Reports of Cases

OPINION OF ADVOCATE GENERAL
MAZÁK
delivered on 12 July 2012 [1]

Case C-534/10 P

Brookfield New Zealand Ltd
Elaris SNC
v
Community Plant Variety Office (CPVO)

and Schniga GmbH

(Community plant variety rights — Regulation (EC) No 2100/94 — Discretion conferred on the CPVO — New submission of virus-free plant material for technical examination)

I – Introduction

1. By the present appeal, Brookfield New Zealand Limited ('Brookfield') and Elaris SNC ('Elaris') (or, collectively, 'the appellants') ask the Court of Justice to set aside the judgment in Case T-135/08 *Schniga* v *CPVO – Elaris and Brookfield New Zealand (Gala Schnitzer)* [2] ('the judgment under appeal'), by which the General Court (Sixth Chamber) annulled the decision of 21 November 2007 of the Board of Appeal of the Community Plant Variety Office ('CPVO' or 'the Office') granting a Community plant variety right for the 'Gala Schnitzer' apple variety (Cases A 003/2007 and A 004/2007) ('the contested decision').

2. The appeal essentially raises the question whether the General Court correctly construed the scope of the discretion conferred upon the CPVO in holding that the CPVO had the power, under the application procedure for the grant of a plant variety right, to allow the submission of new plant material for the technical examination.

II – Legal framework

3. At the material time, the rules governing Community plant variety rights were those established by Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, [3] as amended by Council Regulation (EC) No 2506/95 [4] (Regulation No 2100/94).

1 — Original language: English.
2 — [2010] ECR II-5089.
3 — OJ 1994 L 227, p. 1.
4 — Regulation of 25 October 1995 amending Regulation (EC) No 2100/94 on Community plant variety rights (OJ 1995 L 258, p. 3).

4. Article 10(1) of Regulation No 2100/94, entitled 'Novelty', provides:

'1. 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;

…'

5. Paragraph 4 of Article 55 of Regulation No 2100/94, which is entitled 'Technical examination', provides:

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

6. Article 61 of Regulation No 2100/94 lists the circumstances in which applications for a Community plant variety right are to be refused. It provides, so far as is relevant for present purposes, as follows:

'1. The Office 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 Office has consented to non-submission;

...'

7. Article 73 of Regulation No 2100/94, entitled 'Actions against decisions of the Boards of Appeal', provides:

'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.

4. The action shall be open to any party to appeal proceedings which has been unsuccessful, in whole or in part, in its submissions.

…'

8. Paragraph 1 of Article 80 of Regulation No 2100/94, which is entitled 'Restitutio in integrum', reads:

'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 Office has been unable to observe a time-limit vis-à-vis the Office, his rights shall, upon application, be restored if his failure to respect the time-limit has resulted directly, by virtue of this Regulation, in the loss of any right or means of redress.'

III – Facts

9. In the judgment under appeal, the facts giving rise to the dispute were set out as follows:

'1. On 18 January 1999, the Konsortium Südtiroler Baumschulen ("KSB"), the predecessor in title of the applicant, [Schniga], filed an application for a Community plant variety right at the [CPVO], pursuant to [Regulation No 2100/94].

2. That application was registered under number 1999/0033.

3. The Community plant variety right was sought for the apple variety (Malus Mill) Gala Schnitzer.

4. The CPVO requested the Bundessortenamt (German Federal Plant Variety Office) to carry out the technical examination referred to in Article 55(1) of Regulation No 2100/94.

5. By letter of 26 January 1999, sent to KSB's representative, the CPVO requested KSB to submit to it, and also to the Bundessortenamt, the material necessary for the technical examination, that is to say, 10 dormant shoots for grafting, between 1 March and 15 March 1999. The CPVO also stated that KSB was responsible for complying with all phytosanitary and customs requirements applicable to the delivery of the material.

6. The Bundessortenamt received that material on 9 March 1999.

7. By letter of 25 March 1999, sent to KSB's representative, the CPVO acknowledged receipt of the material requested and stated that that material had been delivered to the Bundessortenamt in good condition and in time, but that it was not accompanied by a phytosanitary certificate. The CPVO asked KSB to ensure that that essential document would be provided as soon as possible.

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

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

10. In 2001, KSB informed the Bundessortenamt that it was impossible for it to provide the phytosanitary certificate requested, because it had emerged that the material sent in March 1999 for the purposes of the technical examination was infected by latent viruses.

11. By email of 4 May 2001, the Bundessortenamt informed the CPVO that it intended to uproot the infected material, in order to prevent the virus spreading to other plants, and proposed that the CPVO request KSB to submit new, virus-free material in order to restart the technical examination.

12. By email of 8 May 2001, sent to the Bundessortenamt, the CPVO agreed that the infected material should be uprooted and stated that it had decided to ask KSB to submit new, virus-free material for March 2002. It also stated that, since the instructions on the submission of material had not specified that it had to be virus-free, but merely that it had to comply with the European plant passport requirements, KSB could not be held liable for the situation, that it would be unfair to refuse the application concerning the Gala Schnitzer variety and that, therefore, the solution proposed appeared to be the best one.

13. By email of 13 June 2001, the CPVO informed KSB that, in consultation with the Bundessortenamt, it had decided to authorise KSB, in so far as its instructions on the submission of plant material and the necessary health status of that material had not been sufficiently clear, to provide new, virus-free material, accompanied by a phytosanitary certificate confirming that that was the case, to the Bundessortenamt in March 2002, in order to restart the examination of the application concerning the Gala Schnitzer variety.

14. On completion of the new technical examination, the Bundessortenamt concluded, in its final report dated 16 December 2005, that the Gala Schnitzer variety was distinct from the closest reference variety, that is to say, the Baigent variety, on the basis of the additional characteristic "Fruit: width of stripes".

15. On 5 May 2006, the interveners, Elaris SNC and Brookfield New Zealand Ltd, the licensee and holder respectively of the plant variety right relating to the Baigent reference 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.

16. The objections were based on the earlier right in respect of the apple variety (Malus Mill) Baigent.

17. The pleas in law relied on in support of the objections were, first, that covered by Article 61(1)(b) of Regulation No 2100/94, on the ground that the applicant's failure to comply with the requirements for submitting material for the technical examination, set out in the CPVO's letters of 26 January and 25 March 1999, ought to have led the CPVO to refuse the application relating to the Gala Schnitzer variety, and, second, the plea in law covered by Article 7 of Regulation No 2100/94, on the ground that the Gala Schnitzer variety is not distinct from the Baigent variety.

18. On 14 December 2006, the President of the CPVO approved the use of the additional characteristic "Fruit: width of stripes" for establishing the distinctness of the Gala Schnitzer variety.

19. By decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007, the committee responsible for deciding on objections to the grant of Community plant variety rights ("the committee") granted a Community plant variety right for the Gala Schnitzer variety and dismissed the objections.

20. On 11 April 2007, the interveners filed notice of appeal with the Board of Appeal of the CPVO, under Articles 67 to 72 of Regulation No 2100/94, against those three decisions.

21. By [the contested decision], the Board of Appeal annulled the decision granting a Community plant variety right for the Gala Schnitzer variety and also the decisions dismissing the objections, and the Board of Appeal itself refused the application concerning the Gala Schnitzer variety. In particular, it found that Article 61(1)(b) of Regulation No 2100/94 did not allow the CPVO to authorise KSB to submit new material, since KSB had not complied with the request in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94, by which the CPVO had requested it to provide a phytosanitary certificate confirming that the material submitted was virus-free.'

IV – The action before the General Court and the judgment under appeal

10. By application lodged on 4 April 2008, Schniga brought an action for annulment of the contested decision before the General Court.

11. Brookfield and Elaris, the appellants in the present proceedings, took part in the proceedings before the General Court as interveners in support of the CPVO.

12. The action for annulment was based on three pleas in law: (i) inadmissibility of the objections lodged with the CPVO by the interveners; (ii) infringement of Article 61(1)(b) and Article 62 of Regulation No 2100/94; and (iii) infringement of Article 55(4) of Regulation No 2100/94.

13. After declaring the first plea in law inadmissible because it had been raised for the first time before it, the General Court considered the admissibility of the third plea in law alleging infringement by the Board of Appeal of Article 55(4) of Regulation No 2100/94. In paragraph 39 of the judgment under appeal, the General Court held that, in assessing the CPVO's letters of 26 January and 25 March 1999, the Board of Appeal had carried out a legal assessment which was open to challenge in those proceedings. The General Court concluded, therefore, that the third plea was admissible.

14. Turning to the substance, the General Court first considered the third plea in law. In that connection, it rejected the view taken by the Board of Appeal in the contested decision that Article 55(4) of Regulation No 2100/94 did not allow the CPVO to authorise the submission of new material for the technical examination.

15. Defining the scope of discretion conferred on the CPVO under Article 55(4) of Regulation No 2100/94, the General Court found in paragraph 63 of the judgment under appeal that that discretion included the right for the CPVO – should it deem it necessary in a particular case – to define the pre-conditions for the examination of an application for a Community plant variety right, provided that the period has not expired within which the applicant for that right must respond to a request which has been made to it in that individual case, for the purposes of that provision. In particular, the General Court noted, in paragraph 64 of the judgment under appeal, that it is consistent with the principle of sound administration and with the need to ensure the proper conduct and effectiveness of proceedings that, when the CPVO finds that the lack of precision which it has noted may be corrected, it has the power to continue with the examination of the application filed with it. Furthermore, as the General Court found in paragraph 65 of the judgment under appeal, the discretion conferred on the CPVO enables it to satisfy itself that the requests which it makes in individual cases are clear and that applicants know their rights and obligations without ambiguity.

16. In the light of an assessment of the relevant facts underlying the case before it, the General Court concluded that, by finding that the CPVO had infringed Article 61(1)(b) of Regulation No 2100/94 in authorising KSB to submit new material – whereas, under that provision, it was under an obligation to refuse the application filed by KSB as soon as it had established that the applicant had not complied with a request made in the individual case – the Board of Appeal had misconstrued the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94.

17. Consequently, finding that it was unnecessary to examine whether the second plea in law was well founded and dismissing the interveners' application to have the contested decision altered, the General Court upheld the action and annulled the contested decision.

V – Forms of order sought before the Court

18. The appellants claim that the Court should set aside the judgment under appeal and refer the case back to the General Court for judgment or, in the alternative, by way of final judgment, dismiss Schniga's action, thereby confirming the contested decision of the Board of Appeal. They claim, furthermore, that the Court should order the respondents to reimburse the costs of the proceedings.

19. The CPVO and Schniga contend that the Court should dismiss the appeal and order the appellants to pay the costs of the proceedings.

VI – The appeal

20. The appellants rely on two grounds of appeal, both challenging the findings of the General Court concerning the third plea in law put forward by Schniga at first instance.

21. The first ground of appeal is that the third plea in law put forward by Schniga at first instance ought to have been declared inadmissible by the General Court and that that Court infringed Article 73(2) of Regulation No 2100/94 by illegitimately reviewing findings of fact made by the Board of Appeal. By their second ground of appeal, which is in several parts, the appellants claim that by misconstruing the scope of the discretion conferred upon the CPVO, the General Court infringed Article 55(4) of Regulation No 2100/94, read in conjunction with Article 61(1)(b) and Article 80 of that regulation.

A – *The first ground of appeal*

1. Main arguments of the parties

22. By their first ground of appeal, the appellants claim that by reviewing, in connection with the third plea in law put forward by Schniga, findings of fact by the Board of Appeal, the General Court exceeded its jurisdiction as defined in Article 73(2) of Regulation No 2100/94. The scope of review as defined in that provision is confined to review of the legality of the Board of Appeal's decision and limited to issues of law and of misuse of power.

23. Accordingly, the General Court should not have reviewed the assessment made by the Board of Appeal of the content and meaning of the two letters of 26 January and 25 March 1999. If it had accepted that assessment of facts by the Board of Appeal, the General Court could not have reached the conclusion that, in May 2001, the CPVO could still exercise its power under Article 55(4) of Regulation No 2100/94 to clarify its previous requests.

24. The CPVO and Schniga reject the claim that the General Court exceeded its jurisdiction. They argue, in particular, that it follows from the case-law of the Court of Justice that the General Court has exclusive jurisdiction to find and appraise the relevant facts and to assess the evidence. Therefore, even if the Court of Justice were to find that the General Court had indeed reviewed findings of fact, that review would nevertheless fall within the jurisdiction of the General Court. As it is, however, according to the CPVO and Schniga, it was the Board of Appeal's legal characterisation of the facts – and not its factual findings – which the General Court reviewed in the judgment under appeal.

2. Assessment

25. The first ground of appeal appears to be based on a misconception of the jurisdiction conferred on the General Court under Article 73(2) of Regulation No 2100/94 to review the legality of decisions of the Board of Appeal.

26. In that regard, whereas the jurisdiction of the Court of Justice in an appeal is indeed, according to settled case-law, limited to a review of points of law, it follows clearly from *Schräder* v *CPVO* that, by contrast, the jurisdiction of the General Court to review the legality of decisions adopted by the Board of Appeal includes the power to find and appraise the relevant facts and to assess the evidence. [5]

27. It should also be noted in this context that Regulation No 2506/95 amended Article 73 of Regulation No 2100/94 specifically in order to align the appeal procedures under the Community plant variety rights regime with the arrangements provided for under Article 63(2) of Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark for the review by the General Court of the legality of the decisions of the Boards of Appeal of the Office for Harmonisation in the Internal market (Trade Marks and Design) ('OHIM'). [6]

28. According to the interpretation given to Article 63(2) of Regulation No 40/94 by the Court of Justice, which is thus transferable to Article 73 of Regulation No 2100/94, the General Court can carry out a full review of the legality of the decisions of OHIM's Boards of Appeal, if necessary examining whether those boards have made a correct legal classification of the facts or whether their assessment of the facts submitted to them was flawed. [7]

29. It follows that the first ground of appeal, alleging infringement of Article 73(2) of Regulation No 2100/94, should be rejected as unfounded.

B – *The second ground of appeal*

1. Main arguments of the parties

30. By their second ground of appeal, the appellants claim that the General Court misconstrued the scope of the discretion conferred upon the CPVO under Article 55(4) of Regulation No 2100/94, read in conjunction with Article 61(1)(b) and Article 80 of that regulation. In that regard, the appellants list a number of erroneous findings or assumptions which, in their view, the General Court made in the judgment under appeal as a consequence of that misconstruction of the powers of the CPVO.

31. Thus, they claim, in particular, that the General Court erred in assuming that the CPVO had the power to make requests in individual cases not only with reference to the quality of the material to be submitted within a certain time, but also with reference to the documentary proof of such quality. In the view of the appellants, however, individual requests within the meaning of Article 55(4) of Regulation No 2100/94 may, on the contrary, concern only the material itself.

32. Next, the appellants argue that the General Court was wrong to hold that the CPVO could split its requests in individual cases into two autonomous and independent requests, one concerning the material itself and one concerning the documentary proof of quality, such as the submission of a health certificate.

5 — See, to that effect, Case C-38/09 P [2010] ECR I-3209, paragraph 69; see also my Opinion in that case, points 20 to 23.

6 — OJ 1994 L 11, p. 1; see the third recital in the preamble to Regulation No 2506/95.

7 — See, in particular, Case C-16/06 P *Les Éditions Albert René* v *OHIM* [2008] ECR I-10053, paragraphs 38 and 39.

33. According to the appellants, the General Court was also wrong, in the light of Article 61(1)(b) of Regulation No 2100/94, to assume that the CPVO had the power to allow a new submission of virus-free material, once the time-limit for the submission of the material had elapsed and once it was definitively clear that the material was not virus-free. The General Court wrongly held that the wording 'as soon as possible' could not, in relation to the invitation to send the missing health certificate for the material already submitted, be construed as a time-limit and, in any case, not as a time-limit which had elapsed, in relation to an individual request within the meaning of Article 55(4) of Regulation No 2100/94, with the result that the application fell to be refused in accordance with Article 61(1)(b) of that regulation.

34. Moreover, the General Court erred in assuming that the CPVO had full discretionary power to satisfy itself, without any further hierarchical review or review by the Courts, as to the legal precision and clarity of its requests in individual cases. In that regard, the General Court was wrong to hold that questions of good or bad faith in the interpretation of such requests were irrelevant. Nor did it verify the limits set by the procedure of *restitutio in integrum* under Article 80 of Regulation No 2100/94, which the CPVO had clearly disregarded.

35. In response, the CPVO contends that its position has always been that it was justified in allowing the applicant to make a second submission of plant material since the request in the individual case (the letter of 26 January 1999) was not sufficiently precise. The importance, in the light of the principle of legal certainty, of precise instructions should be borne in mind when the requests made by the CPVO in this particular case are assessed.

36. As regards requests relating to the quality of the plant material to be submitted, the CPVO submits that it was not until the deadline to submit material had expired and submission had taken place that it was made clear that the plant material to be submitted must be virus-free. The request made on 26 January 1999 had not been sufficiently clear in that regard.

37. For that reason, it cannot, in the view of the CPVO, be held that KSB had failed to comply with a request pursuant to Article 55(4) of Regulation No 2100/94. It follows that there was no basis for a refusal of KSB's application under Article 61(1) of Regulation No 2100/94.

38. As regards requests for documents, the CPVO agrees with the General Court that, before an application can be refused owing to the non-submission of relevant documents, the request must be clear, including the deadline specified.

39. The CPVO argues, furthermore, that the procedure of *restitutio in integrum* provided for under Article 80 of Regulation No 2100/94 was not applicable in the circumstances of the case at issue as the indication 'as soon as possible' was not sufficiently precise to indicate a deadline by which an applicant should have acted. In any event, even if that indication were to be regarded as sufficiently precise, Article 80 of Regulation No 2100/94 is not applicable in cases where the Office has contributed to a delay, in this case by not giving clear instructions in its letter of 26 January 1999.

40. Finally, the CPVO concurs with the General Court that good or bad faith on the part of an applicant before it is not relevant as regards the assessment of the discretion conferred on it under Article 55(4) of Regulation No 2100/94.

41. Therefore, rejecting each of the arguments of the appellants, the CPVO contends that the second plea put forward by the appellants is unfounded in its entirety.

42. Schniga emphasises that – contrary to the assertions made by the appellants – given the scientific and technical complexity of the technical examination of applications for protection, Article 55(4) of Regulation No 2100/94 of necessity confers a wide discretion on the CPVO in the exercise of its functions. This includes the possibility for the CPVO, if it believes that it has not been sufficiently clear with regard to the requirements relating to the health of the testing material, as in the present case, to consent to 'non submission' for the purposes of Article 61(1)(b) of Regulation No 2100/94 by authorising the applicants to submit new material within a fresh period of time.

2. Assessment

43. The second ground of appeal and its parts focus, in essence, on the conclusion of the General Court – and the reasoning on which that conclusion is based, set out in paragraphs 62 to 80 of the judgment under appeal – that, in holding that the CPVO had infringed Article 61(1)(b) of Regulation No 2100/94 in authorising KSB to submit new plant material instead of refusing the application in accordance with that provision, the Board of Appeal had misconstrued the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94. According to the appellants, such authorisation could have followed only from a *restitutio in integrum*, as provided under Article 80 of that regulation – which had not, however, been requested by KSB.

44. It should be recalled at the outset that, under Article 55(4) of Regulation No 2100/94, the CPVO has the power 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.

45. In that regard, it should be pointed out that, in so far as Article 55(4) of Regulation No 2100/94 confers on the CPVO the power to define, both in quantitative and qualitative terms, the material which must be submitted to it for the technical examination, which in itself entails complex scientific and technical assessments, a certain measure of discretion must be accorded to the CPVO in the application of that provision. [8]

46. Not only, in my view, is a relatively broad discretion warranted in that regard and implied by the wording of Article 55(4) of Regulation No 2100/94 itself, but it is also reflected in Article 61(1)(b) of that regulation, which allows the CPVO to consent to non-compliance with its requests for the purposes of Article 55(4) of the regulation and thus to avoid having to refuse the application. [9]

47. Seen in that light, it appears to me that, when defining – in paragraphs 63 to 65 of the judgment under appeal – the scope of the discretion conferred by Article 55(4) of Regulation No 2100/94, the General Court was correct to hold that that discretion includes the right for the CPVO, should it deem it necessary, to define the pre-conditions for the examination of an application for a Community plant variety right, provided that the period has not expired within which the applicant must respond to the request made to it in the individual case.

48. In that context, the General Court was able to hold – without erring in law – in paragraph 64 of the judgment under appeal that it is consistent with the principle of sound administration and with the need to ensure the proper conduct and effectiveness of proceedings that, when the CPVO finds that the lack of precision which it has noted may be corrected, it has the power to continue with the examination of the application filed with it and is not required, in those circumstances, to refuse the application.

8 — See, to that effect, *Schräder* v *CPVO*, cited in footnote 5, paragraph 77, and my Opinion in that case, point 25; see also, inter alia, Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraphs 33 and 34.

9 — See, by way of analogy, to the effect that OHIM has a broad discretion in that it may take account of facts and evidence which are submitted or produced late, Case C-29/05 P *OHIM* v *Kaul* [2007] ECR I-2213, paragraph 42.

49. The General Court was also right to point out, in paragraph 65 of the judgment under appeal, that it is a requirement inherent in the principle of legal certainty that applicants must be in a position to know their rights and obligations without ambiguity and to take steps accordingly.[10] Since, as an authority of the European Union, the CPVO is bound by the requirements of legal certainty as a general principle of European Union law, the General Court could – contrary to the appellants' submission – state without erring in law that the CPVO had the power to satisfy itself that its requests in individual cases are clear and that, accordingly, the responsibility for non-compliance with those requests lies with the applicant alone.

50. However, contrary to the appellants' submissions, there is nothing in the judgment under appeal to suggest or imply that that power of the CPVO is entirely discretionary and exempt from any further hierarchical review or review by the Courts.

51. To my mind, therefore, the General Court did not to that extent err in law in defining the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94.

52. In the subsequent paragraphs of the judgment under appeal, the General Court proceeded with an assessment of the circumstances of the case in the light of the standard of discretion described above.

53. In that connection, the General Court – in paragraphs 69 and 72 of the judgment under appeal, in particular – categorised as containing a request in an individual case within the meaning of Article 55(4) of Regulation No 2100/94 both the letters of 26 January and 25 March 1999 as well as the email of 13 June 2001 by which the CPVO had communicated with KSB in the course of the procedure before it.

54. In that regard, the appellants' argument that such requests can relate only to the material itself but not to documentary evidence as to its quality, such as phytosanitary documents attesting the health status of the material, should be rejected. In so far as such documentation relates – as the General Court has correctly noted – to the quality of the material that must be submitted, it would appear to be overly formalistic and to run counter to the broad discretion, outlined above, conferred on the CPVO by Article 55(4) of Regulation No 2100/94 for the purposes of determining, inter alia, the quality of the material to be submitted, to exclude the possibility of making such requests under that provision.

55. In that light, even if the request contained in the letter of 25 March 1999 is to be interpreted, as the appellants claim, as a separate individual request which relates only to the documentary proof as to the health status of the material to be submitted and not to the quality of the material as such, like the request in the previous letter of 26 January 1999, it is not apparent – nor was it further substantiated by the appellants – to what extent proceeding by means of two individual requests ('splitting') would go beyond the limits set by Article 55(4) of Regulation No 2100/94.

56. As to the appellants' complaint that the General Court was wrong to hold that the CPVO had the power to allow a new submission of virus-free material once the time-limit for the submission of the material had elapsed and once it was definitively clear that the material was not virus-free, it should be pointed out that, in paragraphs 74 and 75 of the judgment under appeal, the General Court endorsed the view taken by the CPVO in the email of 13 June 2001 – which it has maintained also in the present appeal proceedings before the Court – that the instructions in its letters of 26 January and 25 March 1999 had not made it sufficiently clear, thus dispelling any doubts on the part of KSB, that

10 — See, to that effect, Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraph 17; see also Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20; and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30.

the material to be submitted had to be virus-free. In paragraph 76 of the judgment under appeal, it held, moreover, that, by asking KSB in the letter of 25 March 1999 merely to submit the necessary health certificate 'as soon as possible', the CPVO did not set a specific time-limit within which KSB was to provide that certificate.

57. In the light of those assessments of facts, which may not, as such, be called into question in an appeal before the Court, and according to which there was thus a lack of clarity in relation to the fact that the material to be submitted for the technical examination had to be virus-free, the General Court was in my view entitled, having regard to the principles of sound administration and legal certainty as referred to above,[11] to conclude – without erring in law – that it was within the discretion of the CPVO to clarify, in its email of 13 June 2001, its previous requests in that regard and to authorise the submission of new, virus-free material.

58. In so far as the appellants next allege infringement of Article 80 of Regulation No 2100/94 providing for a procedure of *restitutio in integrum*, it is sufficient to note, first, that KSB did not actually file any application for reinstatement pursuant to that provision and, second, that – as the CPVO has correctly observed – the condition laid down in that provision concerning the non-observance of a time-limit has never, in the light of the lack of clarity regarding the deadline for the submission of the plant material, clearly been met; since, as follows from the foregoing considerations, the CPVO had the power to authorise the submission of new plant material in the framework of one and the same application procedure and without rejecting the original application, it was not necessary to restore the right to submit plant material on the basis of Article 80 of Regulation No 2100/94.

59. The plea in law alleging infringement of that provision must therefore be rejected.

60. Lastly, contrary to the appellants' claim in that regard, the General Court in no way erred in law by rejecting, in paragraph 80 of the judgment under appeal, the charges of bad faith levelled at KSB as ineffective, as that question was indeed irrelevant in relation to the issue under examination by that Court as to whether or not the CPVO had remained within the discretion conferred on it by Article 55(4) of Regulation No 2100/94 to clarify its requests in an individual case.

61. In the light of the foregoing, the second ground of appeal alleging infringement of Article 55(4) of Regulation No 2100/94, read in conjunction with Article 61(1)(b) and Article 80 of that regulation, should also in my view be rejected as unfounded.

62. On the basis of all the foregoing considerations, I consider that the appeal should be dismissed in its entirety.

VII – Costs

63. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the CPVO and Schniga have applied for costs against the appellants, who have been unsuccessful, the appellants should be ordered to pay the costs.

11 — See points 47 to 49 above.

VIII – Conclusion

64. For the reasons set out above, I propose that the Court should:

(1) dismiss the appeal;

(2) order the appellants to pay the costs.