



European Union

Community Plant Variety Office
BOARD OF APPEAL

Case A 018/2002

Decision

concerning the appeal lodged by

Hubert Brandkamp, In der Flora 6, D - 46419 Isselburg
Appellant

Additional party to the proceedings:

The President of the Community Plant Variety Office, Bart Kiewiet

relating to Community plant variety application 2000/1750

Variety denomination: INUIT

Species: *Sutera diffusus*

On 14 May 2003, the Board of Appeal of the Community Plant Variety Office, composed of Gabriele Winkler (Chairman) and Nico van Marrewijk and Prof. Geertrui van Overwalle (Members)

gave the following decision:

The appeal is rejected.

Facts

On 27 November 2000, the applicant applied for Community plant variety protection for the Sutera variety INUIT, initially marketed in Germany on 1 May 2000. This variety is obtained and propagated vegetatively using cuttings.

The technical issues relating to point 6 of the questionnaire "Indications of Characteristics of the Variety" (colour of flower: pure white, size of flower and leaves in accordance with the enclosed illustrations; plant size: basket plant) were only answered once the Community Plant Variety Office (hereinafter referred to as the "Office") requested this. 15 December 2000 was then established as the date of application.

The *Bundessortenamt* (Federal Plant Variety Office) based in Hanover, Germany, conducted a technical examination. The applicant had submitted to this Office 25 rooted seedlings, as required. INUIT was compared with the example variety "Novasnow", a variety protected and registered on 14 July 2000 in Australia.

In an expert evaluation of the cultivars from the two varieties on 6 July 2001 in the trial field of the Federal Plant Variety Office it was pointed out to the applicant's agent that the varieties being compared were very similar. The applicant's agent considered the varieties to be distinctive.

In a letter dated 17 July 2001, the applicant pointed out that INUIT had smaller, darker foliage and smaller flowers than Novasnow. In addition, he claimed the varieties were different in terms of shoot length and growth structure.

In a letter dated 31 August 2001, the applicant received a negative examination report. In the attached UPOV report on the technical examination, only the box "is not clearly distinctive from other varieties" was marked with a cross, and the example variety cited was Novasnow. The differences established by the applicant are not expressly mentioned in the report.

In the letter dated 6 September 2001, the applicant reiterated his viewpoint. He reported that he had established variety differences between INUIT and Novasnow at an event held by Veitshöchheim testing institute. Consequently, he applied for variety protection, and by way of alternative, for the varieties to be tested in a second trial period.

The Office felt that a second test period served no purpose. The plant material used was not, therefore, kept.

Before giving its decision, the Office requested and inspected the list, produced by the Federal Plant Varieties Office, of the characteristics of the INUIT and Novasnow varieties. The result was that the Federal Plant Varieties Office only established one distinct state of expression with regard to characteristic 4 (leaf blade (lamina): length). The INUIT variety was given a score of 5, whilst the Novasnow variety scored 4. Where the applicant had perceived differences (length, growth structure, foliage colour, leaf size and flower size) the varieties under comparison scored the same for the relevant expression of characteristics of shoot length, growth structure, leaf width and flower size. Foliage colour was not evaluated, since Sutura is not a variety with variegated leaves.

In view of and with reference to this assessment, the Office rejected the application for Community plant variety protection in its Decision of 17 June 2002.

The appeal by the applicant received on 22 July 2002 opposes this decision.

The pertinent Office committee did not remedy the appeal, submitting the matter to the Board of Appeal for a decision.

To substantiate his right of appeal, the applicant refers to the content of letters dated 17 July and 6 September 2000, to which neither the Office nor the Federal Plant Variety Office responded. He also claims that the variety tests by a number of testing establishments in Germany had identified clear distinctions, in particular in relation to the blossom strength and richness of colour and plant height.

In the oral hearing on 14 May 2003, corresponding test results from the Lehr- und Versuchsanstalt Gartenbau (LVG) in Erfurt (Horticultural Teaching and Testing Institute), the Landwirtschaftskammer (Chamber of Agriculture) in Kiel, Schleswig-Holstein, the Bayerisches Landesanstalt für Weinbau und Gartenbau (LWG) (Bavarian State Institute for Viticulture and Horticulture), Veitshöchheim, and the Sächsisches Landesanstalt für Landwirtschaft, Dresden (Saxony State Institute for Agriculture), were submitted. In Dresden, the applicant claimed that different flower strengths (3.8 versus 4.3) and plant height (9 cm versus 14 cm) had been demonstrated. It was also claimed that flower quality and hardiness differed in the two plant varieties.

In addition, one INUIT plant from the applicant's stock and one Novasnow from another plant breeder were submitted for testing, during which it became clear that the foliage colour of Novasnow was darker than that of INUIT.

The applicant requests,

that the decision of the Office of 17 June 2002 be annulled and that variety protection for the Sutera variety INUIT be granted,

alternatively,

that a further examination be arranged for the INUIT and Novasnow varieties being compared.

The President of the Community Plant Variety Office requests

that the appeal be dismissed.

He argues that one state of expression alone (leaf blade), differing by just one note, clearly did not mean the varieties were distinct. In this case, he claimed it could not be expected that a further examination would lead to a different result, especially given that there were no grounds for suggesting that the Federal Plant Variety Office had not carried out the examination properly.

Reasons

I. The appeal is admissible but not substantiated because the applicant entitled neither to the award of plant variety protection for his INUIT variety nor to further testing of the varieties under comparison.

1. Pursuant to Article 6 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community Plant Variety Rights (hereinafter referred to as CReg 2100), Community plant variety protection is granted only for varieties that are not only uniform, stable and new (Articles 8, 9, 10 CReg 2100), but also distinctive. Pursuant to Article 7 (1) CR 2100, A variety is deemed to be distinct if it is clearly distinguishable by reference to the expression of the characteristics that results from a particular genotype or combination of genotypes, from any other variety whose existence is a matter of common knowledge on the date of application determined pursuant to Article 51.

This precondition has not been met because the INUIT variety is clearly not distinct from the Novasnow plant variety.

The fact that the varieties being compared - as claimed by the applicant – are distinct in the characteristics of leaf growth form (length, width), foliage colour, shoot length and flower size may be assumed to be correct. From this it follows merely that INUIT is a variety within the meaning of Article 5(1) CReg 2100 and thus may be the subject of Community plant variety protection. In accordance with Article 5(2), for the purpose of CReg 2100, 'variety' is taken to mean a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety right are fully met, can be defined by the expression of the characteristics that results from a given genotype or combination of genotypes, and distinguished from any other plant grouping by the expression

of at least one of the said characteristics, The phrase "irrespective of whether the conditions for the grant of a plant variety are fully met", makes it clear that no specific level of distinctiveness has to be attained for a variety to be deemed a plant grouping within the meaning of the Regulation; furthermore, a slight difference in at least one characteristic of the nature mentioned above may be enough.

The prerequisite for the grant of a plant variety right, by contrast, is that the variety can clearly be distinguished by the expression of the characteristics resulting from a genotype or a combination of genotypes from those of any varieties with which it is being compared. The word "clearly" is not defined in the Regulation. This is an unspecific legal concept, to be interpreted in accordance with the purpose and meaning of plant variety rights. Plant variety rights are special rights because, contrary to the basic principle prevailing within the Community of free competition, they give the holder an extensive monopoly right over competitors (cf. Article 13 CReg 2100). The grant of such a right to a plant breeder is only justified if the plant breeder has produced or discovered or developed a variety eligible for protection. However, this is only the case if the expert world and the business circles addressed are enriched with a new variety, the genotypical distinctions of which are clearly able to be seen. Because third parties are excluded from freely using the protected variety, for reasons of legal certainty the protective scope of the right needs to be precisely determined, and it is not clearly definable if the different expressions are not clearly identifiable. In order for competitors to be able to assess whether they are violating any variety protection right, they must be able clearly to identify at least one crucial distinctive characteristic. Minor differences are insufficient to meet these requirements.

Because applicants must be given equal treatment, generally binding criteria are, however, required to allow a reliable and just assessment of distinctiveness. The UPOV guidelines for the conduct of tests for distinctness, homogeneity and stability, separately established for many plants, are a help here, in conjunction with a general introduction thereto (TG/1/2 dated 14 November 1979). The pertinent test guidelines contain a table of characteristics listing the states of expression of the main characteristics of each plant, together with a scale for their evaluation. For *Sutera* varieties, no such UPOV guideline has existed to date. The Federal Plant Variety Protection Office has, therefore, produced a table of characteristics in accordance with the general introduction and the template used for tables concerning similar ornamental plants. There is no reason to believe that this table is incomplete. It contains all basic features of the *Sutera* variety, including in particular those that the applicant, when asked by the Office to describe the INUIT variety (" e.g. flower colour, flower size, plant size, special properties of the variety"), described as important, namely flower colour (Nos 15, 16), flower and leaf size (Nos 13, 14; 4, 5, 6) and plant size which - according to the applicant - vary in the case of a basket plant, depending on the cultivation time and the number of cuttings used per plant. (Nos 1, 2, 3). Special qualities of the variety were not cited. In addition, the other characteristics mentioned in the applicant's letter dated 17 July 2001, such as foliage colour, shoot length and growth structure, were not mentioned in the list of characteristics (Nos 10, 11, 12; 2, 3; 13, 14; 4, 5, 6).

Plant height itself is not a crucial criterion for basket plants since it depends on the shoot, which bends under the weight of gravity after it reaches a certain length. In the case of shoot length, foliage colour, leaf width, colour and growth structure, no differences were established that scored a different note from Novasnow. Only the expression of leaf length scored a different note in the varieties being compared. This assessment was not made on the basis of measurement, but, as usual, by a naked-eye assessment by experts. It led to the finding that this characteristic of distinctiveness did not make the INUIT variety clearly distinct from the Novasnow variety.

The Board sees no grounds to suggest that the assessment by the Federal Plant Variety Office and – following on from this - the decision by the Office is legally invalid. To argue that the test is conclusive in itself is also backed up by the finding by the Federal Plant Variety Office that with regard to oval leaf shape (No 6) the two varieties scored the same note. Since leaf shape is calculated from the quotient of length times width, it changes if just one parameter alters; it becomes stockier or thinner. By giving the two varieties the same note for this characteristic, this therefore means that the leaf length of INUIT, with a higher score of just one note, could not influence the phenomenon of leaf shape to the effect that a note for leaf shape different to that scored for Novasnow could be determined. The assessment by the applicant's agent that the characteristics are clearly different cannot convince the Board that the results in the examination report from the Federal Plant Variety Office are based on a faulty or even a merely seriously dubious evaluation. The view of the applicant is based on a subjective opinion and not on verifiable facts, reliable photographs of the varieties under comparison during testing at the Federal Plant Variety Office, or records of distinctive characteristics signed and drawn up jointly by the tester and the applicant, from which it can be deduced that the claimed differences could be clear or at least possibly clear.

Reference to the test results from the various State institutes does not justify the call for a second assessment. They cannot be considered for the sole reason that it has not been demonstrated that this involved exactly the same material as in this case, or whether the cultivated material was planted there under comparable conditions to those prevailing at the Federal Plant Variety Office. Novasnow was not tested there but, instead, its allegedly identical variety, Nova White, was.

However, this aside, the results by the testing institutes still cannot seriously put into doubt the examination results by the Federal Plant Variety Office.

The tests carried out in Erfurt in 2001 produced no different result to the one secured by the Federal Office. It is established that the INUIT and Nova White varieties are "very similar". There are even possible doubts as to whether there are any differences at all.

For the reasons mentioned above, there is no major significance to be attached to the minor difference established in Erfurt in terms of plant size in the case of basket plants.

Where reference is made to differences in flower strength and richness of colour, the results again are not suitable to cast doubt on the results from the Federal Office. Veitshöchheim (2002) and Erfurt confirm that the varieties being compared had an almost identical flower strength. In Dresden, such a slight difference was established, that it is questionable whether this would achieve a score at all under the criteria used by the Federal Office. Kiel reveals a difference in flower strength between INUIT and just one other variety, Nova Compact White, which cannot be seen as identical to Novasnow or Nova White. Apart from that, the applicant did not describe flower strength as a special property of INUIT until the end of the technical examination. Flowering qualities and hardiness did not fall within the scope of the institutes' tests.

2. There is also no right to have a second examination conducted. Pursuant to Art. 57(3) CReg 2100, a complementary examination can only be carried out if the Office does not consider the examination report to constitute a sufficient basis for decision. As outlined above, the Office can base its decision on the examination report of the Federal Office without any legal violation.

It is, therefore, irrelevant that the Federal Office has destroyed the plant material used during testing, a practice that is questionable given the fact that that with vegetatively propagated plants it is barely possible to demonstrate that the same plant material used for subsequent testing as used in the initial examination has been submitted. It only takes a little time and effort to keep a few parent plants until a decision becomes legally final, a measure that should be taken as a matter of precaution in case - as here - a decision is contested.