JUDGMENT OF THE COURT (First Chamber)

19 December 2012 (*)

(Appeal – Community plant variety rights – Regulation (EC) No 2100/94 – Article 73(2) – Decision of the Board of Appeal of the CPVO refusing an application for a Community plant variety right – Discretion – Review by the General Court – Article 55(4) read in conjunction with Article 61(1)(b) – Right of the CPVO to make a new request for the submission of plant material)

In Case C-534/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 15 November 2010,

Brookfield New Zealand Ltd, established in Havelock North (New Zealand),

Elaris SNC, established in Angers (France),

represented by M. Eller, avvocato,

appellants,

the other parties to the proceedings being:

Community Plant Variety Office (CPVO), represented by M. Ekvad and M. Lightbourne, acting as Agents,

defendant at first instance,

Schniga GmbH, established in Bolzano (Italy), represented by G. Würtenberger, Rechtsanwalt,

applicant at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ilešič, E. Levits (Rapporteur), J.-J. Kasel and M. Safjan, Judges,

Advocate General: J. Mazák,

Registrar: R. Şereş,

having regard to the written procedure and further to the hearing on 26 April 2012,

after hearing the Opinion of the Advocate General at the sitting on 12 July 2012,

gives the following

Judgment

1 By their appeal, Brookfield New Zealand Ltd ('Brookfield') and Elaris SNC ('Elaris') claim that the Court should set aside the judgment of 13 September 2010 in Case T-135/08*Schniga* v *CPVO – Elaris and Brookfield New Zealand (Gala Schnitzer)* [2010] ECR II-5089 ('the judgment under appeal'), by which the General Court of the

European Union annulled the decision of the Board of Appeal of the Community Plant Variety Office (CPVO) of 21 November 2007 relating to the grant of a Community plant variety right for the 'Gala Schnitzer' plant variety (Cases A 003/2007 and A 004/2007) ('the contested decision').

Legal context

2 Article 10(1) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), as amended by Council Regulation (EC) No 2506/95 of 25 October 1995 (OJ 1995 L 258, p. 3) ('Regulation No 2100/94'), provides:

'A variety shall be deemed to be new if, at the date of application determined pursuant to Article 51, variety constituents or harvested material of the variety have not been sold or otherwise disposed of to others, by or with the consent of the breeder within the meaning of Article 11, for purposes of exploitation of the variety:

(a) earlier than one year before the abovementioned date, within the territory of the Community;

...'

3 Article 55(4) of Regulation No 2100/94 sets out the CPVO's powers as regards the procedure for granting Community plant variety rights:

'The [CVPO] shall determine, through general rules or through requests in individual cases, when, where and in what quantities and qualities the material for the technical examination and reference samples are to be submitted.'

4 Article 61(1) of Regulation No 2100/94 sets out the conditions under which applications for a Community plant variety right will be refused:

'The [CVPO] shall refuse applications for a Community plant variety right if and as soon as it establishes that the applicant:

...

(b) has not complied with a rule or request pursuant to Article 55(4) or (5) within the time limit laid down, unless the [CVPO] has consented to non-submission;

...'

5 Paragraphs 1, 2 and 3 of Article 73 of Regulation No 2100/94, which is entitled 'Actions against decisions of the Boards of Appeal', provide:

'1. Actions may be brought before the Court of Justice against decisions of the Boards of Appeal on appeals.

2. The action may be brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of this Regulation or of any rule of law relating to their application, or misuse of power.

3. The Court of Justice shall have jurisdiction to annul or to alter the contested decision.'

6 Article 80(1) of Regulation No 2100/94 provides:

'Where, in spite of having taken all due care in the particular circumstances, the applicant for a Community plant variety right or the holder or any other party to proceedings before the [CVPO] has been unable to observe a time limit vis-à-vis the

[CVPO], his rights shall, upon application, be restored if his failure to respect the time limit has resulted directly, by virtue of this Regulation, in the loss of any right or means of redress.'

7 As stated in the third recital in the preamble to Regulation No 2506/95, it is appropriate to align the rules on actions which may be brought against decisions of the CPVO or its Boards of Appeal established by Regulation No 2100/94 with those provided for in Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1).

Background to the dispute and the contested decision

8 On 18 January 1999, Konsortium Südtiroler Baumschuler ('KSB'), the legal predecessor of Schniga GmbH ('Schniga'), filed an application for a Community plant variety right at the CPVO in respect of the apple variety (Malus Mill) Gala Schnitzer, initially called Schniga.

9 The CPVO asked the Bundessortenamt (Federal Plant Variety Office, Germany) to carry out the technical examination referred to in Article 55(1) of Regulation No 2100/94.

10 By letter of 26 January 1999, the CPVO asked KSB to submit to it, and also to the Bundessortenamt, between 1 March and 15 March 1999, the plant material necessary for the technical examination. The CPVO also stated that KSB was responsible for complying with all phytosanitary and customs requirements applicable to the delivery of the material.

11 KSB submitted the requested material within the time-limits set.

12 By letter of 25 March 1999, the CPVO acknowledged receipt of the material requested, but stated that it was not accompanied by a phytosanitary certificate. It therefore asked KSB to ensure that that essential document was provided 'as soon as possible'.

13 On 23 April 1999, KSB sent a European plant passport to the Bundessortenamt and told it that the authority which had issued the passport – the Plant Protection Service of Bolzano (Italy) – had stated that that document served as a phytosanitary certificate.

14 On 3 May 1999, the Bundessortenamt informed KSB that the material had arrived in due time and that it was appropriate. It also stated that the European plant passport provided was sufficient for the purposes of carrying out the technical examination and determining whether the substantive conditions for the grant of a Community plant variety right had been met. The Bundessortenamt did, however, request a copy of an official certificate confirming that the material sent was virus-free.

15 In 2001, KSB informed the Bundessortenamt that it was impossible for it to provide the requested documentary evidence. It had emerged that the material sent in March 1999 for the purposes of the technical examination was not virus-free. The Bundessortenamt therefore informed the CPVO that it intended to uproot the infected material in order to prevent the virus spreading to other plants.

16 By email of 13 June 2001, the CPVO informed KSB that, in consultation with the Bundessortenamt, it had decided to authorise KSB to provide new, virus-free plant material in order to resume the examination of the application. The CPVO justified its decision by the fact that its instructions regarding the phytosanitary state of the material had not been sufficiently clear, because it had not specified that the material should be virus-free. Accordingly, KSB could not be regarded as responsible for the situation.

17 On 5 May 2006, Elaris and Brookfield – respectively the licensee and the holder of the plant variety right relating to the Baigent variety – lodged with the CPVO, pursuant to Article 59 of Regulation No 2100/94, objections to the grant of a right for the Gala Schnitzer variety. The objections were based on the earlier right in respect of the apple variety (Malus Mill) Baigent.

18 The grounds relied on by Brookfield related to the fact that the Gala Schnitzer variety was not sufficiently distinct from the reference variety owned by Brookfield. Brookfield also contested the fact that KSB had been given the right to submit new, virus-free plant material when, according to Brookfield, the CPVO should have refused KSB's initial application.

19 By decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007, the competent CPVO committee granted a Community plant variety right for the Gala Schnitzer variety, finding that it was sufficiently distinct from the reference variety Baigent. It also dismissed Brookfield's objections.

20 On 11 April 2007, Brookfield lodged an appeal, pursuant to Articles 67 to 72 of Regulation No 2100/94, against the CPVO Committee's decisions.

21 By the contested decision, the Board of Appeal annulled the decisions of that committee and itself refused the application for a Community plant variety right for the Gala Schnitzer variety. In particular, it found that Article 61(1)(b) of Regulation No 2100/94 did not empower the CPVO to authorise KSB to submit new material, since KSB had not complied with the requests in an individual case, for the purposes of Article 55(4) of that regulation, set out in the letters of 26 January and 25 March 1999.

The action before the General Court and the judgment under appeal

22 By application lodged on 4 April 2008, Schniga claimed that the General Court should annul the contested decision on the basis of the following pleas in law:

– the inadmissibility of the objections lodged with the CPVO by Elaris and Brookfield;

– infringement of Article 61(1)(b) and Article 62 of Regulation No 2100/94;

– infringement of Article 55(4) of Regulation No 2100/94.

23 Elaris and Brookfield took part in the proceedings before the General Court as interveners in support of the CPVO. At the hearing, the CPVO amended its heads of claim and agreed with the position defended by Schniga.

24 After declaring the first plea in law raised by Schniga to be inadmissible, the General Court examined the admissibility of the third plea in law, which had been challenged by Elaris and Brookfield.

25 In that regard, the General Court held, in paragraph 39 of the judgment under appeal, that the Board of Appeal had assessed the legal nature of the letters of 26 January and 25 March 1999 and, in consequence, that assessment was subject to review by the Court.

26 In examining the merits of the third plea put forward by Schniga, the General Court, in paragraphs 62 and 63 of the judgment under appeal, rejected the Board of Appeal's findings that, as KSB had not complied with the requests in an individual case set out in the CPVO's letters of 26 January and 25 March 1999, the CPVO was required to refuse KSB's application in respect of the Gala Schnitzer variety.

27 The arguments deployed by the General Court, leading it to hold that the CPVO had not misconstrued the scope of the discretion conferred on it by Article 55(4) of Regulation No 2100/94, are set out in paragraphs 64 to 80 of the judgment under appeal.

28 First, in paragraph 64 of the judgment under appeal, the General Court stated that it is consistent with the principle of sound administration and with the need to ensure the proper conduct and effectiveness of proceedings that where, in the event of a lack of precision as to the conditions to be met if an application for a Community plant variety right is to be examined, the CPVO considers that that lack of precision can be remedied, it has the power to continue with the examination of the application and is not required to refuse it.

29 In addition, in paragraph 65 of the judgment under appeal, the General Court stated that that discretion enables both the CPVO to satisfy itself that its requests in individual cases are clear and other applicants to know their rights and obligations without ambiguity.

30 After describing all the exchanges which took place between the CPVO and KSB, the General Court found, in paragraph 75 of the judgment under appeal, that the letters of 26 January and of 25 March 1999 lacked precision with regard to the fact that the plant material to be submitted had to be virus-free and that, accordingly, the email of 13 June 2001 was intended to remedy that imprecision.

31 Secondly, the General Court rejected as ineffective the allegations made by Brookfield and Elaris that, in relation to the procedure for the examination of its application, KSB had acted in bad faith, and indicated that Article 80 of Regulation No 2100/94 was not relevant in the circumstances.

32 Consequently, the General Court upheld the third plea in law put forward by Schniga and annulled the contested decision.

Procedure before the Court

33 By their appeal, Brookfield and Elaris claim that the Court should:

– set aside the judgment under appeal and refer the case back to the General Court for a ruling on the substance of the case;

– in the alternative, give final judgment and dismiss the action at first instance; and

– order Schniga to pay the costs.

34 The CPVO and Schniga contend that the Court should:

– dismiss the appeal; and

– order Brookfield and Elaris to pay the costs.

The appeal

35 Brookfield and Elaris rely on two grounds of appeal (i) infringement by the General Court of Article 73(2) of Regulation No 2100/94 and (ii) infringement of Article 55(4) of Regulation No 2100/94, read in conjunction with Articles 61(1)(b) and 80 of that regulation.

The first ground of appeal: infringement of Article 73(2) of Regulation No 2100/94

Arguments of the parties

36 Brookfield and Elaris claim that, by re-appraising the facts when considering the third plea in law raised before it, the General Court exceeded its jurisdiction to review legality. The judgment under appeal is accordingly based on a new assessment of the significance and scope of the CPVO's letters of 26 January and 25 March 1999. However, according to Brookfield and Elaris, under the terms of Article 73(2) of Regulation No 2100/94, the General Court has jurisdiction only to verify that decisions of the Board of Appeal are lawful.

37 The CPVO and Schniga contend that the General Court has exclusive jurisdiction to find and appraise the relevant facts, which are not open to review by the Court of Justice on appeal. Moreover, in the judgment under appeal, the General Court reviewed the Board of Appeal's legal assessment of the facts – an exercise which, on any view, falls within its jurisdiction. According to the CPVO and Schniga, the arguments put forward by Brookfield and Elaris are therefore inadmissible.

Findings of the Court

38 It should be borne in mind that, in accordance with recital 3 in the preamble to Regulation No 2506/95, Article 73 of Regulation No 2100/94 was amended in order to align the rules on actions which may be brought against decisions of the CPVO or its Boards of Appeal with the rules laid down in Regulation No 40/94.

39 The Court has repeatedly held, as regards Article 63 of Regulation No 40/94, which was framed in terms identical to those of Article 73 of Regulation No 2100/94, that the General Court is called upon to assess the legality of the decisions of the Boards of Appeal of OHIM by reviewing the way in which they have applied European Union law, specifically in the light of the factual evidence placed before those Boards. Accordingly, within the limits laid down in Article 63 of Regulation No 40/94, as interpreted by the Court of Justice, the General Court may carry out a full review of the legality of decisions of the Boards of Appeal of OHIM, if necessary examining whether the Board of Appeal concerned made a correct legal characterisation of the facts of the dispute or whether its appraisal of the facts placed before it was flawed (see, to that effect, Case C-16/06 P*Les Éditions Albert René* v *OHIM* [2008] ECR I-10053, paragraphs 38 and 39).

40 In that regard, the Court of Justice has acknowledged that the General Court has a similar jurisdiction as regards the review of the legality of decisions of the CPVO or of its Boards of Appeal (see, to that effect, Case C-38/09 P *Schräder* v *CPVO* [2010] ECR I-3209, paragraph 69).

41 In the present case, the General Court held, in paragraph 69 of the judgment under appeal, that the letters of 26 January and 25 March 1999 contained requests in an individual case.

42 In that respect, since it must be acknowledged that, in appeals lodged against decisions of the CPVO or of its Boards of Appeal, the General Court enjoys the same jurisdiction to make appraisals, it cannot be claimed that the General Court erred in law.

43 Consequently, the first ground of appeal must be rejected as unfounded.

The second ground of appeal: infringement of Article 55(4) of Regulation No 2100/94, read in conjunction with Articles 61(1)(b) and 80 of that regulation

Arguments of the parties

44 By their second ground of appeal, Brookfield and Elaris first take issue with the General Court for holding that, under Article 55(4), the CPVO may make a request in an individual case, relating to the submission of documents attesting to health status,

which is distinct from the request for submission of the plant material necessary for the technical examination.

45 Secondly, according to Brookfield and Elaris, the General Court infringed Article 55(4) of Regulation No 2100/94, read in conjunction with Article 61(1)(b) of that regulation, by holding that the CPVO could authorise the submission of new plant material after the deadline specified in an initial request for material. Furthermore, according to Brookfield and Elaris, the General Court erred in finding that the words 'as soon as possible' in the letter of 25 March 1999 could not be regarded as imposing a time-limit in relation to a request in an individual case.

46 Thirdly, Brookfield and Elaris take issue with the General Court for according the CPVO a measure of discretion by permitting it to clarify its requests in an individual case itself, without having recourse to the specific procedure provided for in Article 80 of Regulation No 2100/94, and for rejecting as irrelevant the allegation that the applicant for a Community plant variety right had acted in bad faith.

Findings of the Court

47 As is apparent from paragraph 63 of the judgment under appeal, the General Court held that the CPVO has the right to define conditions which must be met if an application for a Community plant variety right is to be examined, provided that the period within which the applicant for that right must respond to the request made to him in the individual case has not expired.

48 On that basis, the General Court found, in exercising its jurisdiction to make appraisals, that: (i) the letter of 25 March 1999 constituted a request in an individual case relating to the documentary evidence concerning the plant material to be examined (paragraph 69 of the judgment under appeal) and (ii) the CPVO's email of 13 June 2001 contained a request in an individual case for the submission of plant material, within the meaning of Article 55(4) of Regulation No 2100/94 (paragraph 72 of the judgment under appeal). In that regard, the General Court held that the CPVO had not exceeded its discretion.

49 It cannot be claimed that, in so doing, the General Court erred in law.

50 It should be stated at the outset that the CPVO's task is characterised by the scientific and technical complexity of the conditions governing the examination of applications for Community plant variety rights and, accordingly, the CPVO must be accorded a broad discretion in carrying out its functions (see, to that effect, *Schräder* v *CPVO*, paragraph 77). Furthermore, given that broad discretion, the CPVO may, if it considers it necessary, take account of facts and evidence which are submitted or produced out of time (see, by analogy as regards OHIM, Case C-29/05 P *OHIM* v *Kaul* [2007] ECR I-2213, paragraph 42).

51 Moreover, the CPVO – as a body of the European Union – is subject to the principle of sound administration, in accordance with which it must examine all the relevant particulars of a case with care and impartiality and gather all the factual and legal information necessary to exercise its discretion. Moreover, it must, as the General Court pointed out in paragraph 64 of the judgment under appeal, ensure the proper conduct and effectiveness of proceedings which it sets in motion.

52 In the light of those findings, it should first be borne in mind that, under Article 55(4) of Regulation No 2100/94, the CPVO is to determine, through general rules or through requests in individual cases, when, where and in what quantities and qualities the material for the technical examination and reference samples are to be submitted.

53 In view of the discretion which the CPVO enjoys, Article 55(4) of Regulation No 2100/94 cannot be interpreted as preventing it from making a separate request for plant material to be examined and for documentary evidence relating to that material. Accordingly, as the General Court pointed out in paragraph 69 of the judgment under

appeal, without being contradicted on that point by Brookfield and Elaris, the letter of 25 March 1999 related to the quality of the plant material to be examined and, under Article 55(4) of Regulation No 2100/94, a request in an individual case may relate, precisely, to quality.

54 Secondly, it cannot be claimed that the General Court erred in law in holding that the CPVO had the right to make a new request for submission of plant material to be examined.

55 In the light of the principle of sound administration and the need to ensure the proper conduct and effectiveness of proceedings, and inasmuch as the CPVO found – as emerges from paragraph 74 of the judgment under appeal and is not disputed, moreover, by Brookfield and Elaris – that its initial request lacked precision, it was for the CPVO to ask KSB to send it plant material which met the requirements set in a new request in an individual case.

56 In that respect, first, Brookfield and Elaris are not justified in claiming that the General Court ought to have held that, on the basis of Article 61(1)(b) of Regulation No 2100/94, the CPVO was required to refuse KSB's application for a Community plant variety right. Article 61(1)(b) of Regulation No 2100/94 applies where the CPVO finds that the applicant has not complied with a request in an individual case within the time-limit laid down. As it was, in the present case, as the General Court rightly found, the CPVO took the view that KSB was unable to comply with the initial request in an individual case because of its lack of precision. Consequently, the CPVO could not refuse the application for a Community plant variety right submitted by KSB without erring in law.

57 Secondly, as regards the contention of Brookfield and Elaris that the General Court should have taken KSB's bad faith into consideration, it should be noted that Brookfield and Elaris have not specified to what extent the General Court erred in law by holding, in paragraph 80 of the judgment under appeal, that KSB's conduct was unconnected with the issue of whether the CPVO had the power to clarify its requests in an individual case.

58 Moreover, it should also be noted that Brookfield and Elaris adduce no evidence capable of calling that assessment into question.

59 As regards, lastly, the alleged infringement of Article 80 of Regulation No 2100/94, it is sufficient to state that that provision concerns only cases in which the applicant for a Community plant variety right has been unable to observe a time-limit vis-à-vis the CPVO. In the present case, it is common ground that the various requests in an individual case which were addressed to KSB after its application for a Community plant variety right were made in connection with the same proceedings, on account of the lack of precision of the CPVO's first request for the submission to it of the material and the documents necessary for the examination of that application. It follows that Article 80 of Regulation No 2100/94 does not apply in circumstances such as those of the present case.

60 Accordingly, the second ground of appeal must be rejected as unfounded.

61 It follows from all the foregoing considerations that the appeal must be dismissed.

Costs

62 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the CPVO has applied for costs and Brookfield and Elaris have been unsuccessful, Brookfield and Elaris must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Brookfield New Zealand Ltd and Elaris SNC to pay the costs.

[Signatures]

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* Language of the case: English.