



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

24 September 2019*

(Plant varieties — Nullity proceedings — Cripps Pink apple variety— Articles 10 and 116 of Regulation (EC) No 2100/94 — Novelty — Derogative grace period — Definition of exploitation of the variety — Commercial evaluation — Article 76 of Regulation (EC) No 874/2009 — Late submission of evidence before the Board of Appeal — Evidence submitted for the first time before the General Court)

In Case T-112/18,

Pink Lady America LLC, established in Yakima, Washington (United States), represented initially by R. Manno and S. Travaglio, and subsequently by R. Manno, lawyer,

applicant,

v

Community Plant Variety Office (CPVO), represented by M. Ekvad, F. Mattina and M. Garcia Monco-Fuente, acting as Agents,

defendant,

the other party to the proceedings before the Board of Appeal of the CPVO and intervener before the General Court, being

Western Australian Agriculture Authority (WAAA), established in South Perth (Australia), represented by T. Bouvet and L. Romestant, lawyers,

ACTION brought against the decision of the Board of Appeal of the CPVO of 14 September 2017 (Case A 007/2016), relating to nullity proceedings between the WAAA and Pink Lady America LLC,

THE GENERAL COURT (Third Chamber),

composed of S. Frimodt Nielsen, President, I.S. Forrester (Rapporteur) and E. Perillo, Judges,

Registrar: I. Dragan, Administrator,

having regard to the application lodged at the Court Registry on 23 February 2018,

having regard to the response of the CPVO lodged at the Court Registry on 24 May 2018,

having regard to the response of the intervener lodged at the Court Registry on 28 May 2018,

further to the hearing of 14 May 2019,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

- 1 On 29 August 1995, the predecessor in title of the Western Australian Agriculture Authority ('the WAAA' or 'the intervener'), the Department of Agriculture and Food Western Australia ('the Department'), 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, 'the Basic Regulation'). The plant variety in respect of which the right was sought is 'Cripps Pink', a variety of apple belonging to the species *Malus Domestica Borkh.* The variety in question was developed by Mr John Cripps ('the breeder'), a researcher in the Plant Industries division of the Department, by crossing the Golden Delicious and Lady Williams varieties.
- 2 The application form for a Community plant variety right stated that the Cripps Pink apple trees were first marketed within the European Union in 1994 in France and first marketed outside the European Union, more specifically in Australia, in 1988.
- 3 On 12 March 1996, the CPVO informed the representative of the Department that the Cripps Pink variety did not fulfil the novelty requirement under Article 10 of the Basic Regulation.
- 4 In July 1996, the Department explained that 1988 should have been considered to be the date of the 'first plantings in Australia for experimental purposes'. The Department went on to state that the relevant date for the purposes of Article 10 of the Basic Regulation was July 1992, being the date when Cripps Pink apple trees were marketed in the United Kingdom under the trade name 'Pink Lady'.
- 5 On 15 January 1997, the CPVO granted Community plant variety right No 1640 to the Cripps Pink variety.
- 6 On 26 June 2014, the applicant, Pink Lady America LLC ('the applicant' or 'PLA'), lodged an application for nullity in relation to the Cripps Pink Community plant variety right under Article 20 of the Basic Regulation, arguing that the Community plant variety right at issue did not fulfil the novelty conditions laid down in Article 10 of that regulation. On 19 September 2016, by Decision No NN 17, the CPVO dismissed the applicant's nullity application.
- 7 On 18 November 2016, the applicant lodged an appeal with the Board of Appeal of the CPVO, claiming that the CPVO had erred in its assessment of the facts and the evidence and therefore requesting the Board of Appeal to rectify Decision No NN 17 of 19 September 2016 and to declare the Community plant variety right at issue null and void for lack of novelty pursuant to Article 10(1) of the Basic Regulation. In the alternative, the applicant requested that the Community plant variety right be declared null and void for lack of novelty pursuant to Article 10(1)(b), read in conjunction with Article 116 of that regulation.
- 8 By decision A 007/2016 of 14 September 2017 ('the contested decision'), the Board of Appeal dismissed the applicant's appeal as unfounded, stating, inter alia, that it had not provided evidence of sales or disposals of the Cripps Pink variety to third parties outside the European Union, by the breeder or with his consent, for purposes of exploitation of the variety prior to 29 August 1989.

- 9 In essence, the Board of Appeal considered, first, that the provisions of Article 10(1)(b) of the Basic Regulation should be applied as regards the determination of the grace period for sales or disposals outside the territory of the European Union (paragraph II B 3 of the contested decision); secondly, that various items of evidence established that commercial evaluation trials had been carried out which could not, however, be regarded under Article 10(1) of the Basic Regulation as constituting an exploitation of the variety at issue within the meaning of that provision (paragraphs II B 8 to 10 of the contested decision); and thirdly, that there were invoices from the ‘Olea Nurseries’ nursery demonstrating that it had sold the Cripps Pink variety in 1985, but that there was no evidence that the breeder had consented to these sales, the evidence in fact establishing that the variety at issue had been released for testing purposes only (paragraphs II B 10 to 12 of the contested decision).

Forms of order sought

- 10 The applicant claims that the Court should:
- annul the contested decision;
 - annul Community plant variety right No 1640 granted to the Cripps Pink variety, for lack of novelty, pursuant to Articles 10 and 20 of the Basic Regulation;
 - order the CPVO and the intervener to pay the costs.
- 11 The CPVO contends that the Court should:
- dismiss the application;
 - order the applicant to bear the costs of the CPVO.
- 12 The intervener contends that the Court should:
- dismiss the application;
 - order the applicant to pay the costs.

Law

A. The admissibility of the application for annulment of Community plant variety right No 1640 granted to the Cripps Pink variety

- 13 By its second head of claim, the applicant requests the Court to declare Community plant variety right No 1640 granted to the Cripps Pink variety null and void.
- 14 In that regard, it should be borne in mind that the purpose of actions before the Court is to review the legality of decisions of the Boards of Appeal of the CVPO, as provided for in Article 73 of the Basic Regulation. It follows that the Court does not have jurisdiction to review the legality of decisions taken by the lower-ranking bodies of the CPVO nor, therefore, to annul or vary them.
- 15 Consequently, the second head of claim, seeking the annulment of Community plant variety right No 1640 granted to the Cripps Pink variety, must be declared inadmissible.

B. Substance

- 16 In support of the first head of claim, seeking the annulment of the contested decision, the applicant raises two pleas in law. By its first plea, the applicant submits that the Board of Appeal infringed the combined provisions of Articles 10 and 20 of the Basic Regulation and Article 116 of that regulation by concluding, in essence, that the Cripps Pink variety fulfilled the novelty requirement at the time the Community plant variety right was granted in respect of that variety. By its second plea, the applicant submits that the Board of Appeal infringed Article 76 of the Basic Regulation, the general principles of legal certainty and the sound administration of justice and Article 50(3) of Commission Regulation (EC) No 874/2009 of 17 September 2009 establishing implementing rules for the application of the Basic Regulation as regards proceedings before the CPVO (OJ 2009 L 251, p. 3), by declaring inadmissible the evidence submitted out of time by the applicant during the administrative proceedings. In addition, the applicant requests the General Court to admit evidence which was not submitted during the administrative proceedings.

1. The first plea in law

- 17 In support of its first plea, the applicant submits, first, that the Board of Appeal incorrectly applied Article 10(1)(a) of the Basic Regulation. Secondly, it considers that the Board of Appeal was wrong to rely on the International Convention for the Protection of New Varieties of Plants of 2 December 1961 (the ‘UPOV Convention’) as revised on 19 March 1991 in applying the provisions of that article. Thirdly, it contests the Board of Appeal’s assessment of the novelty condition set out in Article 10(1) of the Basic Regulation.

(a) The application of Article 10(1)(a) of the Basic Regulation

- 18 The applicant submits that the Board of Appeal was wrong to apply the six-year derogative grace period laid down in Article 116 of the Basic Regulation to commercial activities within the European Union as it did not first take into account the provisions of Article 10(2) of the Basic Regulation; the applicant maintains that the derogation laid down in Article 116 of the Basic Regulation may be applied under Article 10(2) of that regulation ‘only if the breeder preserves the exclusive right of disposal of these and other variety constituents, and no further disposal is made’, which is also for the breeder to prove.
- 19 The CPVO, supported by the intervener, disputes that line of argument.
- 20 As a preliminary point, it should be noted that Article 6 of the Basic Regulation provides that Community plant variety rights are to be granted for varieties that are distinct, uniform, stable and new. Under Article 10(1) of the regulation which governs the novelty criterion, the breeder of a variety enjoys a grace period during which he may make sales or disposals without compromising the novelty of the variety. The duration of this grace period varies according to whether the disposals take place within or outside the European Union.
- 21 Article 10(1) of the Basic Regulation 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 1 year before the abovementioned date, within the territory of the Community;

(b) earlier than 4 years or, in the case of trees or of vines, earlier than 6 years before the said date, outside the territory of the Community.’

22 Under Article 116(1) of the Basic Regulation:

‘Notwithstanding Article 10(1)(a) and without prejudice to the provisions of Article 10(2) and (3), a variety shall be deemed to be new also in cases where variety constituents or harvested material thereof have not been sold or otherwise disposed of to others, by or with the consent of the breeder, within the territory of the Community for purposes of exploitation of the variety, earlier than 4 years, [and] in the case of trees or of vines earlier than 6 years, before the entry into force of this Regulation, if the date of application is within 1 year of that date.’

23 Under Article 118 of the Basic Regulation:

‘1. This Regulation shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

2. Articles 1, 2, 3, 5 to 29 and 49 to 106 shall apply from 27 April 1995.’

24 The relevant date for the purposes of the combined application of Articles 10 and 116 of the Basic Regulation is therefore 1 September 1994, the date of publication of the Basic Regulation in the *Official Journal*.

25 The effect of Article 116 of the Basic Regulation is to extend the grace period laid down in Article 10(1)(a) of the regulation from 1 year before the application for protection to four, or 6 years in the case of trees, before the date of entry into force of the Basic Regulation. The relevant date in this case was therefore 1 September 1988 for sales and disposals within the European Union.

26 As regards the grace period for sales and disposals outside the territory of the European Union, as set out in Article 10(1)(b) of the Basic Regulation, that provision is not affected by Article 116 of the regulation.

27 In the present case, the documents in the case establish that the application for Community plant variety rights was made by the intervener’s predecessor in law on 29 August 1995.

28 Therefore, it was filed within 1 year of the entry into force of the Basic Regulation.

29 The Board of Appeal was therefore correct in holding in paragraphs II B 2 and 3 of the contested decision that in the present case two grace periods were applicable: first, a period of 6 years before the entry into force of the Basic Regulation for sales and disposals within the territory of the European Union and, secondly, a period of 6 years before the filing of the application for sales or disposals outside that territory.

30 The Board of Appeal found, in paragraph II B 4 of the contested decision, that no evidence had been submitted showing that sales or disposals had been made, by or with the consent of the breeder, within the European Union more than 6 years before the entry into force of the Basic Regulation. Indeed, the file shows that the Cripps Pink apple-tree variety was first marketed within the European Union in 1992 in the United Kingdom.

31 The Board of Appeal did not therefore err, as is apparent from paragraph II B 4 of the contested decision, in limiting itself to examining the impact of the evidence provided by the applicant, in the light of Article 10(1)(b) of the Basic Regulation, on the question whether variety constituents or harvested material of the variety had not been sold or otherwise disposed of to others, by or with the

consent of the breeder, within the meaning of Article 11 of that regulation, for purposes of exploitation of the variety, outside the territory of the European Union earlier than 6 years before 29 August 1989.

32 That conclusion is not affected by the applicant's argument that the Board of Appeal should have applied a grace period only after first examining whether the breeder had preserved his exclusive right of disposal within the meaning of Article 10(2) of the Basic Regulation.

33 Article 10(2) of the Basic Regulation provides:

'2. The disposal of variety constituents to an official body for statutory purposes, or to others on the basis of a contractual or other legal relationship solely for production, reproduction, multiplication, conditioning or storage, shall not be deemed to be a disposal to others within the meaning of paragraph 1, provided that the breeder preserves the exclusive right of disposal of these and other variety constituents, and no further disposal is made. However, such disposal of variety constituents shall be deemed to be a disposal in terms of paragraph 1 if these constituents are repeatedly used in the production of a hybrid variety and if there is disposal of variety constituents or harvested material of the hybrid variety.

Likewise, the disposal of variety constituents by one company or firm within the meaning of the second paragraph of Article 58 of the Treaty to another of such companies or firms shall not be deemed to be a disposal to others, if one of them belongs entirely to the other or if both belong entirely to a third such company or firm, provided no further disposal is made. This provision shall not apply in respect of cooperative societies.'

34 The purpose of this provision is therefore to specify the circumstances in which certain legal situations are or are not covered by the concept of disposal for purposes of exploitation of the variety within the meaning of Article 10(1) of the Basic Regulation. Contrary to what the applicant appears to claim, conditions that must be met in order for a disposal to be considered not to negate novelty are not cumulative.

35 As none of the situations mentioned in Article 10(2) of the Basic Regulation arise in the present case and as the applicant has failed to put forward any argument substantiating its claim that there is such a situation, the Board of Appeal was correct to not apply that provision. It therefore follows from the above that the applicant's argument that the Board of Appeal incorrectly applied Article 10(1)(a) of the Basic Regulation must be rejected.

(b) The interpretation of Article 10 of the Basic Regulation in the light of the UPOV Convention as revised on 19 March 1991

36 The applicant criticises the Board of Appeal for having interpreted Article 10 of the Basic Regulation in accordance with Article 6 of the UPOV Convention as revised on 19 March 1991. According to the applicant, since the sales of Cripps Pink apple trees were made before the entry into force of the Basic Regulation and of that version of the UPOV Convention, the Board of Appeal should have referred to the UPOV Convention, as revised on 23 October 1978, which does not refer to the purpose of the exploitation of the variety.

37 The CPVO and the intervener dispute those arguments.

38 First, it is clear that the applicant's argument is tantamount to claiming that the words 'for purposes of exploitation of the variety' in Article 10(1) of the Basic Regulation should be disregarded when applying that provision.

- 39 Such an argument cannot succeed, as the application of the provisions of the Basic Regulation by the Board of Appeal and the General Court must be full and complete.
- 40 Secondly, it should be recalled that the twenty ninth recital of the Basic Regulation states that ‘this Regulation takes into account existing international conventions such as the International Convention for the Protection of New Varieties of Plants (UPOV Convention)’, which in the present case is the UPOV Convention as revised on 19 March 1991, and that even if the Board of Appeal had referred to it, it was therefore fully entitled to do so.
- 41 In any event, it is clear that the contested decision does not contain any reference to any version of the UPOV Convention. On the contrary, it is clear from section II B of the contested decision, entitled ‘On the substance’, that the Board of Appeal based its assessment of the novelty requirement of the Cripps Pink variety solely on Article 10 of the Basic Regulation.
- 42 Consequently, the applicant’s argument is based on an incorrect reading of the contested decision and must therefore be rejected.

(c) The Board of Appeal’s assessment of the novelty requirement

(1) Preliminary considerations concerning the burden of proof in nullity proceedings

- 43 As a preliminary point, it should be noted that Article 6 of the Basic Regulation provides that Community plant variety rights are to be granted for varieties that are distinct, uniform, stable and new.
- 44 Article 10(1) of the Basic Regulation establishes the conditions under which a variety must be regarded as new.
- 45 The Court has stated that the conditions — including those, in particular, relating to novelty — set out in Article 6 of the Basic Regulation are prerequisites for the grant of a Community plant variety right. Therefore, if those conditions are not met, the right granted is unlawful, and it is in the public interest that it be declared null and void (see, to that effect, judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 52).
- 46 It should be recalled that under Article 20(1)(a) of the Basic Regulation, the CPVO is to declare a Community plant variety right null and void if it is established that the conditions laid down in Articles 7 or 10 of the regulation were not complied with at the time of the Community plant variety right.
- 47 In addition, under Article 53a(2) of Regulation No 874/2009, the request to the CPVO to open the proceedings on nullity or cancellation, as referred to in Articles 20 and 21, respectively, of the Basic Regulation, is to be accompanied by evidence and facts raising serious doubts as to the validity of the title.
- 48 In that context, an applicant seeking a declaration of nullity in respect of a Community plant variety right must adduce evidence and facts of sufficient substance to give rise to serious doubts as to the legality of the plant variety right granted following the examination provided for in Articles 54 and 55 of that regulation (judgment of 21 May 2015, *Schröder v CPVO*, C-546/12 P, EU:C:2015:332, paragraph 57 and judgment of 23 November 2017, *Aurora v CPVO — SESVanderhave (M 02205)*, T-140/15, EU:T:2017:830, paragraph 58).

- 49 It was thus for the applicant to put forward, in support of its nullity application, evidence or facts of sufficient substance to raise serious doubts on the part of the CPVO regarding the legality of the plant variety right granted in the present case.
- 50 While the question may be posed whether, in the present case, the evidence put forward by the applicant in support of its nullity application was such as to give rise to serious doubts regarding the legality of the Community plant right granted to the intervener, it is clear that the CPVO accepted that there were serious doubts that might justify a re-examination of the Cripps Pink variety by way of nullity proceedings and it initiated adversarial proceedings. Moreover, such an assessment of the admissibility of the nullity application does not affect the ability of the CPVO or the Board of Appeal to reject the substantive application subsequently.
- 51 It should also be recalled that under Article 76 of the Basic Regulation, in proceedings before it, the CPVO is to make investigations on the facts of its own motion, to the extent that they come under the examination pursuant to Articles 54 and 55 of that Regulation.
- 52 It follows from the Court's case-law that Article 76 of the Basic Regulation applies to nullity proceedings before the Board of Appeal (judgment of 21 May 2015, *Schröder v OCVV*, C-546/12 P, EU:C:2015:332, paragraph 46).
- 53 The CPVO has a wide discretion to declare a plant variety right null and void under Article 20 of the Basic Regulation, which it exercises on the basis of the evidence submitted to it by the applicant for a declaration of nullity, and, as noted in paragraph 46 above, it is required to declare a Community plant variety right null and void if it is established that the conditions set out in Article 7 or 10 of the Basic Regulation were not fulfilled at the time the Community plant variety right concerned was granted.
- 54 Nevertheless, the exercise of that discretion is not immune to review by the Court. Indeed, Article 73 of the Basic Regulation envisages the General Court being called upon to assess the legality of the decisions of the CPVO Boards of Appeal by reviewing the way in which they have applied EU law, specifically in the light of the factual evidence placed before those Boards. Accordingly, the General Court may carry out a full review of the legality of decisions of the CPVO Boards of Appeal, if necessary examining whether the Board of Appeal concerned made a correct legal characterisation of the facts of the dispute or whether its appraisal of the facts placed before it was flawed (see judgment of 19 December 2012, *Brookfield New Zealand and Elaris v CPVO and Schniga*, C-534/10 P, EU:C:2012:813, paragraphs 39 to 40 and the case-law cited).
- 55 It is apparent from case-law that, where the factual findings and assessments made by the Board of Appeal are the result of complex assessments in the field of botany or genetics, requiring specific expertise or scientific or technical knowledge, the review carried out by the General Court can be limited to ascertaining whether there has been a manifest error (judgments of 15 April 2010, *Schröder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 77, and of 19 November 2008, *Schröder v CPVO (SUMCOL 01)*, T-187/06, EU:T:2008:511, paragraphs 59 to 63). That is, however, not so in the present case.
- 56 Since the examination of the question of novelty at issue in this case does not require specific expertise or technical knowledge, it follows from the case-law referred to in paragraph 55 above that the General Court is to carry out a full or complete review of legality (judgments of 15 April 2010, *Schröder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 77, and of 19 November 2008, *SUMCOL 01*, T-187/06, EU:T:2008:511, paragraph 65).

(2) The assessment of the novelty requirement in the light of sales or disposals made outside the European Union

- 57 As a preliminary point, it should be noted that it was for the applicant, who had made the nullity application regarding the Community plant variety right granted for the Cripps Pink variety to provide evidence enabling the Board of Appeal to conclude that the novelty requirement was not fulfilled at the time when that right was granted.
- 58 Moreover, as already set out in paragraph 34 above, since the function of Article 10(2) of the Basic Regulation is merely to specify the conditions under which certain types of disposal do not constitute a disposal ‘to a third party’, the applicant cannot claim that the conditions in this provision must be fulfilled in all cases in order for a sale or disposal not to negate novelty. Indeed, for a sale or disposal made outside the European Union before the grace period not to negate novelty, it is sufficient under Article 10(1) of the Basic Regulation that the sale or disposal to a third party is not made by the breeder or with his consent ‘for purposes of exploitation of the variety’, which is a separate condition from those set out in Article 10(2) of that regulation.
- 59 Therefore, in the present case, it is necessary to examine whether, in the light of the evidence provided by the parties, the Board of Appeal was right to conclude that the sales or disposals had not been made by the breeder or with his consent to third parties for purposes of commercial exploitation of the variety in question before 29 August 1989.
- 60 The applicant submits, in essence, that the Board of Appeal erred in its assessment of the evidence before it.
- 61 The breeder’s statutory declaration of 6 August 2015 shows that in 1984, as part of an apple breeding programme, the breeder selected the Pink Lady and Sundowner varieties for further trials. This statement is corroborated by a contemporaneous document, namely a memorandum entitled ‘Apple breeding program’ sent by the breeder on 3 September 1984 to the head of the ‘Plant Research’ Division of the Department. In that memorandum, the breeder requested approval for the Pink Lady and Sundowner varieties to be released to the industry ‘for extensive trial and evaluation under commercial conditions’.
- 62 The breeder’s statutory declaration of 6 August 2015 also shows that the handwritten notes made on the memorandum of 3 September 1984 reflect the outcome of his meeting with the head of the Horticulture Division of the Department on 3 April 1985, during which the content of that memorandum was discussed. In particular, it is apparent from the breeder’s statutory declaration that the annotation ‘Two varieties, Sundowner and Pink Lady to be released’ means that his request to release those varieties to the industry ‘for extensive trial and evaluation under commercial conditions’ had been approved.
- 63 In addition, as regards the disposals which were alleged to have been made to Olea Nurseries and How Green Nursery in 1985, during the administrative proceedings the intervener submitted two letters sent by the breeder on 31 May 1985 to those nurseries. In those letters, the breeder informed the nurseries that certain grafted trees of the Sundowner and Pink Lady varieties would be available in winter and that they might be interested in receiving them in order to ‘have a source of budwood and [to] be able to produce trees for sale to fruit growers’, ‘should the Department recommend their planting in commercial orchards’. In addition, the breeder explained in his statutory declaration of 6 August 2015 that, in August 1985, he had distributed ‘for trial and evaluation purposes, 12 Cripps Pink trees and 12 Cripps Red trees’ to Olea Nurseries and How Green Nursery and to eight orchardists and that the intention was to evaluate the performance of the varieties in a ‘non-research station environment’.

- 64 Finally, the breeder's statutory declaration of 6 August 2015 and Departmental Bulletin No 4169, entitled 'Apple varieties for Western Australia', show that it was only in November 1990 that the Department recommended that orchardists grow the Cripps Pink variety.
- 65 Therefore, the content of the letters to the nurseries, taken in isolation, admittedly does not make it possible to conclude, as the Board of Appeal stated in the contested decision, that the variety at issue had been released solely for testing purposes. However, the evidence described above, taken as a whole, confirms that the disposals made in 1985 had been 'for trial and evaluation purposes'.
- 66 Moreover, contrary to the applicant's submissions, the fact that the evidence refers to commercial testing and not botanical testing is irrelevant. In this respect, it should be recalled, first of all, that Article 10(1) of the Basic Regulation specifically refers to 'exploitation of the variety'.
- 67 It has been held that a disposal for the purposes of testing of the variety which does not amount to sale or disposal to third parties for purposes of exploitation of the variety does not negate novelty for the purposes of Article 10 of the Basic Regulation (judgment of 11 April 2019, *Kiku v CPVO — Sächsisches Landesamt für Umwelt, Landwirtschaft und Geologie (Pinova)*, T-765/17, not published, under appeal, EU:T:2019:244, paragraph 74).
- 68 It follows from this case-law that the concept of 'exploitation' of the variety within the meaning of Article 10(1) of the Basic Regulation relates to exploitation for profit, as further demonstrated by the provisions of the Basic Regulation relating to contractual exploitation rights, but this concept excludes commercial trials aimed at assessing varieties under commercial conditions across a range of soil types and different farming systems to determine their value to customers.
- 69 The Board of Appeal therefore did not err in referring to its decision of 2 December 2008 in case A 009/2008, in which it held that what matters for the purposes of Article 10 of the Basic Regulation is that there is an 'evident desire to make sales'. It follows that the applicant's argument that the Board of Appeal wrongly relied upon that decision in order to dismiss as inadequate the evidence produced by it must be rejected.
- 70 Further, as the intervener explained during the hearing before the Board of Appeal, the purpose of the 'commercial trials' in this case was to assess varieties under commercial conditions across a range of soil types and different farming systems to determine their value for customers. The trials thus enabled the performance of the variety in question to be monitored under much more representative field conditions, the full crop cycle to be assessed, and, finally, producers to receive more performance data.
- 71 These statements by the intervener are corroborated by the breeder's statutory declaration of 6 August 2015 and also by the rebuttal statutory declaration of Mr Geoffrey Godley, Agricultural Advisor to the Department, of 13 January 2015. It is apparent from the breeder's statement of 6 August 2015 that the purpose of distributing the Cripps Pink variety to nurseries and orchardists 'was to see how the trees performed in a non-research station environment'. Mr Godley's statement also indicates that he acknowledges having participated, at the material time, in the 'commercial evaluation' activities, which consisted of collecting information from growers 'on yield, harvest, storage, packing, shipping and consumer reaction to the variety apples.'
- 72 Finally, it should be noted that according to the explanations provided during the hearing before the Board of Appeal by the CPVO Technical Expert on Apples, commercial evaluation is a common practice in apple selection. The expert explained that apple selection takes place in two stages: a first stage which consists of carrying out research to test and select varieties, and a second stage which consists of assessing the commercial use of apple trees.

- 73 In those circumstances, the Board of Appeal correctly concluded that commercial evaluation did not amount to commercial exploitation and that, accordingly, sales or disposals made for testing purposes before the grace period were circumstances that did not negate novelty.
- 74 This conclusion is not affected by the evidence provided by the applicant in support of its nullity application.
- 75 First, with regard to the statutory declarations submitted by the applicant, it is settled case-law that in order to assess the evidential value of a document, regard should first be had to the credibility of the account it contains. It is then necessary to take account, in particular, of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (see, by analogy, judgment of 7 June 2005 *Lidl Stiftung v OHIM — REWE-Zentral (Salvita)*, T-303/03, EU:T:2005:200, paragraphs 42 and 43 and the case-law cited). Furthermore, it is settled case-law that even where a statement has been made in accordance with Article 78(1)(g) of the Basic Regulation, if it has been made by persons associated with the applicant, it can only be attributed probative value where it is supported by other evidence (see order of 21 October 2013, *SOUTHERN SPLENDOUR*, T-367/11, not published, EU:T:2013:585, paragraph 49 and the case-law cited) and judgment of 13 July 2017, *Boomkwekerij van Rijn-de Bruyn v CPVO — Artevos (Oksana)*, T-767/14, not published, EU:T:2017:494, paragraph 99].
- 76 In the present case, first, it should be noted that the persons called upon by the applicant to make statutory declarations are referring to events that took place more than thirty years ago. Secondly, at that time, there was no Community plant variety protection legislation in force in Australia and, therefore, the persons called upon to provide these statutory declarations had no knowledge of the legal framework governing the requirements for the registration of Community plant variety rights. Thirdly, unlike the breeder's statement of 6 August 2015, the statutory declarations produced by the applicant are not supported by contemporaneous evidence regarding the facts. It therefore follows from the above, in the light of the case-law cited in paragraph 75 above, that the probative value of those statutory declarations is limited.
- 77 Secondly, as regards the invoices provided by the applicant concerning sales allegedly made by Olea Nurseries in 1987, it is sufficient to note, as observed by the Board of Appeal, that even if the invoices provided by the applicant during the administrative proceedings prove that Olea Nurseries sold the Cripps Pink variety, they do not constitute proof that the breeder had consented to the 'commercial exploitation' of that variety. This is especially true since it is clear from the letters sent to Olea Nurseries and How Green Nursery in 1985 that the breeder had offered them trees of the Sundowner and Pink Lady varieties in the event that the 'Department recommend their planting in commercial orchards' and that no evidence has been submitted that such a recommendation was made before November 1990.
- 78 Moreover, the fact that the Department stated during the administrative proceedings before the CPVO that between 1985 and 1990 its officers 'were closely involved in the trial plantings in commercial orchards to which the Department had provided trees and budwood' serves only to corroborate the experimental purpose of the disposals made during that period. It does not demonstrate, as the applicant suggests, that the Department was aware of or had consented to the sales made by the nurseries.
- 79 In addition, the latter point distinguishes the present case from the decision of the Board of Appeal of 2 July 2013 in case A 007/2013 concerning the Oksana pear variety. In that case, the evidence proved that the distribution of the variety constituents was completely unqualified and was carried out with the express intention of the breeder that the material be distributed without restriction. Consequently, the applicant's argument that the contested decision contradicts the Board of Appeal's decision of 2 July 2013 in Case A 007/2013 concerning the Oksana variety must be rejected.

- 80 Thirdly, the other evidence referred to in paragraph 44 of the application comprises documents subsequent to the facts giving rise to the present case or documents containing vague statements from which it cannot be concluded that the Cripps Pink variety was sold or disposed of to third parties by or with the consent of the breeder for purposes of exploitation before the grace period.
- 81 In that regard, it should be noted that the press release entitled ‘Fruit Growers Encouraged to Plant New Apple Varieties’ is dated 8 September 1992 and contains vague and general statements by the Western Australian Minister of Agriculture at the material time. Indeed, even though the Minister claimed in the press release that, at the date of that press release, Pink Lady and Sundowner apples had ‘been released to growers in 1985’, it does not necessarily provide grounds for concluding that the release to growers was for purposes of commercial exploitation of the Cripps Pink variety. Moreover, it is sufficient to note that the article published in 1993 in the journal *Hort Science* by the breeder and his colleagues corroborates the breeder’s claim that the Cripps Pink variety was released to industry for commercial evaluation in 1986. In addition, it is sufficient to observe that the statement made by the apple grower Mr Atherton in the television program ‘Tickled Pink’ that ‘Pink Lady had just come on the scene’ is an ambiguous statement from which it cannot be deduced that commercial exploitation of the Cripps Pink variety had taken place before the grace period.
- 82 Similarly, with regard to the audit report of the Australian Parliamentary Review Committee, this is a parliamentary committee which was convened several years after the material events, namely in 1995. Moreover, the statement by the rapporteur for the intervenor’s submissions, Mr Charlton, before that review committee that the apples were first grown commercially in 1986 or 1987 is ambiguous and does not permit the conclusion that the variety was sold or disposed of for purposes of exploitation before the grace period.
- 83 Fourthly, the argument that the Department never expressed the intention to file any trademark or claim plant breeder’s rights in Australia is irrelevant for the purpose of determining whether a variety meets the novelty requirement for the purposes of Article 10 of the Basic Regulation. Under that provision, regard is to be had only to sales or disposals to third parties, by or with the consent of the breeder, for purposes of exploiting the variety before the grace period, such sales or disposals negating novelty.
- 84 Fifthly, as regards the decision of the Chilean Tribunal of Industrial Property declaring the plant variety rights for the Cripps Pink variety in that jurisdiction null and void for lack of novelty, it should be recalled that the provisions of the Basic Regulation established the sole and exclusive form of Community industrial property rights for plant varieties. Therefore, the CPVO and, where appropriate, the Courts of the European Union are not bound by a decision made in a third country (see by analogy, judgment of 23 October 2017, *Barmenia Krankenversicherung v EUIPO (Mediline)*, T-810/16, not published, EU:T:2017:749, paragraph 37).
- 85 In addition, the applicant merely refers to this decision of the Chilean Tribunal of Industrial Property in a footnote to paragraph 26 of the application, in which it states that ‘the Department never expressed the intention to file any trademark and/or plant breeder’s rights in Australia’. That footnote also states: ‘Reference is made in particular to the interview to [the breeder] recorded on 17 May 2010 in Floreat, W.A. [Western Australia] ... to the Chilean decision of Tribunal of Industrial Property which had invalidated the Chilean Cripps Pink PBR certificate n.34/95’. There is no further mention of this decision of the Industrial Property Court of Chile in the application, nor is it included in the annexes to the application. It should, moreover, be noted that the applicant does not draw any conclusions from that decision as regards the validity of the contested decision and, consequently, that decision cannot be of any account for the Court.

86 Thus, it follows from the foregoing considerations that the Board of Appeal correctly concluded that the evidence provided by the applicant did not prove that the Cripps Pink variety had been sold or disposed of to third parties outside the European Union, by the breeder or with his consent, for purposes of exploitation of the variety before 29 August 1989.

87 Moreover, the Court must reject the applicant's argument that there is a contradiction between: (i) the fact that the contested decision focuses on whether the evidence provided by the applicant was sufficient to raise serious doubts; and (ii) the fact that the CPVO and, subsequently, the Board of Appeal did not reject the nullity application ab initio. In that regard, the applicant's reading of the contested decision is incomplete. Indeed, whilst that decision is admittedly incorrect in its use of the wording 'serious doubts' under Article 53a of Regulation No 874/2009 in its assessment of the evidence, the decision demonstrates clearly that the applicant has submitted no evidence that the Cripps Pink variety had been sold or disposed of to third parties outside the European Union, by the breeder or with his consent, for purposes of exploitation. Furthermore, the original decision to initiate nullity proceedings was wrong, but this is not because the Board of Appeal concluded, at the end of the proceedings and in the light of all the facts and evidence submitted by the parties, that the evidence provided by the applicant did not raise serious doubts regarding the validity of the Community plant variety right in question. When, following nullity proceedings, the CPVO concludes that the evidence does not raise serious doubts, this means that the serious doubts that the CPVO had at the time it received the nullity application have been dispelled.

88 Consequently, in the light of all the foregoing, the applicant's first plea must be rejected as unfounded.

2. The second plea in law

89 In support of its second plea, the applicant claims, in essence, that the Board of Appeal infringed Article 76 of the Basic Regulation and the principles of legal certainty and the sound administration of justice, as well as Article 50(3) of Regulation No 874/2009.

90 By the first part of the plea, the applicant claims that the Board of Appeal wrongly rejected the evidence put before it by the applicant on the grounds that it was out of time. By the second part of the plea, it requests that the Court acknowledge the admissibility of those items of evidence before it.

(a) The admissibility of evidence submitted late during the proceedings before the Board of Appeal

91 According to the file, the applicant introduced new evidence during the oral hearing before the Board of Appeal. Moreover, the CPVO and the intervener did not receive a copy of that evidence before that hearing, which the applicant acknowledged on that occasion.

92 In the light of these circumstances and Article 53a(4) of Regulation No 874/2009, the Board of Appeal held that, in the absence of reasonable or acceptable explanations justifying the late submission, that new evidence had to be rejected as inadmissible.

93 The applicant submits that the Board of Appeal therefore infringed Article 76 of the Basic Regulation and the general principles of legal certainty and the sound administration of justice and that Article 81 of the Basic Regulation should have been applied. In addition, the applicant submits that, in view of the complexity of the present case and given that the evidence submitted late reflects circumstances that have changed during the proceedings, the Board of Appeal should have granted a further hearing pursuant to Article 50(3) of Regulation No 874/2009.

94 The CPVO and the intervener dispute those arguments.

- 95 As a preliminary point, it should be recalled that under Article 76 of the Basic Regulation, the CPVO is required, in the course of the proceedings before it, to disregard facts or items of evidence which have not been submitted within the time limit set by the CPVO. In addition, Article 53a(4) of Regulation No 874/2009 provides that the CPVO is not to take into consideration written submissions or documents, or parts thereof, that have not been submitted within the time limit set by the CPVO.
- 96 Since the Basic Regulation and Regulation No 874/2009 contain provisions governing the admissibility of evidence submitted out of time, it must be held that Article 81, which provides that, in the absence of procedural provisions in Regulation No 874/2009 or in provisions adopted pursuant to that regulation, the CPVO is to apply the principles of procedural law which are generally recognised in the Member States, and which according to the applicant, in the present case required the CPVO to refer to those principles, is not applicable in the present case.
- 97 Moreover, in the light of the legal provisions mentioned in paragraph 95 above, contrary to the applicant's contention, the Board of Appeal does not have any discretion regarding the admissibility of evidence submitted out of time. On the contrary, as the CPVO submits, it follows from the wording of those provisions that the CPVO cannot take into account facts and evidence that are submitted out of time.
- 98 Nor is this conclusion called into question by the case-law referred to by the applicant in support of its argument that the Board of Appeal should have admitted the evidence submitted late, since, according to that case-law, there is no reason to preclude additional evidence which merely supplements other evidence submitted within the time limit imposed from being taken into account, where the initial evidence was not irrelevant but has been challenged as insufficient by the other party (judgment of 28 March 2012, *Rehbein v OHIM — Dias Martinho (OUTBURST)*, T-214/08, EU:T:2012:161, paragraph 53). This case-law concerns the application of procedural provisions concerning EU trade marks relating to proof of use, according to which, if the opposing party fails to provide proof of use of the trade mark within the prescribed time limits, the European Union Intellectual Property Office (EUIPO) must reject the opposition. These provisions have no equivalent in the field of Community plant variety rights. Therefore, that case-law cannot be applied by analogy to the present case.
- 99 In addition, under Article 95(2) of Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (OJ 2017 L 154, p. 1), EUIPO may disregard facts or evidence which are not submitted in due time by the parties concerned. However, that article is limited to permitting EUIPO not to take into account evidence submitted out of time, whereas Article 76 of the Basic Regulation requires the CPVO to disregard such late evidence.
- 100 In any event, it should be noted that although the Court has acknowledged that Boards of Appeal have a wide discretion as regards the admissibility of evidence submitted late in trade mark matters, it has nonetheless stated that the fact that such additional evidence may be taken into consideration does not in any way constitute a 'favour' granted to one of the parties, but must be the result of an objective and reasoned exercise of EUIPO's discretion. The taking into account of evidence produced late may be justified where EUIPO considers, first, that the material which has been produced late is, on the face of it, likely to be genuinely relevant and, second, that the stage of the proceedings at which that late evidence was submitted and the circumstances surrounding the submission do not argue against such matters being taken into account (see, to that effect, judgment of 13 March 2007, *OHIM v Kaul*, C-29/05 P, EU:C:2007:162, paragraph 44, and judgment of 3 October 2013, *Rintisch v OHIM*, C-120/12 P, EU:C:2013:638, paragraph 38).
- 101 In the present case, it should be noted, first, that the applicant submitted the evidence in question during the oral hearing before the Board of Appeal. Moreover, as acknowledged by the applicant at that hearing, the CPVO and the intervener did not receive a copy of that evidence before the hearing. Secondly, according to the file, the applicant offered no explanation for the late submission of the evidence. With regard to the letter from the Minister for Agriculture of 15 January 1990 and the

statutory declarations of Mr Allan Price and Mr John Paterson, the applicant argued that this evidence was available only after the expiry of the time limit set by the Board of Appeal, namely 7 September 2017. However, as the Board of Appeal correctly found in the contested decision, such an explanation is not on the face of it credible since that letter had been mentioned earlier in the proceedings. Moreover, as regards the statutory declarations of Mr Price and Mr Paterson, it is sufficient to note that these are dated before the expiry of the time limit set by the Board of Appeal. In addition, the press articles could have been obtained earlier because, as the applicant acknowledged in its submission of 26 September 2017, they are publications that are available on the Internet.

- 102 In those circumstances and taking into account the provisions mentioned in paragraph 95 above, the Board of Appeal was required to disregard the evidence in question.
- 103 Consequently, the applicant's argument that the Board of Appeal infringed the principles of legal certainty and the sound administration of justice by declaring the evidence in question inadmissible must also be rejected.
- 104 Finally, as regards the applicant's argument that the Board of Appeal should have granted a further hearing, it should be noted that, under Article 50(3) of Regulation No 874/2009, requests for further hearings are inadmissible except for requests based on circumstances which have undergone change during or after the hearing. In the present case, it is clear that no further hearing was requested. The applicant's argument must therefore be rejected.

(b) The admissibility before the General Court of evidence not submitted during the proceedings before the Board of Appeal

- 105 By the second part of the second plea, the applicant requests that the Court declare admissible three items of evidence which were not submitted during the administrative proceedings. These are a statutory declaration signed on 23 January 2018 of the then 90-year-old breeder, a statutory declaration signed on 20 January 2018 of Mr and Mrs Green, the owners of How Green Nursery at the material time, and a statutory declaration of the apple grower, Mr Atherton, signed on 8 February 2018.
- 106 The CPVO and the intervener submit that this evidence is inadmissible.
- 107 In that regard, it is settled case-law that the Court is required to assess the legality of decisions of the Board of Appeal by reviewing the board's application of EU law, particularly in the light of facts which were submitted to the latter, but it cannot carry out such a review by taking into account matters of fact produced before it for the first time (see judgment of 15 April 2010, *Schräder v CPVO*, C-38/09 P, EU:C:2010:196, paragraph 76 and the case-law cited, and judgment of 13 July 2017, *Oksana*, T-767/14, not published, EU:T:2017:494, paragraph 30 and the case-law cited). Similarly, in carrying out that review of legality, it is not the Court's function to review the facts in the light of documents produced for the first time before it (see judgment of 13 July 2017, *Oksana*, T-767/14, not published, EU:T:2017:494, paragraph 30 and the case-law cited).
- 108 In the present case, since the evidence was not submitted in the proceedings leading to the adoption of the contested decision, it must therefore be declared inadmissible.
- 109 That conclusion is not affected by the applicant's argument that the Board of Appeal's account of the facts was erroneous and that it made an incorrect and partial assessment of the evidence. Indeed, the admissibility of a new piece of evidence cannot be conditional on whether or not the outcome of a given decision is favourable to a party to the proceedings. In addition, the fact that it is additional evidence that supports that the form of order sought by the applicant is also irrelevant (see, to that effect, judgment of 13 July 2017, *Oksana*, T-767/14, not published, EU:T:2017:494, paragraph 32).

- 110 Moreover, as the CPVO correctly pointed out, the applicant provided no explanation of why it was not in a position to be apprised of the facts in question at an earlier stage. Since that evidence consists of written witness statements requested by the applicant of the persons concerned, it could have obtained these statements during the administrative proceedings.
- 111 Consequently, in the light of the foregoing, since the applicant has also failed to provide any specific reason why the Court should take into account the items of evidence in question, even though it was produced for the first time before it, it must be disregarded, without it being necessary to assess their probative value (see, to that effect, judgment of 22 March 2018, *Safe Skies v EUIPO — Travel Sentry (TSA LOCK)*, T-60/17, not published, EU:T:2018:164, paragraph 13 and the case-law cited).
- 112 Having regard to all the foregoing, the second plea must be rejected and, consequently, the action must be dismissed in its entirety.

Costs

- 113 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the forms of order sought by the CPVO and the intervener.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Pink Lady America LLC to pay the costs.**

Frimodt Nielsen

Forrester

Perillo

Delivered in open court in Luxembourg on 24 September 2019.

E. Coulon
Registrar

G. Berardis
President