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**D E C I S I O N**  
**of 25 February 2002**

**Case Number:** T 0323/00 - 3.3.1

**Application Number:** 94900633.2

**Publication Number:** 0670871

**IPC:** C09K 15/04

**Language of the proceedings:** EN

**Title of invention:**

Oxygen scavengers independent of transition metal catalysts

**Applicant:**

COMMONWEALTH SCIENTIFIC AND INDUSTRIAL RESEARCH ORGANISATION

**Opponent:**

-

**Headword:**

Scavengers/CSIRO

**Relevant legal provisions:**

EPC Art. 84, 109(1), 123(2)

**Keyword:**

"Main request: support in the application as filed (yes) -  
clarity (yes) - conciseness (yes)"

"Requirement for interlocutory revision fulfilled (yes)"

**Decisions cited:**

T 0139/87, T 0047/90

**Catchword:**

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Boards of Appeal

Chambres de recours

**Case Number:** T 0323/00 - 3.3.1

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.1**  
**of 25 February 2002**

**Appellant:**

COMMONWEALTH SCIENTIFIC AND INDUSTRIAL  
RESEARCH ORGANISATION  
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**Representative:**

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**Decision under appeal:**

**Decision of the Examining Division of the  
European Patent Office posted 22 October 1999  
refusing European patent application  
No. 94 900 633.2 pursuant to Article 97(1) EPC.**

**Composition of the Board:**

**Chairman:** A. J. Nuss  
**Members:** P. P. Bracke  
R. T. Menapace

## Summary of Facts and Submissions

- I. The appeal lies from the Examining Division's decision, dispatched on 22 October 1999, refusing European patent application No. 94 900 633.2, published as WO-A-94/12590, because the then pending set of 109 claims contravened the requirement of Article 123(2) EPC and did not meet the requirements of clarity and conciseness according to Article 84 EPC.

Claim 1 underlying the contested decision read:

"1. A method of reducing the concentration of **ground state** molecular oxygen present in an atmosphere or liquid, said method comprising the steps of:

(i) treating a **solid phase composition** comprising a source of labile hydrogen or electrons and at least one reducible organic compound, with **predetermined conditions** so as to reduce the **reducible organic compound** to a reduced form oxidizable by **ground state** molecular oxygen; and

(ii) exposing the atmosphere or liquid to said treated solid phase composition such that at least a portion of the **ground state** molecular oxygen present in the atmosphere or liquid is removed through oxidation of the reduced form of the organic compound;

wherein the said method is characterised in that the oxidation of the reduced form of the organic compound occurs **independently of** each of **constant illumination with visible light** and the presence of a transition metal catalyst." (emphasis added)

II. In particular, the Examining Division was of the opinion that there was no support in the application as filed for the features "ground state", "solid phase composition" and "independently of ... constant illumination with visible light" in Claim 1 and that the features "predetermined conditions" and "reducible organic compound" as such and in combination rendered Claim 1 unclear. Moreover, the Examining Division found that the presence of two groups of claims directed to the same subject matter contravened the requirement of Article 84 that the claims be concise.

III. With the statement setting out the grounds of appeal dated 22 February 2000, the Appellant filed a set of 20 claims, of which the independent claims read:

"1. A composition for reducing the concentration of molecular oxygen present in an atmosphere or liquid, said composition comprising at least one reducible organic compound which is reduced by irradiation with light of a certain intensity or wavelength, gamma-irradiation, corona discharge, exposure to an electron beam, or application of heat to a reduced form of the compound which is oxidizable by molecular oxygen, wherein the reducible organic compound is present in a polymerised or oligomerised form, and the reduction and/or subsequent oxidation of the reducible organic compound occurs independent of the presence of a transition metal catalyst."

"18. A polymeric film comprising at least one layer comprising a composition according to any one of the preceding claims."

"19. A multilayer polymeric film comprising at least one layer comprising a composition according to any one of Claims 1 to 8, and at least one other layer comprising a scavenging component reactive towards an activated oxygen species."

"20. A packaging material comprising a composition according to any one of Claims 1 to 17 or a film according to Claim 18 or 19."

IV. The Appellant, with express reference to decisions T 139/87 (OJ EPO 1990,68) and T 47/90 (OJ EPO 1991, 486), requested interlocutory revision on the basis of the fresh claims mentioned under point III above and asked that the application be remitted to the Examining Divisions, so that accelerated examination could be resumed immediately. Only in the alternative he requested that the Appeal Board sets aside the decision under appeal.

As a first and second auxiliary request the Appellant proposed some amendments to Claim 1.

## **Reasons for the Decision**

1. The appeal is admissible.
2. *Main request*
  - 2.1 Article 123(2) EPC

As neither the feature "ground state" nor the features "solid phase composition" and "independently of ... constant illumination with visible light" are present

in any of the claims, the reason for refusing the application because the requirement of Article 123(2) EPC is not fulfilled no longer exists.

Moreover, the Board is satisfied that the claims are not amended in that way that they contain subject matter extending beyond the content of the application as filed, namely:

- present Claim 1 is a combination of the features described in Claims 1, 3 and 11 as filed;
- present Claim 2 is identical with the wording of Claim 2 as filed;
- present Claims 3 to 5 correspond to Claims 4 to 6 as filed respectively;
- present Claim 6 is a combination of the features described in Claims 11, 12 and 13 as filed;
- present Claims 7 and 8 correspond to Claims 14 and 15 as filed;
- present Claims 9 to 17 correspond to Claims 18 to 26 as filed respectively; and
- present Claims 18 to 20 correspond to Claims 30 to 32 respectively.

## 2.2. Clarity

As it is specified in present Claim 1 that the reducible organic compound is reduced by irradiation with light of a certain intensity or wavelength, gamma-

irradiation, corona discharge, exposure to an electron beam, or application of heat and as the term "predetermined conditions" has been deleted from the wording of Claim 1, the reason for refusing the application because the requirement of clarity according to Article 84 EPC is not fulfilled, no longer exists.

Furthermore, since the set of claims does not contain two groups of claims directed to the same subject-matter also the reason for refusing the application because the requirement of conciseness according to Article 84 EPC is not fulfilled, no longer exists.

- 2.3. The Examining Division's reasons for refusing the application have thus been removed already by the main request made with the statement of the grounds for the appeal and, therefore, the Appellant's request that the decision under appeal be set aside is to be allowed.

3. *Auxiliary requests*

In the light of the above findings, there is no need to consider the auxiliary requests.

4. *Request for interlocutory revision*

The Board observes that in the present case, where the Appellant had made clear his endeavour to amend the claims so that (accelerated) examination could be resumed immediately after interlocutory revision of the decision under appeal, and were all objections on which the refusal of the application had been based were actually removed by the amendments according to the main request, rectification of the contested decision

under Article 108 EPC would have been both possible and appropriate (see the Case Law of the Boards of Appeal of the EPO, third edition 1998, item VII.D.12, specifically mentioning decisions T 139/87 and T 47/90 cited by the Appellant). It is pointed out, that rectification under Article 108(1) EPC is mandatory ("it shall rectify") and therefore implies the duty of the responsible department to objectively and diligently examine whether or not the appeal is admissible and well founded.

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The matter is remitted to the first instance for further prosecution on the basis of Claims 1 to 20 according to the main request, filed with the statement setting out the grounds of appeal dated 22 February 2000.

The Registrar:

The Chairman:

N. Maslin

A. Nuss