JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 September 2010 *

In Case T-135/08,

Schniga GmbH, established in Bolzano (Italy), represented by G. Würtenberger and R. Kunze, lawyers,

applicant,

v

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

defendant,

* Language of the case: English.

the other parties to the proceedings before the Board of Appeal of the CPVO, interveners before the Court, being

Elaris SNC, established in Angers (France),

and

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

represented by M. Eller, lawyer,

ACTION against the decision of the Board of Appeal of the CPVO of 21 November 2007 (Cases A 003/2007 and A 004/2007), concerning the grant of a Community plant variety right for the Gala Schnitzer plant variety,

THE GENERAL COURT (Sixth Chamber),

composed of A.W.H. Meij, President, V. Vadapalas and L. Truchot (Rapporteur), Judges,

Registrar: N. Rosner, Administrator,

having regard to the application lodged at the Court Registry on 4 April 2008,

having regard to the response of the CPVO lodged at the Court Registry on 19 August 2008,

having regard to the response of the interveners lodged at the Court Registry on 7 August 2008,

further to the hearing on 17 March 2010,

gives the following

Judgment

Background to the dispute

1 On 18 January 1999, the Konsortium Südtiroler Baumschuler ('KSB'), the predecessor in title of the applicant, Schniga GmbH, filed an application for a Community plant variety right at the Community Plant Variety Office (CPVO), pursuant to Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), as amended.

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 1999 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 decision of 21 November 2007 ('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.

Procedure and forms of order sought

22 The applicant claims that the Court should:

— annul the contested decision;

— order the CPVO to pay the costs.

23 The CPVO contends that the Court should:

— declare the action unfounded;

— order the applicant to pay the costs.

24 At the hearing, the CPVO amended its first head of claim, stating that it was contending that the Court should annul the contested decision. The Court took formal note thereof in the minutes of the hearing.

25 The interveners contend that the Court should:

— dismiss the action and, consequently, uphold the contested decision;

— in the alternative, should the contested decision be annulled, annul the CPVO's decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007 and refuse application No 1999/0033 for the grant of a Community plant variety right, if necessary after adopting the following measures of inquiry: complementary

examinations to be conducted simultaneously at the Bundessortenamt and at the Institut national de la recherche agronomique (INRA) (French National Institute for Agricultural Research) on the candidate variety and on the Baigent reference variety, upon material of the same age and over two fruiting seasons, those examinations being required to focus in particular on the characteristic 'Fruit: width of stripes';

— in the further alternative:

— order complementary examinations to be conducted at the Bundessortenamt on the candidate variety and on the Baigent reference variety, upon material of the same age and over three, or at least two, fruiting seasons, those examinations being required to focus in particular on the characteristic 'Fruit: width of stripes';

— order any other measure of inquiry that the Court deems necessary in order to answer the question of the distinctness of the two varieties in a scientifically acceptable manner and to remedy the alleged infringements of the mandatory procedural rules for carrying out distinctness, uniformity and stability tests;

— order costs to be reimbursed.

26 In view of the fact that, after the oral procedure had closed, Judge Tchipev was prevented from sitting, Judge Vadapalas was designated to complete the Chamber, in accordance with Article 32(3) of the Court's Rules of Procedure.

27 By order of 5 July 2010, the Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they would be given the opportunity to be heard at a further hearing on 7 September 2010.

28 By faxes of 13, 14 and 15 July 2010 respectively, the interveners, the applicant and the CPVO informed the Court that they were waiving their right to be heard afresh.

29 Consequently, the President of the Sixth Chamber decided to close the oral procedure.

Law

30 In support of its action, the applicant relies on three pleas in law, alleging, respectively, the inadmissibility of the objections lodged with the CPVO by the interveners, infringement of Article 61(1)(b) and Article 62 of Regulation No 2100/94, and infringement of Article 55(4) of Regulation No 2100/94.

Admissibility

Admissibility of the first plea in law

— Arguments of the parties

31 The interveners contend that the applicant's first plea in law, by which it alleges that the objections which they had lodged with the CPVO ought to have been dismissed as inadmissible by the committee and by the Board of Appeal, is inadmissible on the ground that it was raised for the first time before the Court.

32 The applicant disputes the interveners' arguments. It contends that the Board of Appeal ought to have examined of its own motion whether the interveners' appeal was admissible.

33 The CPVO contends that the Board of Appeal is competent to assess whether or not the CPVO was entitled to allow a new submission of material.

— Findings of the Court

34 It must be borne in mind that the purpose of an action before the General Court is to obtain a review of the legality of decisions of the Boards of Appeal of the CPVO, as provided for in Article 73 of Regulation No 2100/94, as amended. This must therefore be carried out with regard to the issues of law raised before the Board of Appeal. Therefore, it is not the Court's function to examine new pleas introduced before it. To allow the examination of those new pleas would be contrary to Article 135(4) of the Rules of Procedure of the Court, according to which the parties' pleadings may not change the subject-matter of the proceedings before the Board of Appeal (see, by analogy, Case T-165/06 *Fiorucci* v *OHIM - Edwin (ELIO FIORUCCI)* [2009] ECR II-1375, paragraphs 21 and 22 and the case-law cited).

35 It follows that the plea in law alleging that the objections lodged with the CPVO by the interveners are inadmissible, which was raised by the applicant for the first time before the General Court, must be declared inadmissible.

Admissibility of the third plea in law

— Arguments of the parties

36 The interveners contend that the applicant's third plea in law, alleging infringement by the Board of Appeal of Article 55(4) of Regulation No 2100/94, is inadmissible.

37 They contend that the discretion conferred on the CPVO to make requests in individual cases, within the meaning of Article 55(4) of Regulation No 2100/94, as invoked by the applicant, makes it possible for such requests to be made without any reference to a legal basis. However, Article 73(2) of Regulation No 2100/94 provides that an action before the General Court may lie on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty, of that regulation, or of any rule of law relating to their application, or misuse of power. Thus, in interpreting the meaning of the CPVO's letters of 26 January 1999 and 25 March 1999, the Board of Appeal assessed facts and did not therefore carry out a legal assessment. It follows that it could not have made an error of law which might be regarded as an infringement of the applicable law and, thus, be the subject of an action before the General Court under Article 73 of Regulation No 2100/94.

— Findings of the Court

38 It must be observed that the Board of Appeal, first, found that the CPVO's letters of 26 January 1999 and 25 May 1999 contained requests in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94, next, found that KSB had not complied with them, and, lastly, reached the conclusion, provided for under Article 61(1)(b) of Regulation No 2100/94, that the CPVO was required to refuse the application concerning the Gala Schnitzer variety as soon as it had established such non-compliance.

39 In so doing, the Board of Appeal assessed the legal nature of those letters and acted upon that assessment by applying the relevant provisions of Regulation No 2100/94. Therefore, the interveners cannot contend that the Board of Appeal did not carry out any legal assessment that might be challenged by the applicant in the context of the action provided for under Article 73 of Regulation No 2100/94.

40 It follows that the third plea in law is admissible.

Substance

41 It is appropriate first to consider the third plea in law.

The third plea in law, alleging infringement of Article 55(4) of Regulation No 2100/94

— Arguments of the parties

42 The applicant submits that the CPVO has full discretion to determine the technical and administrative requirements which plant material to be submitted for technical examination must satisfy. Such unfettered discretion for the CPVO to determine, through general rules or through requests in individual cases, the quality of the material for the technical examination and the reference samples, is conferred on it by Article 55(4) of Regulation No 2100/94.

43 The applicant submits that the instructions given by the CPVO must be clear, in order to avoid any arbitrariness. It argues that the institutions of the European Union are subject to a requirement of clear definition, in accordance with which administrative measures and requirements which, if not complied with, may lead to a loss of rights

must be sufficiently precise and clear to ensure that the citizen of the Union may know his rights and duties without any ambiguity and, thus, ensure that he refrains from anything which might be contrary to his interests. That principle requires the CPVO to inform the applicant for a Community plant variety right of precisely which additional requirements it expects that applicant to fulfil other than those laid down in Articles 7 to 9 of Regulation No 2100/94.

44 Consequently, in the present case, if the CPVO had wished that KSB should provide additional documents concerning the health status of the material submitted, it ought to have defined those conditions very clearly and unambiguously from the outset.

45 The applicant submits that, in the absence of general rules within the meaning of Article 55(4) of Regulation No 2100/94, when the application concerning the Gala Schnitzer variety was filed, the CPVO's letter of 26 January 1999 was to be regarded as a request in an individual case, within the meaning of that provision. Since the information contained in that letter, concerning the phytosanitary requirements in force applicable to the material for submission, was insufficient, the applicant had no alternative but to interpret those requirements itself, that is to say, the requirements resulting from Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products (OJ 1976 L 26, p. 20), as amended. In that connection, the applicant submits that it was not for it to assume that the CPVO's phytosanitary requirements were more onerous than those under the provisions of that directive.

46 The applicant then recalls that, in its email of 3 May 1999, the Bundessortenamt informed KSB that the European plant passport provided was sufficient for the purpose of carrying out the technical examination, while asking it to provide, as soon as possible, a certificate confirming that the material sent was virus-free.

47 However, neither the Bundessortenamt nor the CPVO informed KSB of the consequences of failing to provide the certificate requested. In addition, the applicant submits that, by continuing with the technical examination, notwithstanding the absence of that certificate, the CPVO implied that, ultimately, the provision of a European plant passport was sufficient for the purpose of granting the plant variety right applied for, thereby giving rise to a legitimate expectation on the applicant's part that the European plant passport was sufficient in that regard.

48 Although the CPVO did not in fact regard the provision of a document of that kind as being sufficient, the applicant submits that the CPVO was not entitled to refuse the application concerning the Gala Schnitzer variety, having regard to the legitimate expectation which it had created on the part of the applicant and which, like any general principle of law, binds the European Union administration. On the contrary, the applicant submits that the CPVO had no alternative but to allow it to submit new material.

49 The applicant also submits that the CPVO's discretion may be exercised at any time during the examination procedure, as is evident from the wording of Article 61(1)(b) of Regulation No 2100/94 ('unless the Office has consented to non-submission').

50 The applicant submits, lastly, that, bearing in mind the specific nature of living material such as plant material, the CPVO and its President must enjoy a broad discretion when deciding whether new material may be submitted due to circumstances which are outside the applicant's control or which are exceptional.

51 Such exceptional circumstances, the applicant submits, exist in the present case, since thermotherapy treatment, such as that performed in 1996, and which in 99 % of cases results in virus-free material, had not had the expected effect and it had taken over a year to find out that viruses had survived that treatment.

52 The applicant infers from this that the Board of Appeal ought to have found that in 1999 KSB had submitted material to the Bundessortenamt which it was entitled to believe was virus-free, with the result that, in deciding that the President of the CPVO was not authorised to permit the submission of new material, the Board of Appeal misconstrued the discretion conferred on the President by Article 55(4) of Regulation No 2100/94, which allows him to determine, inter alia, the quality of the material and the samples to be submitted.

53 The CPVO argued, at the hearing, that Article 61(1)(b) of Regulation No 2100/94, according to which the CPVO must refuse applications for a Community plant variety right if and as soon as it establishes that the applicant has not complied with a general rule or a request in an individual case within the time-limit laid down, did not apply where such a request was unclear.

54 The CPVO argued that it did not concur with the Board of Appeal's analysis that its instructions on the material for the technical examination had been sufficiently clear for the failure to comply with them to result in refusal of the application concerning the Gala Schnitzer variety.

55 It explained that the instructions which it had given to KSB on the health status of the material to be submitted were not sufficiently clear and, in particular, that it had not correctly informed KSB of the fact that the European plant passport provided was insufficient, and that those instructions ought to have explicitly mentioned that the

material to be submitted had to be virus-free, since it took the view that it was not for applicants for a Community plant variety right to interpret its instructions.

56 The CPVO therefore maintains that it allowed the submission of new material in the present case because of the confusion to which its instructions contributed in part.

57 The interveners dispute the applicant's arguments. They contend that the preconditions for dismissing the application were fulfilled, since KSB, which was responsible for all of the phytosanitary requirements in relation to the plant material submitted, had failed to submit the phytosanitary certificate requested by the CPVO under Article 55(4) of Regulation No 2100/94.

58 In so doing, KSB failed to comply with that request in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94. The interveners accordingly contend that the CPVO could not authorise KSB to submit new material without infringing Article 61(1)(b) of Regulation No 2100/94.

59 They further contend that, in such a case, the consequences as set out in Article 61(1)(b) of Regulation No 2100/94 may be avoided only by means of *restitutio in integrum* within the meaning of Article 80 of Regulation No 2100/94. However, KSB filed no application to that end within the time-limits laid down by that provision.

— Findings of the Court

60 Article 55(4) of Regulation No 2100/94 provides that 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.

61 It is apparent from the contested decision that the Board of Appeal took the view that the discretion conferred on the CPVO by that provision did not allow it to authorise KSB to submit new material, in so far as the preconditions for refusing the application filed by KSB had been met. The Board of Appeal held that, due to the viral infection of the material submitted, of which KSB had informed the CPVO, KSB could never have submitted the phytosanitary certificate requested. It then noted that KSB had not provided the phytosanitary certificate requested and inferred that, by not providing that document, KSB had failed to comply with the requests in an individual case contained in the CPVO's letters of 26 January 1999 and 25 March 1999. In accordance with Article 61(1)(b) of Regulation No 2100/94, however, the CPVO was required to refuse the application concerning the Gala Schnitzer variety as soon as that failure to comply had been established.

62 That reasoning must be rejected, since it misconstrues the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94.

63 That discretion includes the right for the CPVO to define, should it deem it necessary, the requirements which it applies to the examination of an application for a Community plant variety right, on condition that the period within which the applicant for such a right must respond to the request in the individual case made to him has not expired.

64 In that connection, it is consistent with the principle of sound administration and with the need to ensure the proper conduct and effectiveness of proceedings that, when it finds that the lack of precision which it has noted may be corrected, the CPVO has the power to continue with the examination of the application filed with it and is not required, in that situation, to refuse that application. Thus envisaged, that discretion makes it possible to avoid any pointless increase in the period between the filing of an application for a Community plant variety right and the decision on that application which would arise if the applicant were required to file a new application.

65 In addition, that discretion enables, first, the CPVO to satisfy itself that its requests in individual cases are clear and that the applicant alone is responsible for the fact that its actions fail to comply with those requests and, second, applicants to know their rights and obligations without ambiguity and to take steps accordingly, which is a requirement inherent in the principle of legal certainty (see, to that effect, Case 169/80 *Gondrand and Garancini* [1981] ECR 1931, paragraph 17).

66 In the present case, it is common ground that the CPVO communicated with KSB or its representative by letters of 26 January 1999 and 25 March 1999 and by email of 13 June 2001.

67 In its letter of 26 January 1999, 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. In that letter, the CPVO stated that '[t]he sender is responsible for all carriage incurred, and for proper delivery of the plant material, including all the necessary phytosanitary and customs requirements' and that'[t]he plant material must not have undergone any chemical treatment'.

68 In its letter of 25 March 1999, 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 'the shipment was not accompanied by the necessary health certificate'. In that letter, the CPVO asked KSB to provide 'this essential document … as soon as possible, thereby complying with the instructions [which had been] sent to [it] on 26 January 1999'.

69 It must be noted that the letter of 26 January 1999 stipulates where, when and in what quantity the material had to be submitted. In addition, the stipulations that the material for submission must not have undergone any chemical treatment and, as is apparent from the letter of 25 March 1999, had to be accompanied by a phytosanitary certificate, relate to the quality of that material. Those two letters therefore contain requests in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94.

70 In its email of 13 June 2001, after informing KSB of its decision to destroy the material submitted by it because it was infected, the CPVO indicated to KSB that 'since there was not sufficient clarification made in the instructions sent by the [CPVO] on the submission of plant material and the necessary health status, the CPVO ha[d] decided to consent to [KSB's] request of providing new, virus-free material of all three varieties to be sent to the Bundessortenamt Wurzen in March 2002' and asked it to 'ensure that the consignment is accompanied this time by a phytosanitary certificate from an official body attesting as to their health'.

71 It is apparent from the facts, as set out in the application and which are not disputed on this point, that that email followed the information provided by KSB to the Bundessortenamt indicating that the material submitted in March 1999 for the technical examination was infected by latent viruses, with the result that KSB would have been unable to provide the Bundessortenamt with a phytosanitary certificate attesting that the material was virus-free.

72 First, it must be noted that the email of 13 June 2001 stipulates where and when the material must be submitted. In addition, since it requests that a phytosanitary certificate be provided, it contains a stipulation as to the quality of the material to be submitted. It thus contains a request in an individual case, within the meaning of Article 55(4) of Regulation No 2100/94.

73 Second, it must be noted that, in the same email, the CPVO refers to the 'instructions sent by the Office on the submission of plant material and the necessary health status', thereby making reference to the requests in an individual case contained in the letters of 26 January 1999 and 25 March 1999.

74 Third, it is apparent from the email of 13 June 2001 that the CPVO authorised KSB to submit new material, on the ground that the instructions contained in its letters of 26 January 1999 and 25 March 1999 did not make it sufficiently clear, in order to dispel any doubt on the part of KSB, that the material to be submitted had to be virus-free. The CPVO took the view that those instructions ought to have explicitly mentioned that the material to be submitted had to be virus-free, since it was not for applicants for a Community plant variety right to interpret its instructions.

75 It is thus apparent that the email of 13 June 2001 was intended to clarify the requests in an individual case contained in the letters of 26 January 1999 and of 25 March 1999, in relation to the fact that the material to be submitted for the technical examination had to be virus-free.

76 It is, however, apparent from the letter of 25 March 1999 that the CPVO did not set a time-limit within which KSB was to provide the phytosanitary certificate requested.

77 Therefore, it must be held that the CPVO was entitled, in its email of 13 June 2001, to clarify its requests in an individual case contained in the letters of 26 January 1999 and 25 March 1999, in relation to the fact that the material to be submitted for the technical examination had to be virus-free.

78 Consequently, it was for the Board of Appeal to assess whether KSB had complied with the request in an individual case contained in the CPVO's email of 13 June 2001, which was intended to clarify the requests in an individual case resulting from the CPVO's letters of 26 January 1999 and 25 March 1999.

79 In the light of the foregoing, it must be held that the Board of Appeal erred in law in finding that, because KSB had not provided the phytosanitary certificate requested by the CPVO in its letters of 26 January 1999 and 25 March 1999, it had failed to comply with the requests in an individual case contained in those letters. Therefore, 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 had to refuse the application filed by KSB as soon as it had established that the applicant had not complied with a request in an individual case, the Board of Appeal misconstrued the scope of the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94.

80 That conclusion is not called into question by the charges of bad faith levelled at KSB and the applicant by the interveners, which must be rejected as ineffective, since the conduct of KSB and of the applicant is unconnected with the issue of whether or not the discretion conferred on the CPVO by Article 55(4) of Regulation No 2100/94 enabled the latter, in its email of 13 June 2001, to clarify its requests in an individual case contained in the letters of 26 January 1999 and 25 March 1999, in relation to the fact that the material to be submitted for the technical examination had to be virus-free.

81 Consequently, the action must be upheld and, therefore, the contested decision annulled, and it is not necessary to examine whether the second plea in law is well founded.

The alternative claim that the Court should annul the CPVO's decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007, refuse application No 1999/0033 and order complementary examinations and also measures of inquiry to be conducted

82 With regard to the interveners' claim that, should the contested decision be annulled, the Court should annul the CPVO's decisions EU 18759, OBJ 06-021 and OBJ 06-022 of 26 February 2007, refuse application No 1999/0033 and, where appropriate, order complementary examinations and also measures of inquiry, it should be noted that the interveners are, in essence, asking the Court to adopt the decision which, in their submission, the CPVO ought to have taken, that is to say, a decision which would annul the decisions to dismiss the objections which they had lodged with the CPVO, and which would refuse the application concerning the Gala Schnitzer variety. It must therefore be found that, by that part of their second head of claim, the interveners are requesting alteration of the contested decision.

83 It must be noted that, in support of that claim, the interveners relied before the Board of Appeal on pleas in law alleging infringement by the committee of Article 7(1), Article 56(2) and Article 57(3) of Regulation No 2100/94, and of Articles 22 and 23 of Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Regulation No 2100/94 as regards proceedings before the CPVO (OJ 1995 L 121, p. 37), in conjunction with Sections III.3, III.5 and III.6 of the CPVO's Protocol TP/14/1 of 27 March 2003 for distinctness, uniformity and stability tests (Apple), on the ground that the Gala Schnitzer variety is not distinct from the

Baigent variety and the CPVO infringed a number of procedural rules during and after the technical examination.

84 In that connection, it is clear from the contested decision that the Board of Appeal did not examine those pleas in law.

85 Since the interveners have relied, in answer to the present action, on an argument which was not examined by the Board of Appeal, their application to have the contested decision altered cannot be granted, since that would involve, in substance, the exercise of administrative and investigatory functions specific to the CPVO, and would therefore upset the institutional balance on which the division of jurisdiction between the CPVO and the General Court is based (see, by analogy, *ELIO FIORUCCI*, paragraph 67 and the case-law cited).

86 Consequently, the interveners' application to have the contested decision altered must be dismissed.

Costs

87 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

88 Since the CPVO has been unsuccessful, in so far as the contested decision has been annulled, it must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the latter, notwithstanding the amendment, at the hearing, of the form of order sought by the CPVO.

89 Since the interveners have been unsuccessful, they must be ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

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.

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 13 September 2010.

[Signatures]