipt serves this purpose, as it enables the sender to obtain evidence of service of the communication and, therefore, of the presumed knowledge of its content by the recipient.

CONCLUSION: The appeal was dismissed and the appellant was ordered to bear the costs of the appeal proceedings.

‘Sprilecpink’

Case A 004/2013; Sprint Horticulture Pty Ltd vs CPVO

4/4/2014

KEYWORDS: lack of uniformity, micro-propagation, non-suitability of material, refusal

RESULT: Action admissible, appeal dismissed.

BACKGROUND: The applicant filed a CPVR application for the ‘Sprint Pink 3’ (subsequently ‘Sprilecpink’) variety of *Cordyline banksii* species. The variety, whose plants originated from tissue culture, was found to be non-uniform during the trial and a negative report was prepared by the testing station. The applicant contested this outcome, ascribing the lack of uniformity to growing conditions and damages occurred to the plant material during the examination trial and pointing out that micro-propagation of the sample could be at the origin of the problems observed. He, therefore, requested that the technical examination with new young plants be repeated or, alternatively, that the CPVR be granted on the basis of the Australian DUS report. Subsequently, the CPVO issued a negative decision, rejecting the application, as the applicant had submitted non-suitable plant material for the test, failing to comply with a rule or request made under, or a requirement of, Art. 55(4) or (5) of the Regulation.

The applicant appealed against this decision, contending that the grounds for the rejection were incorrect, as the applicant had fully complied with the requirements. The appellant requested that the decision be cancelled and that the case be remitted to the competent examination office of the CPVO for a complementary examination. He contended that the instructions for the submission of the sample were not clear in respect of the submission of material originating from micro-propagation. He pointed out that the lack of uniformity observed during the DUS trial was due to inappropriate trial conditions or the impact of pests and diseases during the trial. The CPVO observed that the instructions for the submission of plant material were clear enough and the applicant had been actively involved in the testing process, but gave no specific instructions on the growing conditions. The examination office did not observe any kind of damages in the plants during the trial and the lack of uniformity was identified shortly after the material was submitted. The CPVO also claimed that it is up to the applicant to ensure that any submitted sample is suitable for the test and the submission of new material is only exceptionally accepted, limited to cases that fall out of the applicant’s control. The examination office correctly judged the lack of uniformity on the basis of the condition of the sample as submitted.

DECISION: The Board of Appeal concluded that the lack of uniformity of the variety did not result from inappropriate conditions at the trial station during the test, but was caused by a fundamental problem with the sample (para. 1).

Regarding the request of a complementary trial under good growing conditions, the Board of Appeal highlighted that, when the appellant visited the trial site, he did not raise any issues about the trial set-up and conditions and did not provide any advice as to growing conditions prior to the start of the trial (para. 2). The fact that the sample deteriorated during the trial and, eventually, could not be used for further investigation did not have any impact on the DUS assessment.

CONCLUSION: The Board of Appeal judged the appeal not well founded. The appellant was ordered to bear the costs of the appeal proceedings.

'Banana Cream'

Case A 008/2013; Walter Gardens Inc. vs CPVO

1/7/2014

KEYWORDS: distinctness, reference variety, variety description

RESULT: Appeal admissible, appeal allowed, CPVO decision reversed.

BACKGROUND: An application was filed for the 'Banana Cream' variety belonging to the *Leucanthemum x superbum* (Bergmans ex j. Ingram) D. H. Kent species. During the DUS examination, the candidate variety was found to lack distinctness compared to the 'Leumayel' variety. The appellant disputed whether the 'Leumayel' sample, furnished by the CPVR owner, conformed to its official description and photos, suspecting that a wrong sample was delivered by the CPVR owner deliberately for fear of his variety becoming unimportant for the market. The main difference between the varieties was the existence of lateral flower branches, a characteristic which 'Leumayel' lacked in the official description, but showed while on DUS trials. However, it is comparison with the official description that establishes distinctness. As the DUS tests showed no distinctness, the CPVO refused the application. The appellant asked either for a new technical trial or for the grant of the CPVR for his variety as distinct from 'Leumayel'.

DECISION: Even though the lateral flower branches were not part of the official 'Leumayel' description, they could actually form part of the variety, but there is no way to actually verify this (paras 1, 2). The Board of Appeal ruled that the doubt on the origin of the 'Leumayel' sample tainted the DUS procedures (para. 3).

CONCLUSION: The Board of Appeal ordered a new DUS trial with samples of the reference variety originating from three different sources, one of them being the CPVR holder, to ascertain whether the variety applied for is distinct. The CPVO was ordered to bear the costs of the appeal proceedings.

'Oksana'

Case A 007/2013; Boomkwekerij Van Rijn — de Bruijn B.V. vs CPVO, Artevos GmbH and Dachverband Kulturpflanzen- und Nutziervielfalt e. V., other parties to proceedings

2/7/2014

KEYWORDS: consent, novelty, propagating material, variety denomination

RESULT: Appeal admissible, appeal rejected.

FACTS: The appellant filed an application for protection of the 'Oksana' variety of *Pyrus communis* L. species, previously bred and distributed under the denomination 'Noiabrskaja', as confirmed by the DUS testing. The variety had been held in the German PVR office collection and forwarded to whoever was interested for the last two decades. It was common practice in the Union of Soviet Socialist Republics to distribute material among institutes when it showed good potential, so the variety has been on the market since the late 1970s. As a result, objections were filed for lack of novelty on the ground that the variety was being sold under a different name through evidence of debit notes, letters and variety descriptions in book excerpts. The appellant disputed that the variety it applied for was identical with the old variety included in the German germplasm collection. It argued that even if it was the same variety, it was not a variety of common knowledge and that the breeder's consent for distribution purposes was missing. The Office refused to grant a CPVR on grounds of lack of novelty and granted the relevant third parties' objections. The appeal followed.

SUBSTANCE: The Board of Appeal considered that the evidence was overwhelming that the variety applied for lacked novelty as it was identical to the 'Noiabrskaja' variety. This variety has been included in the Ukrainian variety list since 1995 and it was developed in the 1960s, after which time it reached eastern Germany (para. 25). Based on the evidence according to which variety constituents were being sold in Germany from 2000 to 2005, the Board of Appeal ruled that the variety was being sold prior to one year before the application (paras 4 and 26). The appellant's claim that the breeder had not consented to any sale or disposition of the variety was inconsistent with the facts as established (para. 27). The Board of Appeal remarked that no breeder's consent was needed for germplasm distribution to third parties, as confirmed by the breeder himself, so no consent was needed either when marketing variety material (para. 27). The distribution was clearly made for the exploitation of the variety, as established by the nature of the material and the quantities sold throughout the years (para. 28). The variety was held to be commonly known as a result of its inclusion in the Ukrainian variety catalogue (para. 29).

The appellant disputed whether the CPVO could ask for a revised description of the variety for DUS examination purposes, in case this was prejudicial to the application. However, the appellant itself had mentioned the 'Noiabrskaja' variety in the application, which was commonly known at the time of filing. According to Art. 56(2) of the Regulation, the CPVO has a role in the technical examinations, so it was in fact obliged to ask for a revised description to identify the relationship between the varieties (para. 30).

CONCLUSION: The appeal was held to be admissible but not well founded. The Board of Appeal ordered the appellant to bear the costs of the appeal proceedings. A further appeal was lodged before the General Court.

'Skonto'

Case A 016/2013; Mr Karl-Heinz Niehoff vs CPVO

11/11/2014

KEYWORDS: fees, cancellation, restoration, payment

RESULT: The appeal is admissible, but unfounded.

BACKGROUND: A CPVR was granted for the 'Skonto' variety belonging to the *Solanum tuberosum* L. species. The right holder — and appellant — failed to pay the annual fees for the fifth year of his CPVR, at which time the Office sent him a payment reminder while outlining the possible legal consequences of not doing so, i.e. cancellation of the right. The reminder was served by registered letter. No payment was received within the time limit, and the right was cancelled according to Art. 21(2) of the Regulation, as no circumstances that would justify not taking such an action were indicated by the appellant. The appellant pointed to an internal error in accounting and asked for the restoration of his CPVR.

DECISION: Art. 21 does not provide that errors committed by the right holder would preclude the cancellation of a right. The Office notified the appellant according to all relevant procedures and he had ample time to conform to the payment request, with clear warning of the consequences of non-payment.

CONCLUSION: The appeal was dismissed as unfounded. The Board of Appeal found that the cancellation decision was justified.

'M 02205'

Case A 010/2013; Aurora S.r.l. vs CPVO, SES VanderHave NV/SA third party

26/11/2014

KEYWORDS: nullity, distinctness information, direct comparison, public access, compensation, patent system

RESULT: Appeal admissible, appeal dismissed.

BACKGROUND: The variety in question is 'M 02205' belonging to the sugar beet species. The appellant requested the invalidity of the variety for lack of distinctness, arguing that distinctness of the variety is to be judged on the so-called distinctness information (DI) document only. According to the specific DI, the distinctness of the variety in question compared to the reference varieties was not evident, something exacerbated by the repeated amendments of the DI documents by the CPVO due to its mistake. The appellant argued that the examination tests compared living material with data collected earlier and also compared data from different years, which is contrary to the rules. The appellant's request for public access to examination data was only partly answered. According to the appellant, the numerous CPVO errors undermined legal certainty and the reliability of the CPVR system, especially when compared to the rigidity of the patent system's procedure. Such continuous amendments, if acceptable, meant that the CPVO was breaching its own rules. The CPVR holder argued that the DI document did not have the status the appellant accorded to it. The CPVO argued that all examinations were conducted according to the rules, something confirmed by the expert testimony of the Swedish examination office, which conducted the examination. The DI played a complementary role, with all the crucial information included in the CPVR certificate being correct. Regarding compensation, the appellant asked for damages but failed to justify the award and amount thereof.

DECISION: The use of the DI document is in accordance with the widely used UPOV model. The document's importance was overestimated by the appellant, as the variety description is completed once all DUS criteria are satisfied, otherwise only the negative finding is reported (para. 1).

The Board of Appeal faulted the CPVO for the very many errors committed in this case but recognised its right to correct obvious mistakes. Regarding the direct comparison of living material, the correct procedure was applied, as testified in the hearing (para. 2).

The testing data requested by the appellant, other than those anyway accessible through public access, were not intentionally withheld from the applicant, and in any case this did not affect the outcome of the case (para. 3).

The Board commented that the nature of patent law requires that the description of the subject matter be much more detailed as compared to the description of a protected variety, which is affected by environmental conditions, among others. In any case, this discussion was deemed to be out of context (para. 4).

The claim for damages was not substantiated (para. 5).

CONCLUSION: The appeal was dismissed and the claim for damages was rejected. The appellant was ordered to bear the costs of the appeal proceedings.

‘Sumost 02’

Case A 007/2009; Schröder vs CPVO, Hansson other party

24/2/2015

KEYWORDS: distinctness, trial, reference material, common knowledge

RESULT: The appeal is admissible, but it is dismissed.

BACKGROUND: The case concerns the candidate ‘Sumost 02’ variety and the protected ‘Seimora’ variety of the *Osteospermum ecklonis* (DC.) Norl. species, which undoubtedly have similarities. There are four related appeals. In addition to this appeal, the other appeals are A 002/2010, A 003/2010, and A 002/2014. The CPVO decided to refuse to grant a CPVR for ‘Sumost 02’ and to uphold the ‘Seimora’ right holder’s objections.

During the first two years of DUS trials, the ‘Seimora’ reference material submitted appeared to be not true-to-type. When the original material was finally submitted, ‘Sumost 02’ was infected by a virus, so the distinctness tests could not be completed. It was only five years after the application that proper distinctness trials could be conducted. The final examination report showed lack of distinctness, so the CPVR application was refused.

The appellant argued that ‘Sumost 02’ should be granted protection, because of the initial positive results of distinctness (obtained with the wrong reference material), because ‘Seimora’ was not of common knowledge, and because the final test results were not relevant as the material submitted did not represent the original ‘Seimora’ variety. He also asserted procedural objections and argued that the ‘Seimora’ CPVR should have been declared null and void. The other party (Hansson) argued that the initial positive results were not based on any direct variety and comparison, that ‘Seimora’ was of common knowledge because it was protected before the start of the ‘Sumost 02’ testing and that the procedural objections were without basis.

DECISION: The Board of Appeal concluded that the Office had correctly rejected the application for ‘Sumost 02’ because of lack of distinctness compared to ‘Seimora’. The lack of distinctness applied regardless of the validity or not of the ‘Seimora’ CPVR. In any case, ‘Seimora’ was of common knowledge at the relevant time. These findings are not invalidated by any procedural defect (part 1).

The long testing period was a result of mistakes committed by all parties involved and there are no sanctions for submitting wrong or infected material (part 2).

The common knowledge of ‘Seimora’ cannot be doubted, as Art. 7(2) of the Regulation and relevant UPOV guidelines make it clear that the filing of a CPVR application renders the variety a matter of common knowledge (part 3).

The Board of Appeal also accepted the verification of the ‘Seimora’ sample by all relevant procedures of the CPVO (part 4) and ruled that in case of a dispute, a side-by-side comparison is conclusive, contrary to a comparison technique altered by environmental influences (part 5).

Finally, the Board of Appeal did not consider that the Office breached its rules by refusing to grant the ‘Sumost 02’ CPVR, as the only positive report was provisional and included no direct comparison with the reference variety. Instead, the Office relied on the testing results available, gathered and heard information and followed all appropriate procedures to reach its conclusion (part 6).

CONCLUSION: The Office found no merit in the appeal and dismissed it as unfounded and ordered the appellant to bear the costs of the proceedings.

‘Seimora’

Case A 002/2010; Schröder vs CPVO, Hansson other party

24/2/2015

KEYWORDS: distinctness, reference material, inadmissibility, non-entitlement

RESULT: The appeal is inadmissible.

BACKGROUND: The case concerns the candidate ‘Sumost 02’ variety and the comparison with the protected ‘Seimora’ variety of the *Osteospermum ecklonis* (DC.) Norl. species, which undoubtedly have similarities. There are four related appeals. In addition to this appeal, the other appeals are A 007/2009, A 003/2010 and A 002/2014.

In this case the appellant requested the nullity of the ‘Seimora’ CPVR, based on lack of novelty and on non-entitlement. As regards non-entitlement, the appellant claimed that it was a Japanese breeder, and not the other party that was entitled to the ‘Seimora’ CPVR, according to Art. 11(1) of the Regulation. He also referred to the difficulties faced during DUS testing of his ‘Sumost 02’ variety in comparison with ‘Seimora’ and brought forward documentation alleging that ‘Seimora’ was the same as the Japanese PVR-protected ‘Orange Symphony’ variety. The Office rejected the appellant’s arguments of lack of novelty of ‘Seimora’ and did not deal at all with the matter of non-entitlement. The Office argued before the Board of Appeal that the appeal should be dismissed as inadmissible as there was no decision on the issue of entitlement. The appellant did not substantiate the claim of non-entitlement in the hearing and conceded that he did not withdraw the present appeal for financial reasons (Art. 85(3) of the Regulation).

DECISION: The Board of Appeal concluded that the appellant lodged an appeal against an Office decision on grounds of non-entitlement, where the contested decision itself made no mention of the entitlement issue. Thus, there is no conflict and the appeal was held inadmissible.

CONCLUSION: The Board of Appeal rejected the appeal and declined to order the refund of appeal fees to the appellant, as the appeal was deemed to be misconceived and unnecessary.

‘Seimora’

Case A 003/2010; Schröder vs CPVO, Hansson other party

24/2/2015

KEYWORDS: comparison, DUS test, nullity, delay, variety verification, *in vitro* propagation

RESULT: The appeal is dismissed.

BACKGROUND: The case concerns the candidate ‘Sumost 02’ variety and the protected ‘Seimora’ variety of the *Osteospermum ecklonis* (DC.) Norl. species, which undoubtedly have similarities. There are four related appeals. In addition to this appeal, the other appeals are A 007/2009, A 002/2010 and A 002/2014.

In this case the appellant requested the cancellation of the ‘Seimora’ CPVR (Art. 21 of the Regulation). The Office refused the cancellation. In his grounds of appeal, the appellant details the complications which arose during the DUS trial of his ‘Sumost 02’ variety and delayed the procedure (no true-to-type ‘Seimora’ samples and impure ‘Sumost 02’ and ‘Seimora’ samples). He claimed that ‘Seimora’ no longer conformed to its original description so DUS tests could not be conducted properly and the ‘Seimora’ CPVR should be declared cancelled. The CPVO explained that the extended testing period was due to difficulties arising from *in vitro* propagation and that it was common practice to repeat testing when the result was doubtful, even if marginally, as in this case. The uniformity of ‘Seimora’ was tested and its continued existence was verified.

The appellant focused on the initial submission of ‘Seimora’ material, which was not uniform, to dispute that the Office was entitled to request another sample to test ‘Seimora’'s uniformity. He claimed that the Office should have cancelled the PVR for ‘Seimora’. The Office claimed that the variety was of continued and unaltered existence, therefore there was no reason to cancel the right. It was clarified that *in vitro* storage of variety material may present difficulties in obtaining material on short notice and that the initial material submitted alleged to be ‘Seimora’ was an improved clone with brighter flower colour.

DECISION: The Board of Appeal referred to the complications and delays arising out of the submission of wrong material and conceded that the procedure could have been a lot simpler and shorter if original ‘Seimora’ material had been used from the beginning. For this, the ‘Seimora’ right holder, the Office and the examination office all were to blame. Nevertheless, the conclusions arrived at (continued validity of ‘Seimora’) were justified (part 1).

As regards the report concerning the verification of the variety, the Board of Appeal concluded that the procedure followed by the examination office was peculiar in failing to render a conclusion on the identity of the majority of the plants, despite the deviates (part 2).

Regarding the appellant’s arguments on the identity of ‘Seimora’ samples, the Board of Appeal clarified that plants can only validly be compared under identical conditions. Data collected from different test seasons or compiled from different descriptions are not acceptable (part 3).

UPOV and CPVO test guidelines and protocols are binding on CPVO practice. Data collected under different versions of these guidelines generally cannot be compared, as they include different scales and ranges. In conclusion, the appellant’s arguments on mistaken application of these guidelines are not accepted (part 4).

Regarding the technical procedure followed by the Office and the examination office, the Board of Appeal recognised that valuable information was missing from the interim and final reports, and that the procedure could have lasted less time, but the overall process was rule-abiding (part 5).

The claim that the Office breached the applicable rules was dismissed. The procedure did indeed take a long time. However, the decisions were rendered with prudence and care, after careful — and long — collection of information (part 6).

CONCLUSION: The Board of Appeal found no merit in the appeal and dismissed it as unfounded.

‘Seimora’

Case A 002/2014; Schröder vs CPVO, Hansson other party

24/2/2015

KEYWORDS: entitlement, assignment, breeder, mutation, trade name

RESULT: The appeal is admissible, but dismissed as unfounded.

BACKGROUND: The case concerns the candidate ‘Sumost 02’ variety and the protected ‘Seimora’ variety of the *Osteospermum ecklonis* (DC.) Norl. species, which undoubtedly have similarities. There are four related appeals. In addition to this appeal, the other appeals are A 007/2009, A 002/2010 and A 003/2010.

In this case the appellant requested the nullity of the ‘Seimora’ CPVR because of lack of entitlement of the proprietor of the variety (Mr Hansson). The Office rejected this request. The appellant claimed that the breeder was the breeder of the Japanese ‘Orange Symphony’ variety and that the latter and ‘Seimora’ are the same variety. The other party claimed that the Japanese breeder assigned the right to seek plant variety protection outside Japan to the other party (Hansson), which was contested by the appellant. The other party also claimed that ‘Orange Symphony’ was a trademark under which various orange varieties were being marketed.

The appellant argued that no effective assignment of rights had been effectuated, as only the breeder is entitled to the PVR, as provided for in Art. 11(1) of the Regulation. The appellant also alleged that the documents had been falsified. He also argued that the CPVO has no discretion in declaring nullity, and that once the conditions have been established, it ‘shall’ declare it null and void.

The other party considered the appellant’s allegations as unfounded. The Office argued that no serious doubt can be cast on the authenticity of the assignment document. Also, the Office argued that no misuse of powers has taken place and that its actions were within its discretion. It confirmed that ‘Seimora’ was a mutation of ‘Lemon Symphony’ and that the assignment was dated before any action was taken relating to ‘Seimora’.

DECISION: The Board of Appeal concluded that the assignment was valid and that Hansson had acted legally in seeking plant variety protection in the European Union for ‘Seimora’ (para. B2).

‘Seimora’ could well both be derived from ‘Lemon Symphony’ — bred by a Japanese breeder — and have been developed by Hansson later elsewhere. Hansson had given sufficient additional information on the matter to the Office (para. B3).

The Board of Appeal finally mentioned that the identity between ‘Orange Symphony’ and ‘Seimora’ has not been proven, and that it is common practice for marketed material under a specific trademark not to belong to the protected variety (para. B4).

CONCLUSION: The Board of Appeal concluded that Hansson was indeed entitled to apply for and become proprietor of the ‘Seimora’ CPVR, that the issue of discretion was not relevant. The appeal was dismissed as unfounded, and the appellant was ordered to bear the costs of the proceedings.

2.2. Court of Justice of the European Union

2.2.1. General Court

‘Nadorcott’

Case T-95/06; Federación de Cooperativas Agrarias de la Comunidad Valenciana (Fecoav) vs CPVO and Nador Cott Protection SARL

31/1/2008

KEYWORDS: plant varieties, appeal, inadmissibility, lack of individual concern, effective judicial protection, obligation to state reasons, *locus standi*

RESULT: Action is dismissed.

BACKGROUND: For detailed facts, refer to Case A 001/2005 of the Board of Appeal whose decision is the object of this appeal. A CPVR for the mandarin ‘Nadorcott’ variety was granted to Nador Cott Protection SARL by the CPVO. Shortly after the grant, the applicant appealed to the Board of Appeal against the decision, arguing that the grant of a CPVR for the variety at issue was of direct and individual concern to it and the CPVR was invalid for lack of novelty and distinctive character of the variety. The Board of Appeal dismissed the appeal as inadmissible, since the applicant did not have *locus standi*. The applicant lodged an appeal before the Court of First Instance (General Court) requesting the annulment of the Board of Appeal decision and that the CPVO be ordered to pay the costs.

DECISION: The applicant, firstly, alleged that the Board of Appeal infringed Arts 49 and 50 of the Implementing Regulation and the principles of care and attention and of sound administration. The applicant specifically argued that the Board of Appeal never informed it that it did not have the *locus standi* or requested that it remedy the situation (para. 22). The applicant pointed out that these are two obligations that the Board of Appeal did not fulfill due to lack of care and attention (paras 25, 26). The General Court noticed, however, that the meaning of Art. 49(1) of the Implementing Regulation is that the obligation to inform and request remedial action is subject to the objective possibility that the deficiencies found could be rectified (para. 34). Moreover, the General Court observed that the matters referred to by the article are ‘irregularities’ and formal errors (para. 35). As the *locus standi* cannot be considered a formal error and, therefore, be remedied, the Board of Appeal had no obligation to require the applicant to remedy the lack of it (paras 36 and 37). With regard to the alleged infringed principles, the General Court noted that the applicant was not able to indicate any circumstances pointing to their infringement and, therefore, the argument should be rejected (paras 41 and 43). The applicant also contended that the Board of Appeal made an error concerning the lack of *locus standi*. The General Court, through a detailed analysis, nonetheless clarified that the applicant did not put forward any argument establishing that it had the *locus standi* under Art. 68 of the Regulation. It did not provide evidence that he was ‘individually concerned’ in the sense established in the judgment of the Court of 15 July 1963 (Plaumann & Co. v Commission of the European Economic Community, Case 25-62), namely ‘by reasons of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and distinguished individually just as in the case of the person addressed’ (para. 84). Furthermore, the applicant failed to prove that it was representing the interest of growers and suppliers who would have *locus standi* (para. 105).

Finally, the applicant alleged that the Board of Appeal failed to fulfill the obligation to state reasons, since it merely held that the applicant lacked the *locus standi* (para. 121). The General Court, however, confirmed that the Board of Appeal addressed the *locus standi* issue, by considering all three possible hypotheses (para. 125).

CONCLUSION: The General Court dismissed the action, upholding the Board of Appeal's decision, and ordered the applicant to pay the costs of the proceedings.

‘Sumcol 01’

Case T-187/06; Ralf Schröder vs CPVO

19/11/2008

KEYWORDS: lack of distinctness, refusal, reference variety, appeal

RESULT: Appeal dismissed.

BACKGROUND: For detailed facts, refer to Case A 003/2004 of the Board of Appeal, of which this case is a continuation. An application was made for ‘Sumcol 01’ of the *Plectranthus ornatus* species. During the technical examination, the appellant’s competitors opposed the CPVR grant on the ground that the variety was not new, but a wild variety originating in South Africa. In order to ascertain novelty, the examination office required Mr van Jaarsveld from South Africa to provide some cuttings of *Plectranthus ornatus*. Since the differences between the variety at issue and the plants obtained from the cuttings proved to be minimal, the CPVO refused the application for lack of distinctness. The applicant lodged an appeal. After the parties presented their arguments at the hearings, the Board of Appeal was not completely convinced that the reference variety was a matter of common knowledge and ordered the taking of further evidence by making an inspection in South Africa pursuant to Art. 78 of the Regulation. However, it made the implementation of that measure subject to the condition that the appellant pay an advance of EUR 6 000 for the expense of taking the evidence under Art. 62 of the Regulation. The appellant claimed that he was not required to provide evidence and refused to pay the fees. The Board of Appeal dismissed the appeal and the appellant brought an action against the Board of Appeal’s decision before the General Court, raising several pleas.

DECISION: Regarding the plea that the CPVO misapplied Art. 62 of the Regulation considering that the variety did not fulfill the conditions for the grant of a CPVR, the General Court addressed only the lawfulness of the substantive assessments made by the Board of Appeal (para. 67). Its conclusion was that the Board of Appeal was fully entitled to consider the reference variety as a matter of common knowledge, since it based its reasoning not only on Mr van Jaarsveld’s statements, but also on the information transmitted by the South African Ministry of Agriculture (paras 92 and 94). However, the General Court considered founded, but ineffective, the appellant’s plea (paras 115 and 117) that the Board of Appeal infringed Art. 62 of the Regulation, making the taking of further evidence subject to the condition that the appellant pay an advance (para. 115). Moreover, the General Court found that the CPVO did not infringe Arts 76 and 88 of the Regulation. It pointed out that the CPVO had no obligation to order a new technical examination (para. 127), since it resulted that the variety was not distinct, and that the Office had transmitted to the appellant all the documents useful for the effective defence of his point of view (para. 134). Regarding the fourth plea, related to the presence of Mrs Heine at the hearing before the Board of Appeal, the General Court noticed that she appeared as an agent of the CPVO and, therefore, the hearing did not require the adoption of a measure of inquiry under Art. 60(1) of the Regulation (para. 130). Regarding the seventh plea, namely that the CPVO waited two months before deciding not to rectify its decision, the General Court explained that the delay was justified by the circumstances and, in any case, the length of time was not of such a nature as to justify the annulment of the contested decision (paras 142 and 143).

CONCLUSION: The General Court dismissed the appeal and ordered the appellant to pay the costs.

‘Gala Schnitzer’

Case T-135/08; Schniga GmbH vs CPVO and Elaris SNC, Brookfield New Zealand Ltd

13/9/2010

KEYWORDS: disease, material, health certificate, discretion, *restitutio in integrum*

RESULT: The action is upheld, and the contested Board of Appeal decision is annulled.

BACKGROUND: For detailed facts, refer to Cases A 003/2007 and A 004/2007 of the Board of Appeal, of which this case is the continuation. The legal predecessor of the appellant was granted a CPVR for the ‘Gala Schnitzer’ variety of the *Malus Mill.* species after being allowed to submit material for the second time, as the first batch was virus infected and it had failed to provide a health certificate. The Board of Appeal cancelled the decision awarding the CPVR, ruling that the Office was not authorised to allow the applicant to resubmit material. The appellant brought a case before the General Court requesting the annulment of the contested decision, which the CPVO supported in the hearing. The interveners requested the dismissal of the action, and as an alternative, a new examination to consider distinctness of the candidate variety.

DECISION: The General Court referred to Art. 73 of the Regulation to rule that pleas in law introduced for the first time before the General Court, and which were not the subject of the contested decision of the Board of Appeal, are inadmissible, as it can only review the legality of the Board of Appeal’s decisions (paras 34, 35).

Regarding the discretion of the Board of Appeal to request material for technical examination (infringement of Art. 55(4) of the Regulation), the applicant argued that the CPVO has full discretion to determine the particulars of the plant material submission, partly owing to the sensitive nature of plant material (paras 42, 50). The applicant argued, supported by the CPVO, that the Office had implied that the applicant did not need to provide a health certificate, thus creating legitimate expectations in this regard (paras 45-47). The Office’s discretion allowed it to accept the submission of new material (para. 49). The Office argued that its unclear instructions had caused confusion, which is why it allowed the resubmission of material (paras 55, 56). On the other hand, the interveners argued that the preconditions for dismissing the application were fulfilled (paras 57-59). The General Court construed the scope of the CPVO’s discretion as allowing it to perform its actions while promoting legal certainty: thus, it has the power to correct any vague or confusing instructions while at the same time not refusing the application or unnecessarily increasing the period between the filing of an application and the corresponding decision (paras 63-65). The General Court found that the instructions sent to the applicant were deemed to be a specific request, but not completely clear as to the fact that the material had to be completely virus free, so it was entitled to clarify its request (paras 72-75). The Board of Appeal thus misconstrued the discretion granted to the Office by the CPVO in holding that it had to dismiss the application when the applicant had not complied with the request (para. 79).

Finally, the interveners’ request to alter the contested decision is based on an argument not examined by the Board of Appeal, and thus cannot be granted, since this would encroach upon the administrative and investigatory functions of the CPVO (paras 82-86).

CONCLUSION: The Board of Appeal’s decision in Cases A 003/2007 and A 004/2007 was annulled. The General Court ordered the CPVO to bear its own costs, to pay those incurred by the appellant and the interveners to bear their own costs. A further appeal was lodged before the Court of Justice of the European Union (Case C-534/10 P).

‘Lemon Symphony’ — ‘Sumost 01’

Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09; Ralf Schröder vs CPVO and Jörn Hansson

18/9/2012

KEYWORDS: growth regulators, nullity, cancellation, adaptation of variety description, burden of proof, right of defense, period of notice, summons to hearing

RESULT: The action against the decision in Case A 010/2007 is dismissed as unfounded. In Cases A 005/2007, A 006/2007 and A 007/2007 the decisions are set aside.

BACKGROUND: For a detailed account of the facts, reference is made to the above Board of Appeal cases, of which these actions are the continuation. Hansson was granted a CPVR for the ‘Lemon Symphony’ variety of the *Osteospermum ecklonis* species. The material used in the DUS examinations was cuttings intended for sale, and had been treated with a growth regulator. Schröder filed a CPVR application for the ‘Sumost 01’ variety, also of the *Osteospermum ecklonis* species, which was refused on the grounds that it was not distinguishable from ‘Lemon Symphony’. Schröder filed a cancellation request against the CPVR for ‘Lemon Symphony’ on the ground that the variety no longer corresponded to its official description. The CPVO decided that the CPVR should be maintained. The CPVO also adopted an amended description, with the agreement of Hansson, in which the ‘Attitude of shoots’ characteristic was described as ‘semi-erect to horizontal’. In the initial description though, it had been described as ‘erect’. Schröder also applied for annulment of the CPVR for ‘Lemon Symphony’ on the ground that the variety had never existed in the form reproduced in the official description (Art. 20 of the Regulation), because of the effect of the growth regulators. The CPVO refused to initiate nullity proceedings.

Schröder appealed against the refusal to grant a CPVR for ‘Sumost 01’ (A 005/2007). He claimed that it should be granted a CPVR. Schröder also appealed against the decision refusing to cancel ‘Lemon Symphony’, claiming that ‘Lemon Symphony’ was no longer the same as it was when granted. He furthermore brought an appeal (A007/2007) before the Board of Appeal against the decision on the adaptation of the description for ‘Lemon Symphony’. Finally, a notice of appeal was lodged against the refusal to initiate annulment proceedings against ‘Lemon Symphony’ (A010/2007), as the plant material used for the examination had been treated with a growth regulator.

Cases A 005/2007, A 006/2007 and A 007/2007 were heard by the Board of Appeal without Mr Schröder’s presence. The Board of Appeal dismissed appeals A 005/2007 and A 006/2007. It also dismissed as inadmissible the appeal in Case A 007/2007. After a separate hearing, the Board of Appeal found the appeal A 010/2007 not well founded and rejected it. Schröder brought actions against all the decisions of the Board of Appeal. Cases T-133/08, T-134/08 and T-177/08 and T-242/09 were joined for the purposes of the oral procedure and the judgment.

DECISION: The Court held that the first three Joined Cases T-133/08, T-134/08 and T-177/08 are interdependent and linked to Case T-242/09 (nullity of ‘Lemon Symphony’), which justifies the latter case being examined first in the judgment (para. 98).

Regarding the alleged infringement of Arts 76 and 81 of the Regulation, the General Court ruled that Art. 76 does not apply to proceedings before the Board of Appeal. The Board of Appeal cannot carry out substantive or technical examination under Arts 54 and 55 of the Regulation. It can only assess the lawfulness of a CPVO decision under Art. 20(1)(a). Since proceedings were initiated by a third party, and

not the CPVO, the onus to prove the conditions that justify the annulment falls on the party, starting the proceedings. This conclusion is consistent with the general principle of *actori incumbit onus probandi*. Therefore, the first ground of appeal is rejected as founded on the incorrect premise that the burden of proof lay on the CPVO (paras 126-133). Furthermore, regarding the claim that the Board of Appeal based its decision entirely on the facts put forward by the CPVO without assessing the evidence he had offered and, in particular, without granting his request for the adoption of a measure of inquiry in the form of an expert opinion, the General Court held that the request to adopt measures of inquiry cannot be accepted without evidence showing that it is justified. The applicant never substantiated the possible distortion of the DUS results due to the chemical and mechanical treatment of the cuttings. Besides, the Board of Appeal was entitled to take the decision based on its own knowledge and expertise in the matter.

The General Court noted that the applicant with his allegations is actually seeking to obtain a fresh assessment of the relevant facts and evidence. As regards factual assessments that are of specific technical or scientific complexity, the General Court is only competent to examine manifest errors of assessments and, as regards factual assessments which are not of a specific technical or scientific complexity, the General Court may carry out a full review of legality. The applicant put into question the Board of Appeal's finding regarding the common practice of taking cuttings without putting forward any evidence. It follows from the contested decision that cuttings were used in the present case and taking cuttings is 'common practice' for DUS examinations and a well-known fact, so it is not necessary to prove its accuracy. The first complaint is rejected and the finding of the Board of Appeal that the DUS examination was carried out on cuttings taken from the plants is confirmed.

In any event, as the contested decision contains findings based on complex assessments of a scientific or technical nature, judicial review must be restricted to reviewing manifest errors of assessment. Regarding the CPVO's wide discretion with regard to complex botanical assessments, the applicant failed to show that there was a manifest error of assessment. The Board of Appeal concluded that the growth regulators used during propagation have no lasting effect. The applicant never produced any specific proof capable of substantiating his submissions regarding lasting effect. The arguments of the applicant by which he criticises the Board of Appeal for not accepting his claims of the unreliability of the DUS test were rejected. The applicant never provided evidence that there was another variety from which 'Lemon Symphony' could not be distinct and the DUS test was carried out by using an appropriate material.

The only issue in dispute subject to full judicial review by the General Court was whether the levels of expression of the 'attitude of shoots' must be determined according to relative or absolute criteria. The characteristic 'attitude of shoots' is not an absolute characteristic and is subject to a relative and comparative assessment between varieties. The General Court deemed the explanations provided by the examining institute to be detailed and persuasive. The comparison of photos confirms that the characteristic has not changed appreciably. Therefore the General Court rejected the first plea as in part unfounded and in part irrelevant (paras 100-170).

Concerning the alleged infringement of Arts 20 and 7 of the Regulation, the plea is rejected since it is based on the premise that the variety was described under the influence of chemical and mechanical treatment (paras 171-175).

Regarding the alleged infringement of Art. 75 of the Regulation, observing the rights of the defence does not mean that the judge must grant the parties the right to be heard on every point of his legal assessment before delivering his judgment. Using cuttings for the DUS test is common practice and a well-known fact. Since the accuracy of such facts does not need to be proven, the applicant's rights of defence cannot

have been infringed solely by reason of such a finding. Besides, the applicant is not credible in claiming his ignorance of such practice. As to the remainder of the plea, the General Court stated that it is directed against the rest of the grounds of the Board of Appeal's decision which were *obiter dicta*. The third plea is therefore rejected as, in part, unfounded and, in part, irrelevant (paras 176-185). Therefore, the action in Case T-242/09 is dismissed as unfounded (paras 186-198).

Turning to Cases T-133/08, T-134/08 and T-177/08, concerning the alleged infringement of Art. 59(2) of the Implementing Regulation and of the right to be heard, the General Court ruled that the one month's notice of the summons is a time limit which must be strictly observed, unless the parties to the proceedings and the CPVO agree otherwise. In the case before the Board of Appeal, this time limit was not observed. The applicant's agreement to the date of the hearing cannot be inferred from the mere return by his lawyer of an acknowledgement of receipt. The rest of the communication exchange shows that the applicant was not in accordance with the date set. Therefore, the General Court concluded that the applicant was not properly summoned and that the proceedings should not have continued *in absentia* of the party that had not been properly summoned. Such a material procedural defect is comparable to the infringement of an essential procedural requirement, of which the failure to observe results in the nullity of the act irrespective of the actual consequences of the infringement. In fact, the applicant had a legitimate and well-founded reason for requesting a stay in the proceedings in the three cases at issue until the adoption of the decision bringing to an end the annulment proceedings against 'Lemon Symphony'. Furthermore, the Board of Appeal, when rejecting the request for staying the proceedings, stated as a reason for the rejection that the annulment proceedings had no 'reasonable prospect of success'. In that way, the Board of Appeal seriously prejudged the decision to be taken in those proceedings. The chair of the Board of Appeal abused her powers inappropriately in seeking to hold a hearing notwithstanding the applicant's reasonable and well-founded objections. The three contested decisions were therefore set aside (paras 199-246).

Regarding the applicant's claim in Case T-133/08 seeking annulment of the decision on the adaptation of the description, the power of the General Court to alter decisions does not have the effect of conferring on that General Court the power to substitute its own reasoning for that of the Board's or to carry out an assessment on which the Board of Appeal has not yet adopted a position (paras 247-252).

CONCLUSION: The General Court rejected the action in Case T-242/09 against the decision of the Board of Appeal A010/2007. The decisions in Cases T-133/08, 134/08 and 177/08 (Board of Appeal decisions A 007/2007, A 005/2007 and A 006/2007) were set aside. Each party was ordered to bear its own costs. An appeal against the decision in Case T-242/09 is pending before the Court of Justice (Case C-546/12 P).

‘Sumcol 01’

Case T-187/06 DEP I; Ralf Schröder vs CPVO

26/9/2013

KEYWORDS: procedure, taxation of costs, lawyers’ fees, representation of an institution by a lawyer, recoverable costs

RESULT: Demand admissible, the losing party was ordered to pay the costs of the proceedings.

BACKGROUND: An application was made by Mr Ralf Schröder for the ‘Sumcol 01’ plant variety of the *Plectranthus ornatus* species. During the technical examination, the appellant’s competitors opposed the CPVR on the ground that the variety was not new, but a wild variety originating in South Africa. In order to ascertain whether the variety was novel, the examination office required Mr van Jaarsveld from South Africa to provide some cuttings of *Plectranthus ornatus*. Since the differences between the variety at issue and the plants obtained from the cuttings proved to be minimal, the CPVO refused a CPVR on the variety for lack of distinctness. The appeal against the CPVO’s refusal decision was dismissed. Subsequently, the appellant brought an action against the Board of Appeal’s decision before the General Court. The General Court dismissed the appellant’s action in Case T-187/06 and ordered the appellant to pay to the CPVO the costs of the proceedings. The parties did not reach an agreement regarding the amount of recoverable costs. Therefore, the CPVO requested that the General Court, under Art. 92 of the Rules of Procedure, fix the recoverable costs at EUR 10 824.40 plus EUR 2 000 for disbursements. The other party asked the General Court to reject the request.

DECISION: As regards the claim of inadmissibility, the General Court pointed out that the demand of taxation of fees submitted by the CPVO was structured and coherent enough to comply with Art. 21 of the Statute of the Court of Justice of the European Union and Art. 44(1)(c) of the Rules of Procedure (para. 8). Although the other party contested that the lawyers’ fees incurred by the CPVO were necessary for the purpose of the proceedings (para. 12) and the Office’s good faith (para. 15), the General Court pointed out that, according to Art. 91(b) of the Rules of Procedure and Art. 53(1) and Art. 19 of the Statute, the CPVO was entitled to choose to be aided by a lawyer (paras 13 and 14).

Mr Schröder, moreover, questioned the amount of the lawyers’ fees, which he deemed excessive and not based on hourly rates (paras 19 and 21), as well as the travel expenses incurred by the CPVO’s agents (para. 29). The General Court considered that recoverable costs are the ‘expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers’ under Art. 91(b) of the Rules of Procedure. The General Court explained that, in establishing the costs, all the circumstances of the case had to be taken into consideration (para. 39). Moreover, it pointed out that the compensation of lawyers should be considered part of the recoverable costs (para. 40). Regarding the lawyers’ fees, the General Court observed that, in determining the amount of recoverable costs, the General Court is free to evaluate the nature and relevance of the case, its complexity and the amount of work carried out by the lawyers (para. 49). Since Case T-187/06 and the subsequent appeal to the Court of Justice was the first case in which the Court of Justice dealt with the annulment of a Board of Appeal’s decision, and proved to be complex, the General Court conceded that it was a very important case for both the General Court and the Court of Justice and the CPVO. As a result, the General Court deemed the amount claimed by the CPVO for the lawyers’ fees not excessive (paras 53 and 54). The General Court found the expenses incurred by the CPVO, which had sent two agents to participate in the hearings, justified, as their presence proved useful as regards the procedure before the General Court

(para. 63). Regarding the claimed costs of the proceedings for taxation of costs, the General Court regarded the amount claimed by the CPVO disproportionate and reduced its amount (para. 69).

CONCLUSION: The General Court ordered the losing party to pay to the CPVO the amount of the recoverable costs of the proceedings, as fixed at EUR 10 000.

‘Southern Splendour’

Case T-367/11; Lyder Enterprises Ltd vs CPVO and Liner Plants (1993) Ltd

21/10/2013

KEYWORDS: assignment, entitlement, competence, evidence, sworn affidavit

RESULT: The action is dismissed.

BACKGROUND: For detailed facts, refer to Case A 007/2010 of the Board of Appeal, of which this case is a continuation. A CPVR application was made for the ‘Southern Splendour’ variety of the *Cordyline* Comm. ex R. Br. species. Lyder was stated to be the owner of the variety and PMI its representative, a fact allegedly proven by a deed of assignment between DDC and Lyder, which referred to another agreement between DDC and Torbay. The applicant argued that it held shares in DDC and that Torbay had unilaterally surrendered its right to apply for a CPVR. Liner objected to the grant and claimed it was the owner, having acquired the right by the liquidator of DDC’s assets, DDNZ. The Board ruled that Lyder was not the owner of the varieties at the moment of filing, so the chain of entitlement under Art. 11 of the Regulation had not been respected. As a result, it upheld the CPVO’s decision to reject the application. The applicant brought actions for a declaratory judgment before the High Court of New Zealand. It requested that the General Court stay proceedings until the judgment of the High Court and remit the case to the CPVO. The CPVO and the intervener asked the General Court to dismiss the case.

DECISION: Regarding the applicant’s plea that the CPVO was incompetent to rule on the transfer of a right between New Zealand companies, the only competent court being the High Court of New Zealand, the General Court reviewed the Regulation, in particular Arts. 11, 12, 53, 54 and 76, which, inter alia, require the Office to examine CPVR applications (paras 29-36). It ruled that where the applicant is not the breeder, it is required to furnish evidence as to how the right came into his possession and it is for the CPVO bodies to assess it, with a full review of the lawfulness of the CPVO’s assessment being up to the General Court (para. 37). The CPVO was competent to judge a question of fact regarding the determination of status of the CPVR applicant, including the transfer of a right through a contract transferring ownership between two New Zealand companies (para. 38).

Regarding alleged errors of law made by the CPVO in reviewing the evidence, the applicant alleged that the Board of Appeal, in not accepting evidence of unsworn affidavits (letters) supporting its entitlement to the right, acted *ultra vires* and breached the principle of *audi alteram partem* (paras 40-41). After reviewing the Board of Appeal’s analysis (para. 43), the General Court noted that the Board of Appeal did take into account the contested evidence, but noted the lack of independent corroborating evidence (paras 44-45). Established case-law requires that general circumstances must be assessed before evidence is taken at face value, like the credibility, the circumstances and the person from whom the evidence originates (para. 49). The Board of Appeal did not err in law in concluding that the content of the letters was not supported by any external evidence (paras 51-53).

Finally, the applicant brought forward new evidence to establish that the deed of transfer is valid, hoping for the CPVR application to be upheld (para. 55). Art. 73 does not authorise the General Court to take into account new evidence in order to reassess the Board of Appeal’s judgment on grounds other than those provided in the provision (paras 57-58). It is not up to the General Court to reexamine the CPVR application based on evidence not present before the Board (paras 59-60).

CONCLUSION: The General Court dismissed by order the action and upheld the Board of Appeal’s decision. It ordered the appellant to pay the costs.

2.2.2. Court of Justice

‘Sumcol 01’

Case C-38/09 P; Ralf Schröder vs CPVO

15/4/2010

Keywords: lack of distinctness, reference variety, refusal, appeal, errors of law.

RESULT: Appeal dismissed.

BACKGROUND: For detailed facts, refer to Case A 003/2004 of the CPVO Board of Appeal, of which case this case before the Court of Justice is a continuation. For the case before the General Court, refer to T-187/06.

An application was made for the ‘Sumcol 01’ plant variety of the *Plectranthus ornatus* species. During the technical examination, the appellant’s competitors opposed the CPVR on the ground that the variety was not new, but a wild variety originating in South Africa. In order to ascertain whether the variety was novel, the examination office required Mr van Jaarsveld from Kirstenbosch Botanical Gardens in South Africa to provide some cuttings of *Plectranthus ornatus*. Since the differences between the variety at issue and the plants obtained from the cuttings proved to be minimal, the CPVO refused the CPVR for lack of distinctness. The appellant lodged an appeal against the CPVO’s refusal decision. After the parties presented their arguments at the hearings, the Board of Appeal was not convinced that the reference variety was a matter of common knowledge and ordered the taking of further evidence by making an inspection in South Africa pursuant to Art. 78 of the Regulation. However, the Board of Appeal made the implementation of that measure subject to the condition that the appellant pay EUR 6 000 as an advance for the costs for this taking of evidence, in accordance with Art. 62 of the Regulation. The appellant claimed that he was not required to provide evidence and refused to pay the fees. The Board of Appeal, finally, dismissed the appeal against the decision. The appellant brought an action against the Board of Appeal’s decision before the General Court, in which he raised eight pleas, mainly arguing that the variety was distinct from the reference variety. The General Court dismissed the appellant’s action and he lodged a further appeal before the Court of Justice, putting forward two pleas.

DECISION: In the first plea, the appellant alleged procedural defects (para. 52) and argued that the General Court made two errors of law: it imposed excessive demands with regard to his submissions and, therefore, infringed the principles of taking of evidence, and distorted the facts and relevant evidence (para. 62). Regarding the first plea, the Court of Justice contended that an appeal before it relies on points of law only. Although the appellant formally pleaded an error of law, he called into question the factual assessment of the General Court and, therefore, most of his claims were judged inadmissible or ineffective (paras 73 and 96).

In the second plea, the appellant alleged errors, contradictions and breach of Community law concerning the consideration of scientific publications in order to establish that the reference variety was a matter of common knowledge (para. 111) and the conditions under which Mrs Heine (a staff member of the German Plant Variety Office — Bundessortenamt) participated in the oral hearings before the Board of Appeal (para. 130). Regarding the second plea, the Court of Justice pointed out that the publication of a detailed description to establish common knowledge is one of the aspects to be considered under UPOV document TG/1/13 and Art. 7(2) of the Regulation (para. 121). As regards Mrs Heine, the Court of Justice pointed out that the minutes of the hearing showed that Mrs Heine appeared as an agent of the CPVO and not as a witness or an expert. Therefore, Art. 60(1) of the Implementing Regulation was not infringed and her acts and statements had to be considered as those of the CPVO (paras 133, 135, 136).

CONCLUSION: The Court of Justice dismissed the appeal and ordered the appellant to pay the costs.

'Gala Schnitzer'

Case C-534/10 P; Brookfield New Zealand Ltd, Elaris SNC vs CPVO and Schniga GmbH

19/12/2012

KEYWORDS: disease, material, health certificate, discretion, *restitutio in integrum*

RESULT: The appeal is admissible but dismissed.

BACKGROUND: For detailed facts, refer to Case A 003, 004/2007 of the Board and Case T-135/08, of which this appeal case is the follow-up. The appellants sought the reversal of the General Court decision in Case T-135/08 and requested the remand of the case for a ruling on substance or for final judgment.

DECISION: The appellants claimed that the General Court exceeded its jurisdiction in conducting a new assessment of the significance and scope of the CPVO's letters and, in so doing, infringed Art. 73(2) of the Regulation (para. 36). The Court of Justice ruled that the General Court has jurisdiction to assess the legality of the CPVO decisions in applying EU law based on the factual evidence in front of it, much like it does with regard to OHIM Board of Appeal decisions (paras 39, 40). The General Court has jurisdiction to make appraisals, thus it cannot be deemed to have erred in law (paras 42, 43).

The second ground of appeal was that the General Court erred in holding that Art. 55(4) of the Regulation allowed the CPVO to request the submission of documents verifying the health status, as this was distinct from requesting material necessary for the technical examination (para. 44). Also, they submitted that the General Court erred in finding that the CPVO was authorised to request the submission of new material, and that the phrase 'as soon as possible' did indeed set a time limit, so Art. 61(1)(b) of the Regulation was infringed (para. 45). Finally, they argued that the CPVO had no discretion to clarify its requests and that it should have instead followed the *restitutio in integrum* procedure provided for in Art. 80 of the Regulation, for which the time limits had now lapsed (para. 46).

The Court of Justice found that the CPVO enjoys broad discretion, as it performs tasks of scientific and technical complexity, so it may take into account facts and evidence submitted outside a time limit (para. 50). It is also governed by the principle of sound administration, according to which it must take account of all the legal and technical particulars in order to render a decision on a case (para. 51). In view of this principle, the General Court was right in holding that the Office did not exceed its discretion (paras 53, 54). The Court of Justice ruled that Art. 61(1)(b) of the Regulation, which provides for the refusal of the CPVR application in case of non-compliance with an individual request in a time limit, is not applicable, as the request could not have been complied with due to its unclear nature (para. 56). Finally, the Court of Justice held that Art. 80 of the Regulation was not applicable in the case, as it concerns cases where a time limit has not been adhered to, which is not the case here, as the supplementary requests of the CPVO were merely intended to rectify the vague and unclear instructions given at the beginning (para. 59).

CONCLUSION: The appeal is dismissed and the appellant is ordered to bear the costs.

‘Lemon Symphony’ — ‘Sumost 01’

Case C-546/12 P; Ralf Schröder appellant, CPVO and Jørn Hansson other parties

21/5/2015

KEYWORDS: review of legality, distinctness, reference variety, evidence, burden of proof

RESULT: The appeal is unfounded.

BACKGROUND: The appellant seeks to have set aside the judgment of the General Court in Case T-242/09, which is one of the Joined Cases T-133/08, T-134/08, T-177/08 and T-242/09, decided by the General Court on 18 September 2012, which dismissed his appeal against the CPVO decision to reject his application for annulment for the CPVR for the ‘Lemon Symphony’ variety of the *Osteospermum ecklonis* species. For more details, reference is made to the judgment of the General Court and each of the Board of Appeal decisions in the cases involved (A 005/2007, A 006/2007, A 007/2007 and A 010/2007).

In short, Hansson was granted a CPVR for his ‘Lemon Symphony’ variety of the *Osteospermum ecklonis* species. The material used in the DUS examinations consisted of buds intended for sale and had been treated with a growth regulator. Schröder filed a CPVR application for the ‘Sumost 01’ variety, also of the *Osteospermum ecklonis* species, which was refused on the grounds that it was not distinct from ‘Lemon Symphony’. Schröder filed a cancellation request against ‘Lemon Symphony’ on the ground that the variety no longer corresponded to its official description. The CPVO decided that the variety should be retained. The Office also amended the official description. In the amended description the ‘Attitude of shoots’ characteristic was described as ‘semi-erect to horizontal’. In the initial description it had been described as ‘erect’. The CPVO rejected the cancellation request. Schröder also applied for annulment of ‘Lemon Symphony’ on the ground that the variety had never existed in the form reproduced in the official description (Art. 20 of the Regulation), because of the effect of the growth regulators on the material. The CPVO rejected the application for nullity. Schröder appealed against the refusal to grant a CPVR for ‘Sumost 01’ (A 005/2007), against the refusal to cancel ‘Lemon Symphony’, against the amendment of the description and against the decision not to invalidate ‘Lemon Symphony’ (the present case). The Board of Appeal dismissed the appeal as unfounded.

Schröder brought actions against all the decisions of the Board of Appeal. The General Court annulled the decisions in Cases A 005/2007, A 006/2007 and A 007/2007 on procedural grounds and remanded the cases to the Office.

In the present case, the General Court confirmed the decision of the Board of Appeal.

DECISION: Schröder’s further appeal on points of law was dismissed by the Court of Justice as unfounded. The Court of Justice held that the General Court erred in law in deciding that the principle of the *ex officio* examination of the facts by the CPVO does not apply to invalidity proceedings before the Office (paras 44-47). This error did not affect the outcome, as the Office — and the General Court — had actually analysed in detail all relevant grounds, including the grounds raised by the appellant, without merely relying on the burden of proof of the person seeking a declaration of invalidity of a protected variety. As regards the nature of the examination to be carried out relating to technical details, the Office enjoys wide discretion. As concerns the decision of whether or not to initiate invalidity proceedings, it is only when there are serious doubts as to validity that a re-examination of the variety through nullity proceedings is justified. It is thus for the appellant to demonstrate that the Office should carry out a review under Art. 20(1)(a) of the

Regulation (paras 55-58). The Court of Justice concluded that the General Court was justified in concluding that at no point did the appellant bring forward evidence on the lasting effect of growth regulators or the chemical and mechanical treatment of material that would justify the review and annulment of the protection granted (paras 59-65).

Secondly, on the burden of proof and taking of evidence, the Court of Justice found that the General Court does not have to respond exhaustively to all the parties' arguments one by one. Instead, its reasoning may be implicit, as long as the parties are able to follow the reasoning for the decision and review may be exercised (paras 71, 72). The General Court did not err in law in holding that the appellant could not secure a measure of inquiry, as he did not produce any evidence whatsoever to support this request (paras 75-79). Also, the General Court did not distort facts or evidence, as the appellant himself never seriously challenged the Board of Appeal's assessment or the examining institute's results (paras 80-89). Thirdly, regarding the appellant's challenge of the General Court's assessment of facts, the Court of Justice concluded that it has no jurisdiction to assess the facts (paras 96-109). Finally, the appellant challenges the General Court's assessments on arguments of the appellant which the General Court found to be ineffective. These related, inter alia, to the issue of the amended official variety description. In this respect the Court of Justice also noted that, having regard to the emergence of new plant varieties, an adaptation or refinement of the description of plant varieties is inevitable (paras 130-133).

CONCLUSION: The Court of Justice dismissed the appeal and ordered the appellant to bear the costs.

‘Sumcol 01’

Case C-38/09 P-DEP; CPVO vs Ralf Schröder

10/10/2013

Keywords: procedure, taxation of costs, lawyers’ fees, representation of an institution by a lawyer, recoverable costs, before the Court of Justice

RESULT: Demand admissible, losing party was ordered to pay the costs of the proceedings.

BACKGROUND: An application was made by Mr Ralf Schröder for the ‘Sumcol 01’ plant variety of the *Plectranthus ornatus* species. During the technical examination, the appellant’s competitors opposed the CPVR on the ground that the variety was not new, but a wild variety originating in South Africa. In order to ascertain whether the variety was novel, the examination office required Mr van Jaarsveld from South Africa to provide some cuttings of *Plectranthus ornatus*. Since the differences between the variety at issue and the plants obtained from the cuttings proved to be minimal, the CPVO refused a CPVR for the variety for lack of distinctness. The appellant’s appeal was dismissed by the Board of Appeal. Subsequently, the appellant brought an action against the Board of Appeal’s decision before the General Court. The General Court dismissed the appellant’s action and he lodged a further appeal before the Court of Justice which was also dismissed (Case C-38/09 P). The appellant was ordered to pay the costs of the proceedings. Since no agreement was reached on the recovery of costs, the CPVO asked the Court of Justice to fix the amount to be paid of the recoverable costs at EUR 28 287.59.

DECISION: The Court of Justice deemed the demand admissible (para. 16). The Court of Justice pointed out that, according to Art. 144(b) and Art. 184(1) of the Rules of Procedure of the Court of Justice, recoverable costs are considered the ‘expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers’ (para. 17). The Court of Justice explained that, in fixing the costs, all the circumstances should be taken into consideration (para. 19).

In a very detailed analysis the Court of Justice considered part of the costs claimed by the CPVO disproportionate and not justified.

CONCLUSION: The Court of Justice fixed the recoverable costs of the CPVO at EUR 9 942.54.

3. TABLES OF DECISIONS

3.1. Decisions reached by the Board of Appeal of the CPVO (1999-2015) (listed by decision date)

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
1	Jubileum	A002/1998	The appeal is deemed not to have been filed.	14/9/1999	Geertrui van Overwalle	Valérie Silvey	Gabriele Winkler	No
2	Enara	A001/1999	1. The case is remitted to the competent body of the Office for complementary examination of 'Enara' by the Spanish Examination Office using the original seed sample of 'Enara' and the reference variety 'Edurne'. 2. There will be no refund of the appeal fees.	25/11/2000	Nicolaas van Marrewijk	John Ardley	Gabriele Winkler	No
3	Llorver	A002/1999	Interim decision on 19/5/2000. The appeal was finally withdrawn.	19/5/2000	Georg Fuchs	Théophile Margellos	Gabriele Winkler	No
4	Estrade	A002/2000	The appeal is refused.	27/3/2001	Timothy Roberts	Dirk Reheul	Gabriele Winkler	No
5	Branglow	A004/2000	1. On appeal by the holder of the right, the decision of the CPVO of 30 August 2000 (C001) is hereby annulled. 2. There will be no refund of the appeal fees.	6/12/2001	Jürgen Tiedje	Eugenio Siboni	Gabriele Winkler	No
6	Egypt	A005/2000	The appeal is refused.	28/5/2002	Johann Habben	Pier Giacomo Bianchi	Gabriele Winkler	No
7	Maribelle Red Maribelle Mauve Maribelle Bronze	A001-A003/2002	The appeals are rejected.	1/4/2003	Paul van der Kooij	Nicolaas van Marrewijk	Gabriele Winkler	No
8	Santis 99	A005/2002	The appeal is refused.	2/4/2003	Joost Barendrecht	Aubrey Boulud	Gabriele Winkler	No
9	Br9	A017/2002	The appeal is rejected.	3/4/2003	Timothy Millett	John Ardley	Gabriele Winkler	No
10	Inuit	A018/2002	The appeal is rejected.	14/5/2003	Nicolaas van Marrewijk	Geertrui van Overwalle	Gabriele Winkler	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
	Terexotic Terwish Tereros Terseries Tersanne Tervirgin	A008-A013/2002	The appeals are rejected.	15/5/2003	Henrik Wanscher	Hanns Ullrich	Gabriele Winkler	No
12	Breeder's reference 'BCT9916BEG'	A023/2002	The appeal is refused.	8/10/2003	Aubrey Bould	Valérie Silvey	Gabriele Winkler	No
13	Jonabel	A031/2002	The appeal is refused.	8/12/2003	Beate Rüdcker	Nicolaas van Marrewijk	Gabriele Winkler	No
14	V209r	A021/2002	The appeal is rejected.	9/12/2003	Roland Petit-Pigeard	Jan Willem Mijis	Gabriele Winkler	No
15	Probril	A003/2003	The appeal is rejected.	4/6/2004	David Boreham	Nicolaas van Marrewijk	Gabriele Winkler	No
16	Silver Edge	A004/2003	The appeal is rejected.	4/6/2004	Nicolaas van Marrewijk	David Boreham	Gabriele Winkler	No
17	Sunglow Blue Sunglow White	A005, A006/2003	The appeals are admissible. 2. Decisions EU 10872 and EU 10873 dated 14 April 2003 are cancelled. 3. The BOA remits the cases to the competent body of the Office for further action and for a new decision. Further action will be in the form of a new testing cycle for the variety 'Sunglow Blue' in comparison with the reference varieties. 4. The costs of the examination will be borne by the Office. 5. The parties shall bear their respective costs and expenses in relation to the appeal.	28/9/2004	Beate Rüdcker	René Royon	Gabriele Winkler	No
18	Phasion	A001/2004	The appeal is rejected.	16/12/2004	Paul van der Kooij	Stefano Borrini	Gabriele Winkler	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
19	Natasja King	A006/2004	<ol style="list-style-type: none"> The appeal is rejected. The appellant shall bear the costs related to the appeal according to Article 85 of Council Regulation (EC) No 2100/94. 	15/6/2005	René Royon	Aubrey Bould	Gabriele Winkler	No
20	Walfrasun	A005/2004	<ol style="list-style-type: none"> The case is remitted to the competent body of the Office for a further examination of uniformity and a further decision on uniformity. The appeal fees shall be refunded. 	16/6/2005	Joost Barendrecht	Timothy Millett	Gabriele Winkler	No
21	Ginpent	A004/2004	<ol style="list-style-type: none"> The appeal is rejected. The costs of the appeal proceedings shall be borne by the appellant. 	18/7/2005	Pietro Russo	Eugenio Siboni	Gabriele Winkler	No
22	Nadorcott	A001/2005	<ol style="list-style-type: none"> The appeal is rejected as inadmissible. The appellant shall bear the costs according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994. 	8/11/2005	Timothy Millett	Stefano Borrini	Gabriele Winkler	T-95/06
23	Sumcol01	A003/2004	The appeal is rejected.	2/5/2006	Hanns Ullrich	Joost Barendrecht	Gabriele Winkler	T-187/06 C-38/09P T-187/06 DEP I C-38/09P-DEP
24	Thunderbolt	A007/2005	<ol style="list-style-type: none"> Decisions R 574 and OBJ/05-004 of the Community Plant Variety Office of 14 November 2005 are cancelled. The applicant is granted plant variety protection for the variety 'Thunderbolt'. The objector shall bear the costs of the appeal proceedings. The appeal fee is to be reimbursed. 	7/7/2006	Michael Köller	Aubrey Bould	Gabriele Winkler	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
25	Moreya	A004/2005	<ol style="list-style-type: none"> Decision No OBJ 05/001 is cancelled. Community Plant Variety Right No EU 15519 is annulled. The appeal fee shall be refunded. 	13/10/2006	Aubrey Bould	Paul van der Kooij	Gabriele Winkler	No
26	Cowichan	A001/2007	<ol style="list-style-type: none"> The appeal is rejected. The appellant shall bear the costs of the appeal proceedings. 	11/9/2007	Timothy Millet	Joost Barendrecht	Gabriele Winkler	No
27	Gala Schnitzer	A003, A004/2007	<ol style="list-style-type: none"> Decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007 are cancelled. CPVO application 1999/0033 for 'Gala Schnitzer' is rejected. The applicant shall bear the costs according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994. 	21/11/2007	José-Manuel Rosa-Pérez	Dirk Reheul	Gabriele Winkler	T-135/08 C-534/10P
28	Lemon Symphony	A006/2007	<ol style="list-style-type: none"> The appeal is rejected. The appellant shall bear the costs of the appeal proceedings according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994. 	4/12/2007	Paul van der Kooij	Aubrey Bould	Gabriele Winkler	T-134/08 C-546/12P
29	Lemon Symphony	A007/2007	<ol style="list-style-type: none"> The appeal is rejected. The appellant shall bear the costs of the appeal proceedings according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994. 	4/12/2007	Paul van der Kooij	Aubrey Bould	Gabriele Winkler	T-133/08 C-546/12P
30	Summost 01	A005/2007	<ol style="list-style-type: none"> The appeal against decision R 701 of 19 February 2007 is rejected. Decision OBJ 07-023 of 19 February 2007 is upheld. The appellant shall bear the costs according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994. 	4/12/2007	Paul van der Kooij	Aubrey Bould	Gabriele Winkler	T-177/08 C-546/12P

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
31	Gasore	A011/2007	<p>1. The appeal is dismissed.</p> <p>2. The appellant is ordered to bear the costs of the appeal proceedings.</p>	9/9/2008	Roland Petit-Pigeard	Timothy Millett	Paul van der Kooij	No
32	Barberina	A009/2008	<p>1. The appeal is rejected.</p> <p>2. The appellant shall bear the costs of the appeal proceedings according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994.</p>	2/12/2008	José Manuel López Aranda	Sophia Bonne	Paul van der Kooij	No
33	Yuval	A001/2008	<p>1. The appeal is rejected as inadmissible.</p> <p>2. The appellant shall bear the costs of the appeal proceedings under Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994.</p>	4/12/2008	Stefano Borrini	Timothy Roberts	Paul van der Kooij	No
34	Yuval	A002/2008	<p>1. The appeal is rejected as inadmissible.</p> <p>2. The appellants shall bear the costs of the appeal proceedings under Article 85 of Council Regulation No. 2100/94 of 27 July 1994.</p>	4/12/2008	Stefano Borrini	Timothy Roberts	Paul van der Kooij	No
35	Lemon Symphony	A010/2007	<p>1. The appeal is rejected.</p> <p>2. The appellant shall bear the costs of the appeal proceedings according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994.</p>	23/1/2009	Aubrey Bould replaced by Joost Barendrecht	Hanns Ullrich	Paul van der Kooij	T-242/09 C-546/12P

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
			<ol style="list-style-type: none"> 1. The appeals are admissible and partially well founded. 2. Decisions C 316 and R 827 of the Office are cancelled. 3. The cases are remitted to the competent body of the Office for a complementary examination by the approved testing station using well-defined material of 'Gold Star' and 89Fach004 to be submitted by the appellant. 4. The appellant has to submit full details of the growing conditions necessary for a successful complementary examination of the material to be submitted. 5. The testing station must ensure good growing conditions and communicate to the Office and the appellant immediately any growing problems arising during the complementary examination. 6. The complementary examination should be continued until full development of the distinguishing characteristics, unless the examination enables an earlier conclusion because the distinctness and uniformity requirements are clearly not met. 7. The claim for the refund of past examination fees and other costs is rejected. 8. The costs of the complementary examination shall be borne by the Office. 9. Two thirds of the appeal fee shall be reimbursed. 					
36	Gold Star Breeder's reference 'FACH004'	A004, A005/2008		21/4/2009	Nicolaas van Marrewijk	René Royon	Paul van der Kooij	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
			<p>1. The appeal is admissible and well founded. Decision R 853 of 25 August 2008 is cancelled.</p> <p>2. The costs of the appeal proceedings shall be borne by the CPVO.</p>					
37	Jewel	A010/2008	<p>The appeal was completed by an annex published on 15/06/2010:</p> <ol style="list-style-type: none"> the technical examination of the Jewel variety, with observation of all of the characteristics included in the protocol, was not completed; this technical examination must, as a result, be continued to verify whether or not the DHS criteria have been met — a necessary precondition for ruling on the granting of protection. 	8/10/2009	Joël Guiard	Alain Guissart	Paul van der Kooij	No
38	Santa Fe	A011/2008	<ol style="list-style-type: none"> The appeal is admissible, but unfounded. The appeal is rejected. The costs of the appeal proceedings shall be borne by the appellant. 	8/10/2009	Joël Guiard	Alain Guissart	Paul van der Kooij	No
39	Razymo	A018/2008	<ol style="list-style-type: none"> The appeal is dismissed. The appellant shall bear the costs incurred by the applicant in the appeal proceedings. The CPVO shall refund the appeal fees to the appellant. 	15/3/2010	Timothy Millett	Jan Willem Mijs	Paul van der Kooij	No
40	Sunrise Coral Candy Cane	A001, A005, A006/2010	<ol style="list-style-type: none"> The appeals against Decisions Nos R971, R969 and R970 are dismissed. The appellant shall bear the costs of the appeals proceedings according to Article 85, paragraph 1, of Council Regulation (EC) No 2100/94 of 27 July 1994. 	18/2/2011	Richard Bianchi	Stéphane Beslier	Paul van der Kooij	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
41	Southern Splendour	A007/2010	<p>1. The appeal against decision No R972 is dismissed.</p> <p>2. The appellant shall bear the costs of the appeal proceedings according to Article 85, paragraph 1, of Council Regulation (EC) No 2100/94 of 27 July 1994.</p>	18/2/2011	Richard Bianchi	Stéphane Beslier	Paul van der Kooij	T-367/11
42	Rogbret	A009/2011	<p>1. The appeal is dismissed. The application for a new DUS examination is rejected.</p> <p>2. The Community Plant Variety Office must allow the applicant to obtain the technical information relating to the growing method for the DUS trial. 3. The cost of the appeal proceedings shall be borne by the applicant, in accordance with Article 85 of Regulation (EC) No 2100/94.</p>	17/1/2012	Richard Brand	Kurt Riechenberg	Paul van der Kooij	No
43	RYN200574	A001/2012	The appeal is rejected.	10/10/2012	Beatrix Bönisch	Michael Köller	Paul van der Kooij	No
44	Pink Sachsenstern	A007/2011	<p>1. The plant variety right application for the variety 'Pink Sachsenstern' is remitted to the Community Plant Variety Office for further prosecution of the application procedure relating to this variety, with due regard for the considerations by the Board of Appeal set out below.</p> <p>2. The parties shall each bear their own costs in the appeal proceedings.</p>	23/4/2013	Huibert Ghijssen	Krieno Fikkert	Paul van der Kooij	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
45	Gala Schnitzer	A003/2007 (II)	[Decision of the Board of Appeal on the outstanding issue of <i>Distinctness</i>] 1. The appeal is admissible and well founded. Decisions Nos EU18759 and OBJ 06-21 are cancelled. 2. The costs of the appeal proceedings shall be borne by the CPVO, pursuant to Article 85(2) of Council Regulation (EC) No 2100/94.	20/9/2013	Dirk Reheul	Helen Johnson	Paul van der Kooij	T-91/14
46	Gala Schnitzer	A004/2007 (II)	[Decision of the Board of Appeal on the outstanding issue of <i>Distinctness</i>] 1. The appeal is admissible and well founded. Decisions Nos EU18759 and OBJ 06-22 are cancelled. 2. The costs of the appeal proceedings shall be borne by the CPVO, pursuant to Article 85(2) of Council Regulation (EC) No 2100/94.	20/9/2013	Dirk Reheul	Helen Johnson	Paul van der Kooij	T-92/14
47	Gradivina	A006/2013	1. The appeal is rejected. 2. The appellant shall bear the costs of the appeal proceedings, pursuant to Article 85(1) of Council Regulation (EC) No 2100/94.	13/1/2014	Richard Bianchi	Kurt Riechenberg	Paul van der Kooij	No
48	Sprilecpink	A004/2013	1. The appeal is admissible but not well founded. 2. Decision No R 1175 of the Office is upheld. 3. The appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Council Regulation (EC) No 2100/94.	4/4/2014	Elizabeth Scott	Michael Köller	Paul van der Kooij	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
49	Banana Cream	A008/2013	<p>1. The appeal is admissible and well founded. Decision No R 1202 of the CPVO of 29 July 2013 is set aside.</p> <p>2. A new DUS test of the candidate variety 'Banana Cream' must be conducted with samples of the reference variety 'Leumayel' from at least three different sources to be included in the trial, including one sample provided by the holder of the Community Plant Variety Right for 'Leumayel', in order to check, in particular, if 'Leumayel' has or does not have lateral flowering branches.</p> <p>3. The costs of the appeal proceedings shall be borne by the CPVO, pursuant to Article 85(1) of Council Regulation (EC) No 2100/94.</p>	1/7/2014	Joël Guiard	Zoltán Csűrös	Paul van der Kooij	No
50	Oksana	A007/2013	<p>1. The appeal is admissible but not well founded. Decisions Nos R1232, OBJ 13-086, OBJ 13-087, OBJ 13-088 and OBJ 13-090 are upheld.</p> <p>2. The costs of the appeal proceedings shall be borne by the appellant, pursuant to Article 85(1) of Council Regulation No (EC) 2100/94.</p>	2/7/2014	Krieno Fikkert	Arnold van Wijk	Paul van der Kooij	T-767/14
51	Skonto	A016/2013	<p>1. The appeal is dismissed.</p> <p>2. The appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Council Regulation (EC) No 2100/94.</p>	11/9/2014	Kurt Riechenberg	Beatrix Bönisch	Paul van der Kooij	No

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
52	M 02205	A010/2013	<p>1. The appeal is dismissed.</p> <p>2. The appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Council Regulation (EC) No 2100/94.</p> <p><i>Decision of the Alternate Board of 15 May 2012 on procedural objection: the procedural objection raised by the appellant pursuant to Article 48(3) of Regulation (EC) No 2100/94 is dismissed.</i></p>	26/11/2014	Nicolaas van Marrewijk	Helen Johnson	Paul van der Kooij	T-140/15
53	Summost 02	A007/2009	<p>Decision of the Board of 24 February 2015:</p> <p>1. the appeal is dismissed;</p> <p>2. the appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Regulation (EC) No 2100/94.</p> <p><i>Decision of the Alternate Board of 15 May 2012 on procedural objection: the procedural objection raised by the appellant pursuant to Article 48(3) of Regulation (EC) No 2100/94 is dismissed.</i></p>	05/15/2012	Dirk Reheul	Hanns Ullrich	Sari Haukka	
54	Seimora	A002/2010	<p>Decision of the Board of 24 February 2015:</p> <p>1. the appeal is inadmissible;</p> <p>2. the appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Regulation (EC) No 2100/94.</p> <p><i>Decision of the Alternate Board of 15 May 2012 on procedural objection: the procedural objection raised by the appellant pursuant to Article 48(3) of Regulation (EC) No 2100/94 is dismissed.</i></p>	05/15/2012	Dirk Reheul	Hanns Ullrich	Sari Haukka	

No	Variety denomination	Case No	Decision reached	Decision date	Rapporteur	Member	Chair	Further appeal
			<i>Decision of the Alternate Board of 15 May 2012 on procedural objection: the procedural objection raised by the appellant pursuant to Article 48(3) of Regulation (EC) No 2100/94 is dismissed.</i>	05/15/2012	Dirk Reheul	Hanns Ullrich	Sari Haukka	
55	Seimora	A003/2010	Decision of the Board of 24 February 2015: 1. the appeal is dismissed; 2. the appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Regulation (EC) No 2100/94.	02/24/2015	Nicolaas van Marrewijk	Timothy Roberts	Paul van der Kooij	
56	Seimora	A002/2014	1. The appeal is dismissed. 2. The appellant shall bear the costs of the appeal proceedings pursuant to Article 85(1) of Regulation (EC) No 2100/94.	24/2/2015	Nicolaas van Marrewijk	Timothy Roberts	Paul van der Kooij	

3.2. Decisions appealed to the Court of Justice of the European Union: General Court and Court of Justice (2006-2015) (listed by decision date)

Case before General Court No	Variety denomination	Date appeal General Court	Against	Date ruling General Court	Ruling Court of First Instance/General Court	Further appeal Court of Justice No	Date further appeal	Date ruling Court of Justice	Ruling Court of Justice
T-95/06	Nadorcott	3/21/2006	Board of Appeal decision of 08/11/2005 in Case A001/2005	31/1/2008	The General Court dismissed the action and ordered Fecoav to pay the costs.	No			
T-187/06	Sumcol01	7/18/2006	Board of Appeal decision of 02/05/2006 in Case A003/2004	19/11/2008	The General Court dismissed the action and ordered the appellant to pay the costs.	C-38/09 P	28/1/2009	15/4/2010	The Court of Justice dismissed the appeal and ordered Mr Schröder to pay the costs.
T-135/08	Gala Schnitzer	4/4/2008	Board of Appeal decisions of 21/11/2007 in Cases A003 and A004/2007	13/9/2010	The General Court: 1. annuls the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 21 November 2007 (Cases A 003/2007 and A 004/2007); 2. orders the CPVO to bear its own costs and to pay those incurred by Schniga GmbH; 3. orders Elaris SNC and Brookfield New Zealand Ltd to bear their own costs.	C-534/10 P	15/11/2010	19/12/2012	The Court of Justice dismissed the appeal and ordered Brookfield New Zealand Ltd and SNC Elaris to pay the costs.

Case before General Court No	Variety denomination	Date appeal General Court	Against	Date ruling General Court	Ruling Court of First Instance/General Court	Further appeal Court of Justice No	Date further appeal	Date ruling Court of Justice	Ruling Court of Justice
T-133, 134, 177/08 and T-242/09	'Lemon Symphony' and 'Sumost 01'	04/03/2008, 04/04/2008, 05/13/2008 and 06/24/2009	Board of Appeal decisions of 04/12/2007 in Cases A005-007, and of 23/01/2009 in Case A010/2007	18/9/2012	The General Court: 1. dismissed the action brought against the decision of the Board of Appeal of the CPVO of 23 January 2009 (Case A 010/2007) concerning an application for annulment of the CPVR granted for the variety 'Lemon Symphony'; 2. set aside the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 007/2007) concerning a challenge to the decision by the CPVO to adapt, of its own motion, the official description of the variety 'Lemon Symphony' in the Register of CPVRs; 3. dismissed the remainder of the action brought against that decision; 4. set aside the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 006/2007) concerning an application for revocation of the CPVR granted for the variety 'Lemon Symphony'; 5. set aside the decision of the Board of Appeal of the CPVO of 4 December 2007 (Case A 005/2007) concerning an application for the grant of a CPVR for the variety 'Sumost 01'; 6. ordered each party to bear its own respective costs.	C-546/12P	28/11/2012	21/5/2015	The Court of Justice dismissed the appeal and ordered Mr Ralf Schröder to pay the costs.

Case before General Court No	Variety denomination	Date appeal General Court	Against	Date ruling General Court	Ruling Court of First Instance/General Court	Further appeal Court of Justice No	Date further appeal	Date ruling Court of Justice	Ruling Court of Justice
T-187/06 DEP I	Sumcol 01	7/2/2013	Non-payment of recoverable costs of the proceedings T-187/06	26/9/2013	The General Court decided on the reimbursement of costs based on praetorian criteria taking into consideration the precise information that the parties provided. The General Court decided that an amount of EUR 10 000.00 should be paid by Mr Schröder as recoverable costs to the CPVO.	No			
T-367/11	Southern Splendour	4/7/2011	Board of Appeal decision of 18/02/2011 in Case A007/2010	21/10/2013	The General Court dismissed the action and ordered Lyder Enterprises Ltd to pay the costs.	No			
T-91/14 and T-92/14	Gala Schnitzer	10/2/2014	Board of Appeal decisions of 20/09/2013 in Cases A003 and A004/2007	Pending					
T-767/2014	Oksana	17/11/2014	Board of Appeal decision of 02/07/2014 in Case A007/2013	Pending					
	Sumcol 01						7/2/2013	10/10/2013	The Court of Justice decided to fix the total of EUR 9 942.54 as recoverable costs.
T-140/15	M 02205	24/3/2015	Board of Appeal decision of 26/11/2014 in Case A010/2013	Pending			C-38/09 P-DEP		

4. LIST OF CASES

4.1. CPVO Board of Appeal: chronological list of decisions

Variety denomination	Case No	Page
1. Jubileum	A002/1998	page 8
2. Enara	A001/1999	page 9
3. Llorver	A002/1999	page 10
4. Estrade	A002/2000	page 11
5. Branglow	A004/2000	page 12
6. Egypt	A005/2000	page 13
7. Maribelle Red — Maribelle Mauve — Maribelle Bronze	A001-003/2002	page 14
8. Santis 99	A005/2002	page 15
9. BR9	A017/2002	page 16
10. Inuit	A018/2002	page 17
11. Terexotic — Terwish — Tereros — Terseries — Tersanne — Tervirgin	A008-013/2002	page 18
12. Breeder's reference 'BCT9916BEG'	A023/2002	page 19
13. Jonabel	A031/2002	page 20
14. V209r	A021/2002	page 21
15. Probril	A003/2003	page 22
16. Silver Edge	A004/2003	page 23
17. Sunglow Blue — Sunglow White	A005 and 006/2003	page 24
18. Phasion	A001/2004	page 25
19. Natasja King	A006/2004	page 26
20. Walfrasun	A005/2004	page 27
21. Ginpent	A004/2004	page 28
22. Nadorcott	A001/2005	page 29
23. Sumcol 01	A003/2004	page 30
24. Thunderbolt	A007/2005	page 31
25. Moreya	A004/2005	page 32
26. Cowichan	A001/2007	page 33
27. Gala Schnitzer	A003 and 004/2007	page 34
28. Lemon Symphony	A006/2007	page 35
29. Lemon Symphony	A007/2007	page 36
30. Sumost 01	A005/2007	page 37
31. Gasore	A011/2007	page 39
32. Barberina	A009/2008	page 40
33. Yuval	A001/2008	page 41
34. Yuval	A002/2008	page 42
35. Lemon Symphony	A010/2007	page 43

Variety denomination	Case No	Page
36. Gold Star — Breeder's reference 'FACH004'	A004 and 005/2008	page 44
37. Jewel	A010/2008	page 45
38. Santa Fe	A011/2008	page 46
39. Razymo	A018/2008	page 47
40. Sunrise — Coral — Candy Cane	A001, 005 and 006/2010	page 48
41. Southern Splendour	A007/2010	page 50
42. Rogbret	A009/2011	page 51
43. RYN200574	A001/2012	page 53
44. Pink Sachsenstern	A007/2011	page 56
45. Gala Schnitzer	A003 and 004/2007 (II)	page 57
46. Gradivina	A006/2013	page 58
47. Sprilecpink	A004/2013	page 59
48. Banana Cream	A008/2013	page 60
49. Oksana	A007/2013	page 61
50. Skonto	A016/2013	page 62
51. M 02205	A010/2013	page 63
52. Summost 02	A007/2009	page 64
53. Seimora	A002/2010	page 65
54. Seimora	A003/2010	page 66
55. Seimora	A002/2014	page 68

4.2. Court of Justice of the European Union

4.2.1. General Court: Chronological list of judgments

Variety denomination	Case No	Page
1. Nadorcott	T-95/06	page 69
2. Sumcol 01	T-187/06	page 71
3. Gala Schnitzer	T-135/08	page 72
4. Lemon Symphony — Summost 01	T-133, 134, 177/08 and 242/09	page 73
5. Sumcol 01	T-187/06 DEP I	page 76
6. Southern Splendour	T-367/11	page 78

4.2.2. Court of Justice: Chronological list of judgments

Variety denomination	Case No	Page
1. Sumcol 01	C-38/09 P	page 79
2. Gala Schnitzer	C-534/10 P	page 80
3. Sumcol 01	C-38/09 P — DEP	page 81
4. Lemon Symphony — Sumost 01	C-546/12 P	page 83

5. COMPOSITION OF THE BOARD OF APPEAL OF THE CPVO

5.1. List of qualified Chairs of the Board of Appeal (1997-2017)

WINKLER, Gabriele (*Chair, 1997-2007*)

CHRISTODOULOU, Dimitrios (*Vice-Chair, 1997-2002*)

MILLETT, Timothy (*Vice-Chair, 2002-2010*)

VAN DER KOOLJ, Paul (*Chair, 2007-2017*)

HAUKKA, Sari (*Vice-Chair, 2011-2016*)

5.2. List of qualified members of the Board of Appeal (1996-2016)

1. ANDERSEN, Preben Veilstrup (*2006-2010†*)
2. ARDLEY, John (*1996-2006*)
3. BALZANELLI, Sergio (*2006-2011*)
4. BARENDRECHT, Joost (*1996-2016*)
5. BERTOLI, Guiseppe (*1996-2006*)
6. BESLIER, Stéphane (*2006-2011*)
7. BIANCHI, Pier Giacomo (*1996-2001*) and (*2006-2016*)
8. BIANCHI, Richard (*2006-2016*)
9. BLOUET, Françoise (*2006-2011*)
10. BÖNISCH, Beatrix (*2011-2016*)
11. BONNE, Sophia (*2006-2011*)
12. BOREHAM, David (*2001-2006*)
13. BORRINI, Stefano (*2001-2011*)
14. BOULD, Aubrey (*2001-2010*)
15. BRA, Maria (*1996-2011*)
16. BRAND, Richard (*2006-2016*)
17. BYRNE, Noël Joseph (*1996-2006*)
18. CALVACHE QUESADA, David (*2006-2011*)
19. CHANZÁ JORDÁN, Dionisio (*1996-2011*)
20. CHARTIER, Philippe (*2006-2011*)
21. COLLINS, Anthony Michael (*1996-2006*)
22. CORTE-REAL, Antonio (*1996-2006*)
23. COTSIONIS, Christos (*1996-2006*)
24. CSÚRÖS, Zoltán (*2006-2016*)
25. DANKERT, Rindert (*1996-2001*)
26. DEL RIO PASCUAL, Amparo (*1996-2011*)
27. FEYT, Henry (*1996-2001*)
28. FIKKERT, Krieno (*2011-2016*)
29. FUCHS, Georg (*1996-2001*)
30. GHIJSEN, Huibert (*1996-2001* and *2011-2016*)
31. GRESTA, Fabio (*2006-2011*)
32. GUIARD, Joël (*2006-2016*)
33. GUISSART, Alain (*2006-2011*)
34. HABBEN, Johann (*1996-2006*)
35. HERNÁNDEZ TEN, Amparo (*1996-2006*)
36. HOPPERUS BUMA, Mia (*1996-2001*)
37. JOHNSON, Helen (*2011-2016*)
38. KARAYANNOPOULOS, Fotis (*1996-2006*)
39. KÖLLER, Michael (*1996-2016*)
40. KOOMEN, Nicolaas (*1996-2001*)
41. KRALIK, Andrej (*2006-2011*)
42. LAURENS, François (*2006-2011*)
43. LIESEBACH, Mirko (*1996-2006*)
44. LIGHTBOURNE, Muriel (*February-November 2011*)
45. LÓPEZ-ARANDA, José Manuel (*1996-2011*)
46. MALCOLM, John (*1996-2006*)
47. MARGELLOS, Théophile (*1996-2011*)
48. MATTHIES, Chistoph (*1996-2006*)
49. MEZZA, GianLorenzo (*1996-2006*)
50. MENNE, Andrea (*2006-2011*)
51. MIJS, Jan Willem (*1996-2011*)
52. MILLETT, Timothy (*1996-2010*)
53. OLIVIUSSON, Peter (*2006-2011*)

54. PATACHO, Rosa (2006-2011)
55. PAUSE, Christof (2006-2011)
56. PERRACINO, Mauro (2006-2011)
57. PETIT-PIGEARD, Roland (1996-2011)
58. PINHEIRO DE CARVALHO, Miguel Ângelo (2006-2016)
59. REHEUL, Dirk (1996-2016)
60. REMEDIA, Giovanni (1996-2001)
61. RIECHENBERG, Kurt (2006-2016)
62. ROBERTS, Timothy (1996-2016)
63. ROFES I PUJOL, Maria Isabel (2006-2011)
64. ROSA-PEREZ, José Manuel (2006-2011)
65. ROYON, René (1996-2011)
66. RÜCKER, Beate (2001-2011)
67. RUIZ-NAVARRO Y PINAR, José Luis (1996-2001)
68. RUSSO, Pietro (1996-2011)
69. SANTANGELO, Enrico (2006-2011)
70. SCOTT, Elizabeth (2006-2016)
71. SIBONI, Eugenio (1996-2011)
72. SILVEY, Valérie (1996-2006)
73. TIEDJE, Jürgen (1996-2006)
74. TURRISI, Rosario Ennio (2006-2011)
75. ULLRICH, Hanns (1996-2016)
76. VALATSOS, Athanassios (1996-2001)
77. VAN DER KOIJ, Paul (1996-2007)
78. VAN DOESBURG, Jan (1996-2001)
79. VAN EYLEN, Louis (2001-2006)
80. VAN MARREWIIJK, Nicolaas (1996-2016)
81. VAN OVERWALLE, Geertrui (1996-2012)
82. VAN WIJK, Arnold (2011-2016)
83. VEIGA DA CRUZ DE SOUSA, Pedro António (2006-2011)
84. WANSCHER, Henrik (2001-2006)
85. WIESNER, Ivo (2006-2011)
86. WINTER, Rudolf Romke (1996-2001)

MAIN ACRONYMS AND ABBREVIATIONS

Art.	Article
Arts	Articles
Basic Regulation/Regulation	Council Regulation (EC) No 2100/94 of 27 July 1997 on Community plant variety rights
Board	the Board of Appeal of the CPVO
CPVO/the Office	Community Plant Variety Office
CPVR	Community plant variety right
DI	distinctness information
DUS	distinctness, uniformity and stability
EUR	euro
Fees Regulation	Commission Regulation (EC) No 1238/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards the fees payable to the Community Plant Variety Office
i.e.	id est (that is)
Implementing Regulation	Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the Community Plant Variety Office
OHIM	Office for the Harmonization in the Internal Market (Trade Marks and Design)
para.	paragraph
paras	paragraphs
PVR	plant variety right
the Office	the Community Plant Variety Office
UPOV	International Union for the Protection of New Varieties of Plants
UPOV Convention	International Convention for the Protection of New Varieties of Plants
USA	United States of America
vs	versus
VCU	value for cultivation and use



3 boulevard Maréchal Foch • CS 10121
49101 ANGERS CEDEX 2 • FRANCE
Tel. +33 241256400 • Fax +33 241256410
cpvo@cpvo.europa.eu • www.cpvo.europa.eu

Follow us on 

Join us on 

Служба на Общността за сортовете растения
Oficina Comunitaria de Variedades Vegetales
Odrůdový úřad Společenství
EF-Sortsmyndigheden
Gemeinschaftliches Sortenamt
Ühenduse Sordiamet
Κοινοτικό Γραφείο Φυτικών Ποικιλιών
Community Plant Variety Office
Office communautaire des variétés végétales
Ured Zajednice za zaštitu biljnih sorti
Ufficio comunitario delle varietà vegetali
Kopienas Augu šķirņu birojs
Bendrijos augalų veislių tarnyba
Közösségi Növényfajtá-hivatal
L-Uffiċju Komunitarju dwar il-Varjetajiet tal-Pjanti
Communautair Bureau voor plantenrassen
Wspólnotowy Urząd Ochrony Odmian
Instituto Comunitário das Variedades Vegetais
Oficiul Comunitar pentru Soiuri de Plante
Úrad Spoločenstva pre odrody rastlín
Urad Skupnosti za rastlinske sorte
Yhteisön kasvilajikevirasto
Gemenskapens växsortsmyndighet



Publications Office