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Bezeichnung der Erfindung: Aluminium alloy support for lithographic
Title of invention: printing plate
Titre de l'invention :

Klassifikation / Classification / Classement : B41N 1/08, C22C 21/00, B32B 15/01

ENTSCHEIDUNG / DECISION

vom / of / du 4 December 1990

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Fuji Photo Film Co.
Sumitomo Light Metal Industries Limited
I Alusuisse-Lonza Holding AG
II VAW Vereinigte Aluminium-Werke AG
III Hoechst AG

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPO / EPC / CBE Article 56

Schlagwort / Keyword / Mot clé : "Inventive step (main request: denied; first
auxiliary request: affirmed)"

Leitsatz / Headnote / Sommaire



Case Number : T 539/88 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 4 December 1990

Appellant I : Alusuisse-Lonza Holding AG
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Decision under appeal : Interlocutory Decision of the Opposition Division of
the European Patent Office dated 10 October 1988
concerning maintenance of European patent
No. 0 067 056 in amended form.

Composition of the Board :

Chairman : C.T. Wilson
Members : F. Brösamle
F. Benussi

Summary of Facts and Submissions

- I. European patent No. 0 067 056 was granted on 16 January 1985 with six claims in response to European patent application No. 82 302 901.2, filed on 4 June 1982.
- II. Notices of opposition to this patent were filed on 9 October 1985 by

I Alusuisse - Lonza Holding AG and
II VAW Vereinigte Aluminium-Werke AG

and on 11 October 1985 by

III Hoechst AG ;
(Appellants I, II and III in the following),

requesting that the patent be revoked in its entirety on the grounds of Article 100 EPC, in particular on grounds of lack of inventive step in the light of the state of the art according to the following documents:

- D1: DE-A-1 929 146
D2: DE-B-2 255 309
D3: FR-A-1 438 096
D4: Derwent Patent Abstract 78-20454 A/11
D5: Derwent Patent Abstract 77-26312 Y/15
D6: Aluminium-Taschenbuch, 13. Auflage 1974, pages 222 and 936
D7: Solidification Technology in foundry and cast house, by E. Lossack, pages 484-489
D8: "Metall", reprint from Volume 29, No. 3 and 4 (1975), pages 309-312 and 394-396
D9: US-A-3 397 044
D10: Journal of the Institute of Metals, Vol. 100, 1972, pages 301-308.

The Patentee (Respondent in the following) himself filed the following evidence:

D11A: "Registration Record of International Alloy Designations and Chemical Composition Limits for Wrought Aluminium and Wrought Aluminium Alloys, published by the Aluminium Association (June 1, 1985)", and

D11B: Comparative Experiments.

- III. The Respondent filed amendments to the claims and to the description and the Opposition Division informed the parties in accordance with Rule 58(4) EPC that it intended to maintain the patent on the basis of documents as agreed upon during the oral proceedings held on 25 November 1987; the Appellants, however, disapproved of the text communicated by the Opposition Division, Rule 58(5) EPC.
- IV. By an interlocutory decision within the meaning of Article 106(3) EPC dated 10 October 1988 the Opposition Division maintained the patent in amended form on the basis of the documents specified in the communication according to Rule 58(4) EPC.
- V. Appellants I, II and III lodged appeals against the interlocutory decision of the Opposition Division:

Appellant I: with telecopy of 30 November 1988 confirmed with letter received on 3 December 1988; the appeal fee was paid on 3 December 1988 and the Statement of Grounds of Appeal received on 30 January 1989;

Appellant II: with letter of 24 October 1988, received on 26 October 1988 paying the appeal fee on that date. The Statement of Grounds of Appeal was received on 18 February 1989;

Appellant III: with letter of 8 November 1988 (not 1987 as incorrectly shown on the letter) received on 12 November 1988 paying the appeal fee on that date. The Statement of Grounds of Appeal was received on 19 January 1989.

Appellants I, II and III maintain their requests to revoke the patent essentially for reasons of lack of novelty and inventive step, whereby documents

D12: German Translation of JP-A-29 301 (see D5), and

D13: "Aluminium und Aluminiumlegierungen", Altenpohl, Springer-Verlag, 1965, page 57

were cited, to demonstrate that the term "impurities" in the attacked Claim 1 should be interpreted as in document D13, in which it is set out that impurities in aluminium also comprise those in gas-form (compounds between hydrogen and metal). It is moreover indicated that the location of the intermetallic compounds ("positioned directly under a roughened outer surface of the rolled plate") is not clear and that the amended claims in their version pursuant to the Communication according to Rule 58(4) EPC are not supported by the original disclosure, since the lower limit for Fe (0,33%) respectively the remainder Al (99,54% or 99,49%, see example "L" in Table 5 of the attacked patent) is arbitrarily introduced to the claims respectively modified in the cited table of the attacked patent. It is the opinion of Appellant III that Rule 88 EPC cannot be applied in this context.

- VI. The Respondent maintained that the available prior art would not deprive the claimed subject-matter of novelty or render the subject-matter of Claims 1 and 3 obvious.
- VII. With a communication of 29 August 1990 the Board gave its provisional opinion about formal issues, see particularly 3.1 to 3.3 as well as 6.2 and 6.3.

The Respondent thereupon defended the patent according to the main request on the basis of the documents according to the Communication pursuant to Rule 58(4) EPC and according to the auxiliary request on the basis of the documents filed with letter of 24 October 1990, received on 25 October 1990.

- VIII. In the oral proceedings held on 4 December 1990 the parties defended their cases essentially on the basis of their arguments put forward in written form, whereby the documents D5/D12, D7, D8 and D10 were dealt with in detail.

The Appellants contended that the Al alloy of both Claims 1 according to the main and auxiliary requests would be known from D5/D12 and that the claimed grain size defined in these independent claims would be automatically obtained, if one casts, quenches and rolls this known Al alloy following the known processing steps, see D10 for instance. Documents D5/D12 and D10 would, in the Appellant's opinion, be combined by a skilled person, since in all these documents Al alloys are cast, quenched and rolled to form intermetallic compounds of small grain size in order to thereby increase mechanical strength of the Al plate.

The Respondent rejected this approach of the Appellants and argued the existence of novelty and of an inventive

step concerning the subject-matter of Claims 1 and 3 according to the main and auxiliary requests.

Claims 1 and 3 according to the main request read as follows:

"1. An aluminium alloy support for a lithographic printing plate, comprising:

a rolled plate of aluminium alloy consisting of:

98% or more Al;

Fe in an amount of from 0.33 to 1.2%;

impurities each present in an amount of 0.15% or less;

wherein the rolled plate has a distribution of intermetallic compounds, the compounds having grain sizes of 3 microns or less, which are positioned directly under a roughened outer surface of the rolled plate."

and

"3. A composite aluminium alloy support for a lithographic printing plate, comprising:

a plate consisting of 98.0% or more Al, Fe in an amount of from 0.33 to 1.2%, and impurities each of which are present in an amount of 0.15% or less, the plate having a thickness of 10 microns or more;

and

a core material having a surface united with a surface of the plate, the core material being composed of aluminium alloy having a yield strength of 15 kg/mm² or more, wherein the outer surface of the plate is roughened and includes a distribution of intermetallic compounds

directly under the outer surface, the compounds having grain sizes of 3 microns or less."

Claims 1 and 3 according to the auxiliary request differ from those of the main request in that they are clearly restricted to "a lithographic printing plate having an aluminium alloy support respectively having a composite aluminium alloy support" rather than to an aluminium alloy support respectively a composite aluminium alloy support "for a lithographic printing plate".

Reasons for the Decision

1. The appeals comply with Articles 106 to 108 and Rule 64 EPC and are admissible.
2. Concerning formal aspects of the claims the following is observed, whereby the claims of the main and of the auxiliary request are simultaneously dealt with, since the respective issues are identical in both claim versions.
 - 2.1 According to Claims 1 and 3 the amount of Fe should be from 0.33 to 1.2%.
 - 2.1.1 While the upper limit of that range can be seen from the original Claim 1 (1.2% or less Fe), the lower limit of the claimed range is derived from original page 34, Table 5, example "L", since this Fe content is the lowest of all examples "L, M, N" embodying the invention.

Since in the example "L" the total of all constituents of the alloy is not 100%, it is obvious that one or more of its constituents is/are wrong. "

- 2.1.2 For the Respondent it is clear that the content of Al is simply the "remainder", see letter of 25 March 1988, and that it can immediately be seen that the value "99, 54" should read "99, 49".

For Appellant III, see letter of 17 January 1989, it is, however, not so clear that in Table 5, example "L", the content of Al is wrong and that the other constituents of the alloy are correctly cited. Reference is made in this respect to the decision T 2/80, OJ EPO, 1981, 431.

- 2.1.3 It is true that in an alloy the total should be 100%.

From the way in which the constituents and the "remainder" Al are presented in Table 5, it appears justified to follow the argument of the Respondent that the Al content is generally determined by first calculating the total percentage content of the other constituents and then subtracting this value from 100% to give the percentage of Al, since the Al content is indicated in the last column of Table 5 of the attacked patent, which column normally is read latest by any reader. In the Board's opinion Rule 88 EPC has to be applied, since the requested correction is "obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as the correction", so that the lower limit for Fe as being 0.33% and the related correction in Table 5 into an Al content of 99,49% has to be accepted.

As a result Claims 1 and 3 are therefore not open to an objection under Article 123(2) EPC, since the remaining features can be derived from the originally filed Claims 1, 2 (roughened surface) and 3 (content of Al is 98% or more).

2.1.4 Claim 2 corresponds to the remaining single feature of original Claim 2 and the considerations in connection with Claim 1 are also applicable to Claim 3, which is based on all features of Claim 1, plus a core material as defined in original Claims 3 and partly 4.

In agreement with the impugned decision, see paragraph bridging pages 4 and 5, "stress resistance" can be altered into "yield strength", see Claims 3 and description.

2.1.5 Claims 4 to 6 (main request) correspond to originally filed Claims 4 (partly), 5 and 6 so that they also comply with the requirements of Article 123(2) EPC, see also Claims 4 and 5 of the auxiliary request.

2.1.6 While the originally filed Claims 1 and 3 cover a range of "0 to 1.2% Fe" this range is narrowed from "0.33 to 1.2% Fe". The feature "surface roughening" from originally filed Claim 2 now forms part of Claims 1 and 3 and also narrows the extent of protection, Article 123(3) EPC.

2.1.7 Both claim versions are as a result of the foregoing not open to objections under Article 123 EPC.

2.2 In metallurgy impurities in gas-form normally are not considered as constituents in tables or formulae, though such impurities are existent, see D13. Since it is absolutely clear in this context, see D8, page 8 left column, paragraph beginning "Bei der Herstellung ...", that the casting process is carried out under conditions in which no contamination of the Al alloy is possible, the existence of significant impurities in gas-form over all is doubtful.

2.3 Appellant III brought forward an objection under Article 82 EPC (lacking unity of invention).

The discussion of "unity of invention" appears, however, to be superfluous for the following reason:

It is true that Claims 3 (main and auxiliary request) are independent claims. The subject-matter of both Claims 3 contains, however, all the features of their respective Claim 1 (main and auxiliary requests); they contain in addition features which define a composite printing plate. Claims 1 and 3 according to both requests are based on the same single inventive concept so that the Board cannot see a contravention against the requirements of Article 82 EPC.

2.4 Appellant III inter alia has brought forward an objection under Article 84 EPC, concerning the feature of the independent Claims 1 and 3 "positioned directly under a roughened outer surface of the rolled plate". If the thickness of the outer surface of the rolled plate is considered, see for example Claim 5 (main and auxiliary requests) being in the range of 10 to 100 microns, reference has to be made to remark 12. of the Respondent in his letter of 31 August 1989 i.e. intermetallic compounds are distributed over the whole thickness of a plate and therefore also directly under an outer surface of it.

2.5 Summarising, the claims according to the main and auxiliary request are not open to formal objections.

3. Main request

3.1 Appellants I and II with their letters of 27 January 1989 and 20 January 1989 raised an objection under Article 54 EPC (lacking novelty) in view of D5/D12.

- 3.2 D5 has to be seen in the light of D12, which is a complete translation of JP-A-52-29 301, see also decision T 77/87, OJ EPO 1990, 280, in particular remarks 4.1.1 to 4.1.6.

From D12, see Claims 1 and 2, a printing plate is known with 0.6 to 2% Fe, Si below 0.15% and Mg lower than 0.5%.

As far as the Fe content is concerned, the teachings of D12 and of Claim 1 and Claim 3 are overlapping in the range of 0.6 to 1.2% Fe; the Mg content according to D12 is, however, by far too high.

Intermetallic compounds in the form of Al_3Fe and Al_6Fe are mentioned in D12. However, their grain size is not discussed, so that at least this feature makes the subject-matter of Claims 1 and 3 novel. Claim 3 is, moreover, based on a composite aluminium alloy support; this feature cannot, however, be seen from D12, so that the subject-matter of Claim 3 is distinguished by a further feature from D12.

From the sentence "Therefore, the mass is scraped away till the layer mainly contg. Al_6Fe mols. appears." from D5, Appellant II derives that the intermetallic particles have a size below 3 microns. If D5 is, however, seen in the light of D12, no such allegation is justified.

- 3.3 Summarising, the subject-matter of Claims 1 and 3 is novel within the meaning of Article 54 EPC.
- 3.4 The validity of the claims on file depends, therefore, on the question whether or not the claimed subject-matter is based on an inventive step in the meaning of Article 56 EPC.

The term of Claims 1 and 3 "for a lithographic printing plate" does not limit the claims to such plates, since this "for" has to be seen in the sense of "suitable for", so that the document D3, though relating to foils for packaging purposes or to cans is to be considered, see particularly its page 2, left column, lines 6 to 3 from bottom or page 3, left column, penultimate paragraph and Claims 1, 2 and 7. D3 discloses an overlapping Fe content in the range of 0.6 to 1.2% and impurities each present in an amount of 0.15% or less. Since Fe and Al are present in the known alloy it is obvious that intermetallic compounds for instance of the type Al_xFe_y are present in the foil, which has a thickness according to Claim 7 of D3 of below 76 microns. It can therefore be assumed that the intermetallic compounds are existent over the whole thickness of the foil and also directly under its outer surface.

- 3.5 What is not literally known from D3 is the "roughened" outer surface of the rolled plate and the grain size of 3 microns or less of the existing intermetallic compounds.

It is quite obvious that "surface roughening" is specific for a printing plate, see for instance D5, last paragraph "The surface...can be roughened...", so that this feature is of a trivial nature when using the rolled Al plate as a lithographic printing plate.

- 3.6 As far as the grain sizes of the intermetallic compounds are concerned (3 microns or less) it can be seen from D3 that cast material is hot and cold rolled, see page 2, right column, paragraphs 1 and 3 as well as Claim 5. Large grains are thereby crushed and transformed into smaller grains. That this treatment by rolling can lead to grain sizes in the range of 3 microns can be seen per se from D7, see page 487, right column, first paragraph and Figure 7. Since D7 deals with casting/quenching and

rolling of Al alloys, see Figure 5, it is likely that the skilled person would apply that technology to an Al alloy known from D3 to obtain a support suitable for a lithographic printing plate, without the exercise of an inventive step within the meaning of Article 56 EPC. Claim 1 of the main request has therefore to be rejected.

- 3.7 The main request cannot, therefore, form a basis for the maintenance of the patent in amended form. For reasons of completeness it should be added that Claim 3 of this request does also not define patentable subject-matter, since composite plates per se are well known, even in the technical field of printing, see D8, page 7, last paragraph ("plattierte Aluminiumlegierung") so that the additional technical feature of Claim 3 over the subject-matter of Claim 1, i.e. the core material, does not add anything inventive to the non-allowable subject-matter of Claim 1, Article 56 EPC.

4. Auxiliary request

- 4.1 Claim 1 is restricted to a lithographic printing plate, see also Claim 3.
- 4.2 Since Claims 1 and 3 of the main request already define novel subject-matter then the restricted subject-matter of Claims 1 and 3 of the auxiliary request necessarily is novel within the meaning of Article 54 EPC.
- 4.3 For assessing the inventive step of the subject-matter of Claims 1 and 3 the expert in printing technology is relevant for the assessment of inventive step.
- 4.4 Document D3 is not relevant for an expert in printing technology, since there and in D9 only foils per se for packaging, for heat exchangers and alloys for cans are

disclosed, but no information is given in combination with a lithographic printing plate. Of little relevance is also document D2 dealing with the production of foils for electrolytic condensers. D13 constitutes only background knowledge, not more. D11A has to be disconsidered, since it is not republished.

- 4.5 Starting point of the invention could be the state of the art as reflected by D5/D12 dealing with offset (lithographic) printing plates.

From D5/D12 an Al alloy for a printing plate is known which in a limited range of the Fe content is identical with that claimed, i.e. 0.6 to 1.2% Fe, and which contains 98% or more Al and impurities each present in an amount of 0.15% or less.

If the mechanical strength of the printing plate has to be increased in D5/D12 then Mg has to be added in amounts up to 0.5% to the Al-Fe alloy. It is clear that the addition of Mg also increases the production costs of the printing plate. No specific attention is given to the influence of the grain size of the printing plate known from D5/D12.

- 4.6 The invention aims at solving the problems of

- (a) high printing speeds with the consequent high stress applied to the printing plate, i.e. the achievement of a printing plate with sufficient mechanical strength,
- (b) good printing quality even in combination with increased printing speeds i.e. the avoidance of surface defects of the printing plate leading to dot-form stain and,
- (c) production of the printing plate at low cost.

Reference is made in this respect to the patent in suit, page 2, lines 34 to 60 in which the drawbacks of known Al alloys and their properties are discussed and in which the "object of the invention" is set out. This object of the invention is based on the "objectively remaining technical problem" to be solved by the invention when starting from D5/D12 to obtain the subject-matter of Claims 1 and 3 and which forms the basis for assessment of inventive step.

4.7 The above-mentioned problem according to Claim 1 is solved by the following features:

- (a) the Fe content is restricted to a range including a lower limit of 0.33% and an upper limit of only 1.2%,
- (b) the impurities are present each in an amount of 0.15% or less and
- (c) the grain sizes of intermetallic compounds are less than 3 microns.

Feature (b) indicates that Mg cannot be present in an amount as known from D5/D12, that is up to 0.5%.

4.8 With this teaching of Claim 1 a printing plate is achieved which clearly solves the three aspects of the object of the invention, namely good printability, sufficient mechanical strength and production at low cost. The aspect of good printability of the claimed printing plate involves the absence of dot-form defects caused by coarse grains of certain intermetallic compounds distributed in the Al alloy plates before these plates receive surface treatments, so that the occurrence of dot-form stain is sharply reduced.

4.9 It has now to be assessed whether the available prior art singly or in combination gives a lead to the subject-matter of Claim 1.

4.9.1 As mentioned before mechanical strength in D5/D12 is achieved by the addition of Mg in a relatively large amount. This teaching is, however, contradictory to that of Claim 1, since in this alloy no Mg in an amount up to 0.5% is contained and since the mechanical strength of the printing plate is achieved by different means such as rapid quenching of the cast plate and subsequent treatment by rolling leading to a relatively fine grain of the intermetallic compounds distributed all over the Al alloy, see page 3, lines 8 to 12 of the attacked patent, namely 3 microns or less.

It is a direct consequence of the above-mentioned small grain sizes of the intermetallic compounds that dot-form defects of the printing plate surface are reduced so that dot-form stain on the printed products consequently is largely excluded.

4.9.2 Documents D5/D12 are completely silent about fine grains of intermetallic compounds and their influence on dot-form stain. What is taught in D5/D12 is that after casting the plates the fine grains at the surfaces (Al_3Fe) are removed to expose the coarse grains of the centre of the cast plate (Al_6Fe). The starting point before rolling is therefore not comparable between D5/D12 and the invention since the latter already starts with fine grains of the intermetallic compounds due to the fact that the cast material is rapidly quenched, see page 3, line 20 of the attacked patent, leading to an interruption in grain

growth, whereas D5/D12 starts the rolling steps with coarse grains (Al_6Fe), which cannot be transformed into grain sizes below 3 microns or less.

- 4.9.3 Summarising, D5/D12 do not lead to the subject-matter of Claim 1 but point in another direction. D4 is very similar to D5/D12 - up to 0.4% Mg and up to 0.2% Si - so that the above considerations in connection with D5/D12 are also valid for D4.
- 4.9.4 D1 is, if at all, only relevant for Claim 3 and its feature "core material" respectively "composite aluminium alloy support" see page 2, last line ("zu plattieren"). The Mg content of preferably 1.5%, the Si content of preferably 0.3% and the Mn content of preferably 1.1% of D1 are, however, by far too high in respect of Claim 1, so that D1 is not particularly relevant.
- 4.9.5 D8 is silent about the specific Al alloy defined in Claim 1. It deals only with the background of printing plate production such as general remarks concerning casting, surface removal and rolling, see page 8, left column ("Bei der Herstellung...") to line 3 of the middle column or see page 7, right column, paragraph 3 where it is set out that plates for printing surfaces inter alia must be of high quality, good surface finish and free of surface defects as well as of a fine grain structure. D8 only reflects technological background and does not deal with the problem of how dot-form stain can be avoided by the choice of a specific Al alloy and its specific treatment resulting in grain sizes of 3 microns or less.
- 4.9.6 D7 and D10 already form part of a technical field apart from printing, since they deal with casting of strips which are subsequently treated by rolling. It can be seen from these documents that by rolling the grain size can

be drastically reduced to very small values, see Figure 8 from D10 (magnification 1000 times) or see D7, page 7 in particular.

In D7, page 487, last paragraph to page 488, line 1 it is, however, also stated that the normal direct cast material "consists of large (bold added) Al_3Fe primary particles...". The invention, however, aims at cast plates with small Al_3Fe grains in that the casting step is carried out with subsequent high quenching rates (50°C/sec). There is thus no unambiguous teaching in D7 which could lead the skilled person directly to the subject-matter of Claim 1. At any rate in D7 there is no disclosure as to the problem how dot-form stain can be avoided. Only by ex post facto analysis of D7 and D10 can it be derived therefrom that the dot-form stain could be excluded by small grains of intermetallic compounds in combination with an Al alloy as defined in Claim 1.

D6 is not more relevant than for example D8, since again only technological background is disclosed there, namely extreme requirements as to the "purity" and "surface smoothness" of lithographic plates. The Al alloys set out in Table 14.2 of D6 all fall outside the scope of the claims, since the impurities are either too high (Si from 0.8 to 0.2%) or the Fe content is too low (for instance from 0.15 to 0.005%).

4.9.7 Document D11B is a summary of comparative tests ("P" representing the invention and "Q, R, S" control samples) in which the superiority of the samples "P" are evident as far as "dot-form stain" is concerned, see Table 5 or see page 8 "Remarks" of D11B.

4.9.8 The Board cannot see any reason for combining documents D1 to D13 since all documents are silent about the problem of

how dot-form stain can be avoided if simultaneously the printing plates are optimised in respect of their mechanical strength and their production cost.

- 4.9.9 Claim 1 of the auxiliary request defines as a result of the foregoing considerations patentable subject-matter in the meaning of Articles 54 and 56 EPC so that this Claim 1 can form the basis for the maintenance of the patent in restricted form.
- 4.9.10 Since Claim 1 is acceptable in the opinion of the Board, it follows that Claim 3 of the auxiliary request which contains the features of Claim 1 plus features defining the core material ("composite support"), is also acceptable, even though a composite plate per se is known in the art, see D1, page 2, last paragraph or see D8, page 7, last paragraph, Article 56 EPC.
5. The arguments brought forward by the Appellants have been dealt with in the above discussion of documents D1 to D13; over all they do not persuade the Board since some documents were interpreted in the Board's opinion with the benefit of hindsight. Hindsight is, however, inadmissible. As far as the main request is concerned, the appeals are, however, successful.
6. As pointed out in the oral proceedings before the Board the main request has to be rejected, the auxiliary request can, however, be allowed so that the patent in suit has to be maintained in amended form on the basis of documents brought forward with the letter of 24 October 1990. The further auxiliary requests of the Respondent therefore do not have to be dealt with.

Order

For these reasons, it is decided that:

1. The impugned decision is set aside.
2. The case is remitted to the first instance with the order to maintain the patent with the text in accordance with the (first) auxiliary request filed on 25 October 1990.

The Registrar:



N. Maslin

The Chairman:



C.T. Wilson

00032

Bv. 21.91

