European Union

Community Plant Variety Office

Case A 001/2005

DECISION

concerning the Appeal lodged by

Federación de Cooperativas Agrarias de la Comunidad Valenciana (FECOAV), calle Cabelleros 26, 46001 Valencia, Spain, represented by Mr Salvador P. Roig Girbés, lawyer, calle Monforte 1, 46010 Valencia, Spain,

further parties to the proceedings:

SARL Nador Cott Protection, 51 rue Jules Barbier, 83700 Saint-Raphaël, France, represented by Ms N. R. Wallis, lawyer, Withers & Rogers LLP, Goldings House, 2 Hays Lane, London SE1 2HW, United Kingdom,

and

COMMUNITY PLANT VARIETY OFFICE (CPVO), Angers, France, represented by its President, Mr. B. Kiewiet,

Relating to Community plant variety right EU 14111

(CPVO file number 1995/0726)

Variety denomination:

Nadorcott

Species: *Citrus L.*

On 8 November 2005, the Board of Appeal of the Community Plant Variety Office, composed of Gabriele Winkler (Chairman), Timothy Millett and Stefano Borrini (Members), gave the following decision:

1. The appeal is rejected as inadmissible.
2. The appellant shall bear the costs according to Article 85 of Council Regulation (EC) No 2100/94 of 27 July 1994.

FACTS

1. The breeder is Mr El Bachir Nadori, a Moroccan national who also acquired French nationality in 1997.

In 1982 in Morocco Mr Nadori observed a variety of mandarine growing among “Murcott” mandarine trees planted in 1964. That variety, code-named “Inra W” is believed to be the result of a chance cross-pollination between the “Murcott” mandarine and an unknown parent. From 1983 to 1985, further experiments were carried out to test the fruit of “Inra W”, but, due to the high amount of seeds, the fruit did not seem commercially interesting and the project was abandoned.

By a letter of 5 October 1982, Professor W. P. Bitters of the University of California, Riverside, asked Mr Nadori for material from the variety in question for the research station at Riverside. In answer to that request, Mr Nadori supplied the University of California with bud wood from the variety in 1985.

In 1988 Mr Nadori observed, on five-year old trees of “Inra W” that had been planted under the name “Murcott Sasma”, that the fruits could be grown without seeds if the trees were isolated so that cross pollination could not occur. Those trees were re-named “Afourer”. That name comes from the town of Afourer in Morocco, where the variety was developed. In 1989, Mr Nadori confirmed the result by artificially isolating trees. In 1990 to 1991, Mr Nadori planted more experimental plants in a different region of Morocco to confirm the possibility of producing seedless fruits. This experiment proved successful. Two other experimental plantations were carried out in 1991 and 1992. The variety was renamed “Nadorcott”. The name Nadorcott is

composed in part from the name of the parent plant (Murcott) and in part from the name of the breeder (Nadori).

SARL Nador Cott Protection affirms that the first sale of the contested variety took place in France in 1994. This sale concerned fruit grown in the fields planted in 1990 to 1991 in Morocco. The fruit left Morocco on 22 January 1994 and was sent to France. (A statement made on an internet webpage by the Norwegian company B. M. Larsen to the effect that the Afourer variety “was launched on the market in 1983” was subsequently withdrawn by that company as being incorrect.)

On 22 August 1995, Mr Nadori assigned the Nadorcott variety to Mr Jean de Maistre.

On the same day as the assignment of the variety from Mr Nadori to Mr Jean de Maistre, 22 August 1995, Mr de Maistre filed an application for the grant of a Community plant variety right (CPVR) citing Mr de Maistre as applicant and Mr Nadori as breeder.

The application was registered by the CPVO under No 1995/0726.

On 26 February 1996 the application was published in the bulletin of the CPVO.

On 21 March 1997, Mr de Maistre assigned the Nadorcott variety to the French company SARL Nador Cott Protection, represented by its managing director, Mr Franc Raynaud.

By a letter of the same date, 21 March 1997, Mr de Maistre informed the CPVO of that assignment.

The Instituto Valenciano de Investigaciones Agrarias (IVIA) in Valencia, Spain, was appointed by the CPVO as the testing station for the technical examination of the variety Nadorcott. Material of the variety was supplied to the testing station in 1997. That material was put in quarantine for two years before tests actually began.

On 28 January 1997, an application was filed for a United States patent on the Nadorcott variety. The United States patent was granted on 7 July 1998. The patent number was “Plant 10,480”. El Bachir Nadori was stated as the inventor and Jean de Maistre as the assignee. The background and reproduction of the new variety are set out in detail in the first part of the United States patent.

On 25 February 1999, the IVIA began testing the variety, after the end of the quarantine period. Interim reports on the tests for 1999, 2000, 2001 and 2002 indicate the good development of the plants, except that they were damaged by a hailstorm in May 2001. Because of the damage from the hailstorm, it was not possible to complete the technical examination until 2004.

On 13 January 2004, SARL Nador Cott Protection gave a power of attorney to the group Gestion de Licencias Vegetales Geslive (hereafter, Geslive) to exercise all its rights in the Nadorcott variety in Portugal. The parties appear to admit that Geslive has similar powers in Spain.

On 11 May 2004, IVIA established a positive report for the Nadorcott variety.

By a letter of 8 June 2004, the CPVO pointed out a number of defects in that report. Consequently, the IVIA produced a revised version of its report on 21 June 2004, which is the definitive version.

On 4 October 2004, the CPVO granted a CPVR for the Nadorcott variety to SARL Nador Cott Protection (decision No 14111).

On 15 December 2004, that decision was published in the bulletin of the CPVO.

2. By a notice of appeal dated 11 February 2005, and received by the CPVO on the same date, 11 February 2005, the Federación de Cooperativas Agrarias de la Comunidad Valenciana (FECOAV) appealed against decision No 14111 of 4 October 2004 (hereafter the “contested decision”). By document dated 14 April 2005 and received on the same date, FECOAV lodged the statement of grounds for its appeal. FECOAV duly paid the appeal fees.

FECOAV put forward two grounds in support of its appeal, and each of these grounds has two branches. The first ground is that the CPVR granted for the Nadorcott variety is invalid (1) for lack of distinctive character and (2) for lack of novelty. By its second ground, FECOAV alleges (1) that the assignments of Mr Nadori's rights in the Nadorcott variety to Mr de Maistre and then by Mr de Maistre to SARL Nador Cott Protection are void, and (2) that even if those assignments were valid, they would constitute an abuse of rights and would therefore be contrary to Community law.

Nador Cott Protection and the CPVO contest all of those grounds and argue that the appeal is unfounded. As a prior point, however, both of them submit that the appeal by FECOAV is inadmissible.

FECOAV states that it is a federation of unions of cooperatives in the Spanish provinces of Alicante, Castellón and Valencia, which in turn comprise local farming cooperatives in those three provinces. FECOAV states that it was founded on 21 February 1986 and is registed in the register of cooperatives of the Directorate General of Labour in the Ministry of Finance, Economy and Employment of the Autonomous Government of Valencia.

FECOAV argues that its appeal is admissible because the contested decision is of direct and individual concern to FECOAV within the meaning of Article 68 of Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (hereafter, the Basic Regulation, or B.R.) in two respects. Firstly, because the grant of the CPVR in question would hamper FECOAV if it were to seek to supply material of the Nadorcott variety to its members for exploitation by them. Secondly, because FECOAV represents the interests of Spanish growers. FECOAV asserts that its cooperative members who sell products whose price is affected by having to pay royalties to the holder of the CPVR or who may even be prevented by him from growing the protected variety, are directly and individually concerned by the contested decision.

At the hearing on 8 November 2005, FECOAV also argued that under Article 49 of Commission Regulation (EC) No 1239/95 of 31 May 1995 establishing implementing rules for the application of Council Regulation (EC) No 2100/94 as regards proceedings before the CPVO (hereafter the Proceedings Regulation, or P.R.), the Board of Appeal should have invited FECOAV before the hearing to lodge documents establishing that FECOAV's members were directly and individually concerned by the contested decision. At the hearing on 8 November 2005, the representative of FECOAV asked to be allowed time to return to Spain to assemble and produce complete documentation to that effect, or at least to be allowed to produce at the hearing the incomplete documentation to that effect which its representatives had with them at the hearing. Such documentation was stated to include contracts between Geslive and at least one co-operative affiliated to FECOAV agreeing to make royalty payments for cultivating the Nadorcott variety, and documents by growers empowering FECOAV to bring an appeal on their behalf.

FECOAV claims that

1. the contested decision should be annulled,
2. that FECOAV should be allowed to produce documents to show that it is directly and individually concerned by that decision.

By a letter dated 24 February 2005 and received on 4 March 2005, SARL Nador Cott Protection responded to FECOAV's appeal, contending that it was both inadmissible and unfounded. After an extension of time granted at its request, SARL Nador Cott Protection deposited its grounds of response by a document dated 29 July 2005, and received on the same date.

As to admissibility, SARL Nador Cott Protection argues that under the terms of Article 68 B.R. the appeal is inadmissible because it is not of direct and individual concern to FECOAV, which is a federation of unions of cooperatives, but is not itself a cooperative. The contested decision does not directly affect the legal situation of FECOAV. The effect of the contested decision on farmers who are members of a union of cooperatives which is a member of FECOAV is no different from the effect of that decision on any other farmer in Valencia, in Spain or elsewhere in the

Community. Accordingly, such farmers are not individually concerned by that decision and so FECOAV is not individually concerned. FECOAV is neither individually nor directly concerned by the CPVO's decision and, therefore, its appeal is inadmissible. Further, Nador Cott Protection opposes FECOAV's request to produce documents.

SARL Nador Cott Protection claims

1. that the appeal should be dismissed and
2. that FECOAV's request to produce documents should be rejected.

After an extension of time granted at its request, the CPVO lodged its observations on 15 September 2005, arguing that the appeal is both inadmissible and unfounded.

As to admissibility, the CPVO argues that FECOAV is not directly and individually concerned by the contested decision, as it only represents cooperatives of farmers. FECOAV cannot be regarded as the legal representative of a specific farmer since it is appealing itself and since it has no power of attorney to represent an individual farmer or farmers. The CPVO considers that it would be unsatisfactory to extend the right of appeal under Article 68 of the Basic Regulation to representative organisations of farmers.

The CPVO claims

1. that the appeal should be dismissed
2. that FECOAV's request to produce documents should be rejected.

GROUNDS

1. Under Article 71(1) B.R. the Board of Appeal must decide whether the appeal is admissible before considering whether it is well-founded. The admissibility of this appeal having been put in issue, the Board of Appeal must examine the questions

relating to admissibility, first the request of FECOAV to produce more documents, secondly the admissibility of the appeal itself.

2. Article 49(1) P.R. provides: “If the appeal does not comply with the provisions of the Basic Regulation and in particular Articles 67, 68 and 69 thereof or those of this Regulation and in particular Article 45 thereof, the Board of Appeal shall so inform the appellant and shall require him to remedy the deficiencies found, if possible, within such period as it may specify. If the appeal is not rectified in good time, the Board of Appeal shall reject it as inadmissible”.

The words “If the appeal does not comply with the provisions” and “the deficiencies found” indicate that this provision relates to defects in an appeal which are obvious.

The words “if possible”, in the phrase “the Board of Appeal shall so inform the appellant and shall require him to remedy the deficiencies found, if possible”, indicate that Article 49(1) P.R. requires the Board of Appeal to intervene only when the defect can be readily repaired by a simple, non-contentious step.

Article 49 P.R. does not, on the other hand, require or allow the Board of Appeal to pre-judge issues that are contested between the parties. This flows both from the principles of the administration of justice, in particular the rule “audi alteram partem”, and from the system of the appeals procedure laid down in particular by Articles 71 and 72 B.R. and 48 and 50 to 52 P.R.

The admissibility of the present appeal is a complex issue, vigorously contested between the parties. Such a matter cannot be dealt with by the Board of Appeal under Article 49 P.R. but requires the Board to hear all parties fully. Thus Article 49 P.R. did not require the Board of Appeal to invite FECOAV to submit documents establishing the admissibility of its appeal.

FECOAV, duly served with the observations of SARL Nador Cott Protection and the CPVO, was informed of their objections to the admissibility of its appeal. FECOAV had every opportunity to respond to those objections in writing before the hearing, and to submit documents in support of its position. In its written statement of grounds

of appeal of 14 April 2005, FECOAV argued the issue of admissibility and annexed such documents as it saw fit.

At the hearing on 8 November 2005 FECOAV asked for leave to produce the following documents: (1) a number of forms signed by growers and empowering FECOAV to appeal against the contested decision on their behalf and (2) a contract between a cooperative on behalf of individual growers and Geslive accepting payment of royalties for cultivation of the Nadorcott variety.

Such documents, if admitted, would have to be translated for the benefit of the other parties. That would necessarily imply a further hearing, which tends to run counter to the rule of a single hearing laid down in Article 50 P.R.. Article 50(3) P.R. provides that requests for further hearings shall be inadmissible except for requests based on circumstances which have undergone change during or after the hearing. As indicated above, FECOAV had been fully informed of the other parties' objections to the admissibility of its appeal, and no change in circumstances arose at the hearing such as to justify a further hearing.

In addition, any documents submitted at or after the hearing would have to stay within the scope of the arguments already in the parties' written observations. FECOAV brought the present appeal in its own name alone and, as it stated at the hearing, chose not to use the powers of attorney allegedly granted to it by growers. FECOAV cannot subsequently submit such documents in order to bring the appeal in their names, as that would fundamentally change the nature of the action, by substituting different appellants. The alleged powers of attorney are not relevant to the appeal as brought before the Board of Appeal, and their production must therefore be refused.

As regards the alleged contract between a cooperative and Geslive regarding royalties for the exploitation of the Nadorcott variety, the Board of Appeal accepts that, if they grow the Nadorcott variety, farmers affiliated to a cooperative may be affected by the grant of the CPVR for that variety, in that the grant of the CPVR may result in an obligation to pay royalties and possibly in restrictions on their ability to exploit that variety. Since the Board accepts that allegation without further proof, no

useful purpose would be served by producing the alleged contract between a cooperative and Geslive.

For the foregoing reasons, the Board of Appeal rejects FECOAV's request to produce documents, either at the hearing of 8 November 2005 or afterwards.

3. Under Article 68 B.R. a person may appeal against a decision addressed to another person only if the decision is "of direct and individual concern to the former". As the person relying on this provision, the appellant bears the burden of proving that he is directly and individually concerned within the meaning of this provision.

The wording of Article 68 B.R. in this respect is identical to that of Article 230, fourth paragraph, of the EC Treaty. It should therefore be construed in the same way as Article 230, fourth paragraph, of the EC Treaty, as interpreted in the case-law.

FECOAV claims to be directly and individually concerned by the contested decision firstly because that decision would hamper FECOAV if it were to seek to supply reproductive material of the Nadorcott variety to its members.

That situation seems hypothetical. As it emerges from its Statutes, FECOAV is made up of provincial unions of cooperatives. The cooperatives which group together farmers who grow fruit do not belong to FECOAV directly but only via those provincial unions of cooperatives. According to FECOAV's statements at the hearing, FECOAV is also made up of "second-level cooperatives", which carry out a variety of services for farming cooperatives but do not themselves grow fruit. Supply of reproductive material appears to be carried out by such "second level" co-operatives, in particular ANECOOP. There is no evidence that FECOAV actually supplies reproductive material of the variety Nadorcott to growers.

However, even supposing that it did, FECOAV would have to show that, by virtue of that activity, the contested decision was of direct and individual concern to it. According to the case-law, that decision would be of individual concern to FECOAV only if it affected FECOAV by reason of certain attributes which are peculiar to FECOAV, or by reason of circumstances in which FECOAV is differentiated from all

other persons, and by virtue of these factors distinguishes FECOAV individually in the same way as the addressee of the decision (see Case 25/62 Plaumann v Commission [1963] ECR 95, 107 and Case C-50/00 P Unión de Pequeños Agricultores v Council, 25 July 2002, para 36). This is plainly not the case of the situation invoked by FECOAV: the situation of a dealer in reproductive material of the protected variety could be held by many people and does not differentiate FECOAV from any other operator in the sector concerned.

Thus, FECOAV by itself as a dealer is not directly and individually concerned by the contested decision within the meaning of Article 68 B.R.

Secondly, FECOAV claims to be directly and individually concerned by the contested decision in as much as it represents the interests of growers.

The members of FECOAV are not individual growers but unions of cooperatives, which in their turn comprise local farming co-operatives. Some farmers, indirectly affiliated to FECOAV through such co-operatives, may be concerned by the contested decision in as much as they may have to pay royalties as a result of the grant of the CPVR in question. Other farmers, indirectly affiliated to FECOAV through co-operatives, may not be concerned at all since they do not grow the variety Nadorcott. Even among those growing the Nadorcott variety, it is possible that not all are inclined to contest the CPVR in question, and may be content to accept its effects. It also appears from the file and from statements at the hearing that FECOAV is far from including all citrus fruit growers of the Valencia region, and may in fact only cover a minority of them. In these circumstances there is some doubt as to whether FECOAV actually represents the general interests of growers as a category.

Furthermore, it is settled case-law that an association representing a category of persons cannot be considered to be individually concerned by a measure affecting the general interests of that category (see in particular Joined Cases 16/62 and 17/62 Confédération nationale des producteurs de fruits et légumes v Council [1962] ECR 471, 479-480; Joined Cases 19/62 to 22/62 Fédération nationale de la boucherie en gros et du commerce en gros des viandes v Council [1962]

ECR 491, 499; and Case 117/86 UFADE v Council and Commission [1986] ECR 3255, para 12).

In principle that case-law covers the present case, with the effect that FECOAV, as representing growers' interests, cannot be considered to be individually concerned by the contested decision.

Certain judgments recognise exceptions from that general rule in the context of decisions relating to competition, State aids and public tender procedures (see, for example, respectively Case 75/84 Metro SB-Grossmärkte v Commission [1986] ECR 3021, paras 21-23; Case C-313/90 Comité international de la rayonne et des fibres synthétiques v Commission [1993] ECR I-1125, paras 29 30; Case C 496/99 P Commission v Succhi di Frutta SpA [2004] ECR I 3801, paras 57 and 58). However, the present case does not come within such exceptions, as it concerns different circumstances. The parties in those exceptional cases had taken part in the procedure leading up to the adoption of the competition or State aid decision or had been party to the tendering process in question. Here, FECOAV did not take part in the procedure leading up to the grant of the contested CPVR or lodge an objection to the grant of that CPVR under Article 59 B.R..

Thus FECOAV, as an association representing the interests of growers, is not directly and individually concerned by the contested decision within the meaning of Article 68 B.R.

Accordingly the present appeal must be considered inadmissible.

Gabriele Winkler Timothy Millett