European Union

Community Plant Variety Office

Case A 004/2003

DECISION

Concerning the Appeal lodged by

David R. Tristram, Walberton Nursery, Yapton Lane, Walberton, Arundel, West Sussex, England.

Further party of the proceedings

Community Plant Variety Office, represented by its President B. Kiewiet
Procedural Representative:
Vice-President J. Elena

Relating to Community plant variety right application No 1999/0128

Variety denomination:

SILVER EDGE

Species *Lavandula vera.*

On 4 June 2004 the Board of Appeal of the Community Plant Variety Office, composed of G. Winkler (Chairman), N. van Marrewijk and D. Boreham (Members), gave the following decision:

The appeal is rejected

Facts

The application was submitted on 3 February 1999. The variety (Walvera) SILVER EDGE is a variegated mutation of *Lavandula vera*, [correct name: *Lavandula* X *intermedia,* being a natural species cross between *Lavandula angustifolia* and *Lavandula latifolia,* first discovered and described in the 19th century in the Southeast of France at an altitude of 500 to 1000 m] also designated as the 'true lavender' and English or Dutch lavender. The variety was developed as a sport from a *Lavandula vera* selection and is highly successful in the temperate regions of Northwest Europe. SILVER EDGE has already been granted a Plant Patent in USA and was first commercialised in the United Kingdom in May 1998.

The application has been tested by G.E.V.E.S. Cavaillon at Les Vignères in the South of France from 2000 until 2002, both outdoors and in the greenhouse.
On 3 April 2000 the office asked the applicant to submit - between 1 and 30 April 2000 – 20 young plants with roots, about 6 months old. The material was received on 21 April 2000 and the first year of testing was carried out in 2000. The first interim report dated 27 February 2001 stated that the variety was similar to another application, BURG 9801, and that the testing had to be continued to observe the flowering characteristics, because SILVER EDGE did not flower in 2000.
In a letter from G.E.V.E.S. Cavaillon dated 12 June 2001 the testing station reported that green branches (reversals) were observed in 8 of 20 plants (7 of 12 outdoors an 1 in 8 in the greenhouse). By letter from the CPVO of 15 June 2001 the applicant was invited to visit the trial.
In his letter of 30 June 2001 the applicant said that the photos sent on June 25 showed much more green reversion than he would have expected. He also argued that this looked as if the material suffered from disease, possibly *Botrytis*? He questioned whether this could have encouraged the green shoots. He admitted that he occasionally had observed green shoots.
A letter from the CPVO of 20 June 2002 announced a negative report to the applicant and he was once more invited to visit the trial.

The second interim report from the testing station dated 21 June 2002 confirmed distinctness from Burg 9801 (also tested in France), but it concluded that the candidate variety is neither uniform nor stable. G.E.V.E.S. reported:

> "We observed 10 doubtful plants having at least one 'green shoot' (not variegated, reverse mutation) among the variegated conform shoots (10 into a sample of 17 observed plants)….. The doubtful plants were cut after flowering in order to eliminate at least partly the doubtful shoots. These plants were observed in open field (10 plants) and under glass house (7 plants). 6 plants out of 10 in open field and 4 plants out of 7 in glass house, so in total 10 out of 17 plants have shown since October 2001 new green, non conform, shoots among the new shoots. This confirms that doubtful plants present mutant shoots on other part of the plants. These 10 plants are now declared as non stable plants among the 17 plants. So the initial plant submission shows non uniformity for the variegated leaf blade characteristic..… In the meantime, cuttings from two doubtful shoots and two conform shoots have been rooted in September 2001. The observations show that: a clone from a doubtful shoot (non variegated), represented by 14 cuttings shows variability: young plants, rooted from this doubtful shoot, are variegated or not variegated; a clone from a conform shoot represented by 13 cuttings shows variability: young plants, rooted from this conform shoot, are variegated or not variegated. The variegated mutation is not stable: the reversion is frequent….. No special disease is observed in open field when the variegated type material seems effectively weak, compared to other *L. angustifolia* green type or *L. bumatii* (lavandin). Nevertheless the plants are now stronger and present the reversion. Any way, the plants kept in glass house all over the year show the reversion. So the influence of growing conditions seems not to be important on the reversion."

In his letter of 24 June 2002 the applicant referred to his letter of 30 June 2001 and his remarks on the possibility of an attack of *Botrytis* or a similar disease, a lot of dead or diseased leaves and healthy shoots emerging from within the canopy (from a mass of decaying foliage), but not from the healthy material on the outside. He further referred to the reduced vitality of shoots of chlorophyll mutants. He also stated

that SILVER EDGE is a very stable variegated variety (only 8 deviates out of 1200 plants). So the high proportion found at Cavaillon must have been the result of the conditions there. SILVER EDGE is a very important variety and he said he would consider an appeal against the conclusions. Finally he proposed re-testing under more suitable conditions, preferably in the UK or The Netherlands.
The final report of the testing station dated 4 November 2002 included negative conclusions for homogeneity and stability and detailed information on the additional testing and research.
In his letter of 9 February 2003 the applicant commented on the G.E.V.E.S. remarks. He also admitted that his variety belongs to *Lavandula angustifolia* x *latifolia* hybrids. He stated that these 'Dutch' or 'English' lavender hybrids perform better in Northern Europe. Cavaillon would therefore, in his view, be unsuitable for testing of such varieties. Finally he proposed re-testing in Cambridge or Holland.

In its decision No R 403 taken on 14 April 2003 the relevant Committee of the Community Plant Variety Office (hereinafter: the Office) refused the plant variety application based on Art. 61 (2) lit. b), Art. (8) of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (hereinafter: CR). It was held that the candidate variety is not uniform.

On 6 May 2003 the applicant lodged an appeal against the decision and duly paid the appeal fees.
As the office did not grant interlocutory revision it remitted the case to the Board of Appeal in accordance with Art. 70 (2) CR.

The appellant claimed that:

1. All chimeras are capable of reversion and the amount will depend on two factors, a) the inherent stability and b) the growing conditions. The ruling failed to take the latter into account.
2. Referring to his letters of 30/06/01, 24/06/02 and 09/02/03 his case is: The material, 'English' or 'Dutch' lavender, performs better in Northern Europe and the trials were carried out in a testing station only 100 km from the Mediterranean. This has affected the judgement of CPVO. (This is illustrated by the report on the "weak

vigour" at Cavaillon - letter of 16/01/03-, whereas the variety would be a strong growing lavender in UK).
The photographs sent by the testing station showed weak variegated shoots. This would have resulted from continued growth during the Mediterranean winter, while in the North of Europe the growth fully stops in winter. Those Northern European conditions would favour a better re-growth.

3. According to the appellant the more favourable conditions in Northern Europe and absence of pathogens (*Botrytis*) after winter would have promoted the development of variegated shoots.
He is convinced that the stability of his variegated lavender variety could have been tested fairly only in Northern Europe.

The appellant applied for

> the grant of a CPVR for SILVER EDGE and/or for the submission of a second sample and testing in another location.

The Vice-President of the Office applied

> for the dismissal of the appeal

The request should not be allowed because of the too high number of deviating plants showing reversion to plants with green leaved shoots.

He argues that the G.E.V.E.S. Cavaillon in the South of France is well experienced in DUS testing of lavender and the only approved testing station on behalf of CPVO. Even if a national application had been made in the United Kingdom or in The Netherlands the testing would have taken place in Les Vignères, because of the centralised testing of these species.

He noted that the applicant did not visit the trials in the second or the third year although he was invited to observe the uniformity and stability problem himself.

Re-testing at a Northern location with new material should not be considered. The arguments concerning unsuitable conditions at the testing location presented by the applicant should not be taken into account, because all lavender testing in the European Union is centralised in the South of France.
The Office asked for dismissal of the request because there was no reason to doubt the validity of the test result.

Grounds

The appeal is admissible but not well founded.

The disputed decision stands up to legal examination since the variety SILVER EDGE is not uniform for the purposes of Art. 8 CR.

A variety shall be deemed to be uniform if, subject to the variation that may expected from the particular features of its propagation, it is sufficiently uniform in the expression of those characteristics which are included in the examination for distinctness, as well as any others used for the variety description.

Pursuant to the UPOV document Revised General Introduction to the Guidelines for the Conduct of Tests for DUS, TG/1/2 applicable at the time of the technical examination, only one off-type is allowed when testing a sample of 6-35 plants. Accordingly, the variety was not uniform as stated in the test report.
The Board noted that periclinal chimeras, as present in material - the subject of this application - will always be more or less unstable because of the presence of tissue layers with different genetic constitution. If a new adventitious bud is formed out of a cell of one of those layers it will show only the phenotype of that particular layer and not the combined phenotype of the variegated parent. Sooner or later reverted branches can be expected in all variegated plants and varieties. Unfavourable conditions could promote that reversion.
UPOV is aware of these problems of variegated varieties and has discussed appropriate instructions to be added to the ‘General Introduction to the test guidelines’. So far no agreement has been reached and the TGP document

concerned has not yet been approved. Important issues are the maximum duration of the testing and the additional uniformity standards to be applied. Under these conditions the uniformity standards for vegetatively propagated varieties have to be applied. The proposal is to allow a higher population standard, e.g. 2,3 or even 5%. This would result in 3 off-types out of a sample of 17 to 28 plants (population standard = 5% and acceptance probability = 95%; being the weakest requirement of this range). Accepting this in favour of the applicant, the variety is still lacking of uniformity and stability.

The appellant is not entitled to claim for re-submission of plant material for further testing.
According to Art. 57 (3) CR the Office is not permitted to grant this request unless it does not consider the examination report to constitute a sufficient basis for decision. There were no exceptional circumstances brought forward by the applicant to allow for complementary examination.

The appellant has not questioned this finding as such. The Board of Appeal did not see any basis to doubt the validity of the test carried out at Les Vignères and so could not accept the applicant's request that the decision of the Office be overturned.
In particular, it is not evident or likely that diseases or other stress factors or the southern climate of Les Vignères had influenced the result of the test. As the test centre had noted the declaration of the appellant concerning these matters it carried out the test extremely carefully both outdoors and under glass. So there is no serious doubt that growing conditions might have affected the result.

The applicant's request to have his variety re-tested at a more suitable Northern location with new material (re-submission) could not be granted, because a similar variegated variety, 'Burg 9801' - presently named 'Burgoldeen' -, tested at Les Vignères during the same period, had passed the DUS examination successfully under identical conditions. Moreover the applicant had applied for the grant of Community Plant Variety Protection, which should be valid in the whole area of the Community.

The DUS examination and the additional research, both outdoors and in the greenhouse, have been carried out exceedingly carefully by the testing station and constitute a sufficient basis for the decision of the Office. The applicant did not identify any specific conditions for testing in paragraph 8.2 of the Technical Questionnaire submitted with his application.

Furthermore the submission of a new sample could not be allowed, because this would create unequal treatment in comparison to other applicants, while sufficient attention had been paid to the problems observed during the testing period.
It is the applicant's responsibility to submit material, which meets the specified requirements of the Office and the testing station. This includes a plant size, which guarantees flowering in the first season after transplanting.

Winkler van Marrewijk