FOR REFERENCE
DCCJ14835/2000

多層大廈——業主立案法團——法團主席——實在權限——表面權限——管理合約——合約——代理——《建築物管理條例》

原告物業管理公司多次派高級職員出席多層大廈業主立案法團管理委員會會議。管理委員會會議中透露，業主大會授權管理委員會全權處理管理合約「續約」事宜。委員會決定不續約，重新招標及向業主大會「推薦」新管理公司。原告公司參與投標。法團主席以法團信箋及膠印向原告公司發函表示，經管理委員會決定，聘請原告公司接手管理大廈。法團主席並於發信當日以法團主席名義與原告公司簽署書面管理合約。合約所涉金額超過二十萬元。被告法團不承認法團主席所簽署的管理合約。原告公司告以毀約。

判決：（1）根據《建築物管理條例》第 14 條，第 18 條及第 29 條，多層大廈業主立案法團採集團決策制，業主大會為最高決策體，決策可下放至管理委員會。（2）《建築物管理條例》第 14 條，第 18 條，第 29 條，附表 2 及附表 3，管理委員會和個別委員，包括法團主席，並非業主法團的行政人員，不能視作等同有限公司董事。（3）法律政策上亦不宜視個別管理委員或法團主席如同有限公司董事具營運職能。（4）所以，法團主席沒有實在權限，也沒有表面權限締結或簽署對法團有約束力的合約，除非法團主席已獲有效授權。（5）原告公司應該熟悉《建築物管理條例》，必然知悉法團主席是沒有實在權限或表面權限簽約的。（6）無論如何，原告公司的高級職員出席管理委員會的會議，明知管理委員會和法團主席都是無權決定與原告公司締結和簽署管理合約的，原告公司聲稱被法團或法團主席的表態誤導，乃屬自欺欺人。（7）所以原告公司所持的管理合約無效。

FOR REFERENCE

DCCJ14835/2000

香港特別行政區
區域法院
民事訴訟案件 2000 年 14835 號

宜高物業管理有限公司　　原告人
對
新蒲崗大廈業主立案法團　　被告人

主審法官：李宗鍔法官
審訊日期：2001 年 8 月 23 日
頒下判案書日期：2001 年 9 月 17 日

判案書

1. 本案原告（「宜高」）在其聲請書內自稱為物業管理公司。被告（「法團」）顧名思義及在法律上毫無疑問是新蒲崗大廈之合法業主立案法團。兩造之間的爭執，簡單而言，是宜高聲稱法團的主席於 1999 年 12 月 13 日代表法團簽了一份管理合約（「管理合約」）委託宜高代法團管理新蒲崗大廈，為期一年（即 2000 年 1 月 1 日至 2000 年 12 月 31 日）。管理合約內的條件包括每月（1）經理人酬金 8,000 元，（2）管理員隊伍總薪金不超過$68,000 和（3）其他費用實報實銷。可是，法團後來不履行管理合約，另行聘請其他管理公司管理新蒲崗大廈。所以宜高入稟索取每月$8,000 元經理人酬金，合共 12 個月$96,000。聲請書內原本還有其他申索，但代表宜高的文大律師於審訊末期表示，除上述經理人酬金，利息及訟費，其餘的申索項目均已放棄。法團方面的答辯理由，一言以蔽之，指管理合約乃無效及對法團無約束力的，因法團主席無權代表法團訂約，且宜高是明知法團並無授權主席訂約的。宜高方面則稱，法團主席是有「通常權限」[註1]和「表面權限」[註2]代表法團訂約。而且，宜高方面又稱，法團方面已認許了主席所簽的管理合約。本席在這裏應作一備註：法團方面的立場是，倘若法庭認為主席有權代表法團簽約，則法團不承認管理合約事實上是由宜高所指的主席所簽署的。

2. 基於以上所示，法團主席是否有「通常權力」或「表面權力」代表法團訂約，是本案的關鍵法律問題。視乎法庭就此點的裁斷，本案可能迎刃而解。因此，本席徵得雙方同意，決定暫不聆聽證人，先處理法律觀點。不過，就有關法律觀點，雙方同意，法庭可就雙方呈堂的無爭議的文件的內容作事實論。

管理合約

3. 就管理合約而言，鑑於合約條件的規定，該合約所涉金額肯定超過 200,000 元。這點是沒有爭議的。因此，本席認為，在考慮訂約權力的法律問題時，法庭應專注於此類大額金錢合約而不是一般性地考慮訂購十元八塊價值的用品或三數百元聘請一工匠作小維修的合約的訂約權力。

大額金錢合約

4. 雙方同意，就大額金錢合約，有關當局根據《建築物管理條例》第 44 條已訂下守則（「守則」）。該守則內容如下：-

「 建築物管理條例（香港法例第 344 章）第 44 條
有關供應、物料及服務的採購及選用事宜守則

現根據建築物管理條例第 44 條公布，監督業已發出下述有關供應、物料及服務的採購及選用事宜的守則：—

1. 如任何供應、物料及服務的價值超過或很可能會超過以下款額中的較少者 —

(a) 100,000 元或監督（民政事務局局長）藉憲報公告所指定用以取代 100,000 元的其他款額；或

(b) 相等於法團每年收支預算 20% 或法團於大會上通過的決議案所批准用以取代 20% 的其他百分比的款額，

則須以招標方法採購或選用該等供應、物料或服務。

2. 在本守則第 1 段的規限下，管理委員會須製備一份建議書，列明所需物料或服務供應的種類、有關的預算費用，以及公開招標期間。招標建議書的副本須張貼於建築物內的當眼處。

3. (a) 在本守則第 1 段所適用的標書，須以書面製備，並於密封後放進一個專為裝載標書而設的堅固箱子內；箱上須註明「投標箱」字樣。投標箱須雙重上鎖，並且牢固地放置在建築物內的當眼處。投標箱的兩條鎖匙，須由主席、秘書或司庫分開保管。

(b) 如上面第(a)節的規定難以切實遵行，法團可於大會通過決議案後，接受由專人遞交的標書或以郵遞方式寄往法團註冊辦事處的標書。

4. 擬徵求的標書最少須達以下數目 ：—

(a) 如招標提供價值超過 10,000 元但不超過 100,000 元的供應、物料或服務，則最少須有 3 份標書；或

(b) 如招標提供價值超過 100,000 元的供應、物料或服務，則最少須有 5 份標書。

5. 有關的招標文件須清楚說明截標日期及時間。逾期交回的標書，一概不得接受。

6. 所有標書必須在至少有 3 名管理委員會委員在場見證下同時開啟；該等委員須在投標文件上簽署及寫上日期。

7. 如投標價值不超過本守則第 8 段所列的款額，則標書可交由管理委員會決定是否予以接受。

8. 如投標價值超過以下款額中的較少者 ：—

(a) 200,000 元或由監督藉憲報公告指定用以取代 200,000 元的其他款額；或

(b) 相等於法團一年收支預算的 45%，或由法團在大會上通過決議所批准用以取代 45%的其他百分比的款額，

則須將標書提交法團處理，而法團可藉在法團大會上通過的決議案決定是否予以接受。

9. 管理委員會必須將所有投標文件、合約副本、帳目及發票，以及其他屬法團所有並與採購或選用供應、物品和服務事宜有關的文件，妥為備存及保管一段期間，這個期間可由法團決定，但不得少過 6 年。管理委員會亦須讓監督、租客代表、業主、註冊承押人，或任何其他由業主或註冊承押人以書面授權作為其代表的人士，在合理的時間內，查閱有關文件。

10. 本守則第 9 段所提及的文件，必須載有可讓查閱紀錄的人士計算法團在查閱時的財務負債（包括任何日後的財務負債）所需的資料。

11. 在批出投標之前，如管理委員會的委員在正由或將由管理委員會或法團考慮的標書或合約中有着金錢上的利益關係，則該委員須以書面形式將該項利益關係告知管理委員會秘書。如管理委員會秘書有該項利益關係，則須以書面告知管理委員會的主席。凡已表示在標書或合約中有既得利益的委員，在管理委員會會議上投票甄選有關標書/合約時，必須放棄投票。

民政事務總署編製
一九九七年七月」

5. 無可置疑，守則第 8 段適用於本案的管理合約。雙方的代表律師亦同意已有案例指出即使不遵守上述守則，不一定表示所訂的合約無效。然而，本席認為這些案例對宜高沒有幫助，因為該些案例不涉及在沒有權限的情況下締結或簽署的合約。

訂約權力

6. 未分析有關法律問題之前，應首先分辨兩個不同的概念。締約權，在合約法而言，指同意或接受締結合約的決定權。一般而言，締約權在於當事人，也就是締約者。不過，若締約者須透過代理人或代表行事，決定權在於締約者的決策體。例如有限公司，公司章程通常規定締約決定權在於公司的董事局，也就是說董事局有實在的締約權；倘若董事局經過合法有效程序授權個別董事可單獨決定締約，該董事也算是有實在的締約權。 當然，有限公司需要透過有血有肉的人代表簽署書面合約，故有簽約代表的出現。而簽約代表可能是董事局授權的一名董事、一名經理、或多位聯署人士。不難想象，締約代理與簽署代表未必是同一人或同一群體。獲授權締約的代理未必同時獲授權代表簽署合約。獲授權代表簽署合約的人未必獲授權決定同意或授受締結合約，不過，由於某人獲授權代表有限公司簽署合約，他人不瞭解公司的內部權力分派，或會相信該人有權決定締約。設若決策體，例如董事局，沒有明確授權與某方締約，而某人却與該方簽署了合約，決策體不承認該合約，就出現某人有沒有權限決定締約或有沒有權限代表簽約的兩個層次的問題。

7. 在本案，法團主席以法團名義與宜高簽署了管理合約，法團不接受該合約，也就帶出如上述的問題， 即（1）法團主席有否實在權限[註3]獨自決定與宜高締結管理合約？（2）若法團主席沒有實在的決策權，基於其法團主席身份及環境情況，外界人士是否可視法團主席為有通常權限作決策，因而即使法團主席雖然沒有實在的決策權，其締約行為對法團仍有約束力？（3）即使法團主席沒有實在或通常權限決定締約，基於其法團主席身份及環境情況，外界人士是否可視法團主席為有表面權限及已獲決策體授權代表法團簽署管理合約，雖然事實上決策體並沒有如此授權？據代表宜高的文大律師表示，宜高並不是主張法團主席有實在權限締結或簽署管理合約。故上面（1）問題的答案已知是否定的。餘下（2）和（3）問題，就是本席應尋找答案的。

通常權限

8. 外界人士是否限可視法團主席為有通常權限為法團決定締約，首先要參看法團的組織法例。於此，本席注意到《建築物管理條例》內有以下規定：—

> 「14. 法團的一般權力
>
> （1） 除本條例另有規定外, 法團會議可通過有關公用部分的控制、管理、行政事宜或有關該等公用部分的翻新、改善或裝飾的決議，而該決議對管理委員會和全部業主均具約束力。
>
> 18. 法團的職責及權力
>
> （1） 法團須 —
>
> (a) 使公用部分和法團財產維持良好合用的狀況，並保持清潔；
>
> (b) 在公職人員或公共機構行使任何條例所賦權力，命令或要求就公用部分進行某項工作時，遵照辦理；
>
> (c) 採取一切合理必需的措施，以執行公契（如有的

話）載明有關建築物的控制、管理、行政事宜的責任。

（2） 法團可就下述事情行使其酌情決定權 —

(a) 僱用並付酬予員工，以達致與法團根據本條例或公契（如有的話）而有的權力或職責有關的任何目的；

(aa) 除第（3）款以及管理委員會所決定的有關管理委員會及其小組委員會的出席會議條款及條件另有規定外，支付津貼予按照附表 2 委任的主席、副本主席（如有的話）、秘書、司庫及其他擔任管理委員會職位的人，津貼為法團藉業主大會的決議批准並按照但不超過附表 4 所指明的最高津貼者；（由 1993 年第 27 號第 17 條增補）

(b) 聘請並付酬予會計師，以審計法團帳簿及擬備年度收支表和資產負債表；

(c) 聘請並付酬予經理人或其他專業機構、專業商號或專業人員，以由其代表法團執行法團根深柢固據本條例或公契（如有的話）而有的職責或權力；

(d) 為建築物或其任何部分購買火險或其他保險，並保持各項保險生效，保額則以能使建築物恢復原狀所需款額為準；

(e) 購買、租賃或以其他方式獲取動產，作為公用部分的設施，以供業主享用，或藉以符合公職人員或公共機構為施行任何條例而作出的規定；

29. 管理委員會執行法團職責並行使法團權力

除本條例另有規定外，本條例授予法團的權力及委以的職責，須由管理委員會代表法團行使及執行。」

此外，〈建築物管理條例》附表 2 第 10（2）節規定：—

「授權或要求管理委員會進行的一切行為、事務、事情，均可由出席管理委員會會議的委員、以多數票通過決議決定。」

9. 縱觀《建築物管理條例》及其附表 2 及附表 3，法團主席的權力和職責，根據明文規定，就是召開會議，主持會議，需要時投決定性票和簽署會議錄。換言之，法團主席的權力和職只限於開會有關事宜。

10. 綜合上述各條文的規定， 本席相信業主立案法團的最高決策權在於業主大會，其次在於管理委員會。任何個人，包括法團主席，是沒有決策權的。《建築物管理條例》第 29 條謂，法團的權力及職責「須由」管理委員會代表法團行使及執行，意義再明顯不過，就是指法團由集體領導，法團主席身為管理委員會主席並非法團的領導人或執行長。

11. 任何與法團交易的人士，有法律責任熟知《建築物管理條例》的各條文。熟識《建築物管理條例》的人士，必然知悉法團主席個人以其主席身份是沒有決策和執行權的。決策和執行是整個管理委員會或業主大會的決議所致。所以，任何人，包括宜高，都不能說法團主席有通常權限替法團作主締約。換句話說，問題（2）的答案無可置疑是否定的。

12. 文大律師有謂，就其當事人的證人觀察，法團主席在開會時的表現，法團主席使用法團的信箋發函，函件上蓋有法團的膠印，及法團主席出面與宜高洽談管理合約，這些環境情況，就是法團給予外界如宜高的表態，使人相信法團主席有權決定締約。這其實是指法團主席有默示權限[註4]。關於表態，將會有詳盡的分析。在這裏，本席只需很簡單地指出，宜高所倚賴的文書證據之中，有一封法團主席於 1999 年 12 月 9 日發予宜高的函件，其全文如下：—

「 新 蒲 崗，大 廈 業 主 立 案 法 團
THE INCORPORATED OWNERS OF SAN PO KONG MANSION
新 蒲 崗 彩 虹 道 84-114 號 電話/傳真 ： 2326 4968

敬啟者：

本法團於一九九九年十二月九日經管理委員會決定由二 000 年一月一日起正式聘用 貴公司為[新蒲崗大廈]經理人（管理合約將另行簽署）接替[港深聯合物業管理有限公司]一切職務。並由即日起授權及委託 貴公司負責下列事宜：

（一） 全權代表法團與[港深]安排及進行一切交接事務。
（二） 全權代表法團於正式按管前監察大廈日常管理運作。
（三） 協助法團其他安排或指派之工作。

此致
宜高物業管理有限公司

見証人：黃福萍 （簽名）
黃道儀
業主立案法團主席
一九九九年十二月九日」

不論法團或法團主席是否於1999年12月9日之前曾向宜高作過任何誤導性的表態，（法團方面堅稱並無表態），法團主席的函件清楚表明決策乃管理委員會之事，不是由他作主的。宜高事實上是在收到此函之後才與法團主席簽署管理合約。宜高聲稱相信法團主席或法團默示法團主席有權決定締約，不過是自欺欺人。

<u>表面權限</u>

13. 說表面權限，文大律師其實是依賴所謂特克安德法則[註5]。該法則是公司

法的一項重要原則。援引和闡釋該法則的案例數不勝數。文大律師所依賴的四宗案例裏，*British Thomson-Hauston Company, Limited v. Federated European Bank, Limited* [1932] 2 K.B. 176 的英國上訴法院判詞就曾重覆引述 Atkin 法官的如下說話：—

> "If you are dealing with a director in a matter in which normally a director would have power to act for the company, you were not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power."

換句話說，表面權限是推定有限公司的一些管事人士已獲授權代表公司行事，即使實際上並沒有授權。

14. 根據本席的理解，如若所謂的代表本人具有董事身份，而公司章程又容許董事局將權力下放予個別董事，就可以指行事的董事有表面權限，毋須有公司的任何表態作佐證。倘若所謂的代表本人不具有董事身份，只是公司的其他受僱職員，則不能假定該行事職員必然已獲授權，須有證據顯示公司曾作出表態使人相信該行事職員已獲授權。

15. 在本案，文大律師辯稱，法團主席相等於有限公司的董事或董事會主席，故有表面權限。而且，主席還有表態使宜高相信法團主席有權代表法團行事。故文大律師認為表面權限在本案是無可置疑的。

16. 基於兩點理由，本席認為特克安德法則不適用於業主立案法團。第一，特克安德法則是法院因應有限公司的情況而訂下的。一般而言，有限公司是商業性或業務性的組織，每天無時無刻與外界有交易。而且，有限公司的董事，與公司的盈虧常都有切身關係，有些還是大股東。業主立案法團不同。業主立案法團是推行產業自治的集體，對外交易不多，鮮有時間上的逼切性。業主立案法團的管理委員會內的每一委員以至全體委員，在建築物內並不佔有多數權益。

17. 眾所周知，有限公司的章程細則慣常有規定董事會可下放權力，賦予個別董事行事權力。《公司條例》內的表格甲有這樣的規定，悠來已久。個別董事有表面權限，是法律認可的經營制度。反之，《建築物管理條例》及其附表均無下放權力的規定。業主立案法團的職責「須由」管理委員會代行，就是說業主立案法團採用集體決策制，任何個人不能代策代行。此外，《建築物管理條例》附表 4 批准給予管理委員會各成員的津貼，微不足道，其作用不是為贖付各委員担當日常行政管事工作的薪金。根據《建築物管理條例》附表 2，管理委員會可以三個月才開會一次。種種規定顯示，管理委員會是集體議事決策的組織，不是必然的日常行政管理組織。總而言之，有限公司與業主立案法團的性質不同，成立目的不同，運作模式不同。有限公司的董事和業主立案法團的管理委員的職能也非對等。既然如此，為有限公司而訂的特克安德法則就不宜引伸適用於業主立案法團。事實上，從來沒有法官主張該法則可套用於其他的法人團體。本席不敢貿貿然開創先例。

18. 第二，鑑於實務考慮，本席認為在法律政策上亦不宜認可業主立案法團的管理委員會，包括法團主席，有表面權限締結對業主立案法團有約束力的鉅額金錢合

約。試想，假如法團主席有表面權限訂約，只要法團主席在合約上簽署，大廈全體業主就可能要揹負數以百萬元計的合約債務。且莫說法團主席有可能徇私舞弊，只要主席稍為輕率一點，慷他人之慨，大廈的全體業主就無法脫離困局。本席認為，為萬全之計，必須堅持集體決策才有約束力；起碼對於當局所訂前述守則所指的大額 金錢合約應該如是。

19. 倘若本席以上的觀點正確，宜高未能證明管理合約已得法團的集體決議同意接受，又不能引用特克安德法則，其所根據的由法團主席簽署的管理合約形同廢紙，宜高理應敗訴。

<u>表態</u>

20. 設使特克安德法則適用於業主立案法團，宜高仍須說服法庭本案的環境情況的確符合引用該法則的各項條件。

21. 首先要指出，文大律師所列舉引致宜高相信法團主席有權限的表態，在宜高的狀辭內並沒有提出。根據訴訟慣例，狀辭內沒有提出的論點和論據，是不能在審訊時引用的。譬如宜高指法團主席在開會時有這樣那樣的表態，而在場的其他人的表現附和了這些表態，應在狀辭內申明，好等法團有機會應提出反證。但宜高的狀辭內並沒有主張受到甚麼表態的影響。故此，嚴格上而言，法庭是毋需考慮宜高這個論點的。不過，法團的代表律師並無反對，本席也就勉力斟酌此點。

22. 關於表態誤導引致出現表面權限，在文大律師所援引的 *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [1964] Q.B. 480 案例裏，Diplock 法官說：—

> 「If the foregoing analysis of the relevant law is contract, it can be summarised by stating four conditions which must be fulfilled to entitle a contractor to enforce against a company a contract entered into on behalf of the company by an agent who had no actual authority to do so. It must be show:
>
> (1) that a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor;
> (2) that such representation was made by a person or persons who had "actual" authority to manage the business of the company either generally or in respect of those matters to which the contract relates;
> (3) that he (the contractor) was induced by such representation to enter into the contract, that is, that he in fact relied upon it; and
> (4) that under its memorandum or articles of association the company was not deprived of the capacity either to enter into a contract of the kind sought to be enforced or to delegate authority to enter into a contract of that kind to the agent.
>
> The confusion which, I venture to think, has sometimes crept into the cases is in my view due to a failure to distinguish between these four separate conditions, and in particular to keep steadfastly in mind (a) that

> the only "actual" authority which is relevant is that of the persons making the representation relied upon, and (b) that the memorandum and articles of association of the company are always relevant (whether they are in fact known to the contractor or not) to the questions (i) whether condition (2) is fulfilled, and (ii) whether condition (4) is fulfilled, and (but only if they are in fact known to the contractor) may be relevant (iii) as part of the representation on which the contract relied. (505-506 頁)
>
> The cases where the contractor's claim failed, namely, *Houghton & Co.* v. *Nothard, Lowe & Wills,*[67] *Kreditbank Cassell G. m.b.H.* v. *Schenkers Ltd.*[68] and the *Rama Corporation* case,[69] were all cases where the contract sought to be enforced was not one which a person occupying the position in relation to the company's business which the contract knew that the agent occupied would normally be authorised to enter into on behalf of the company. The conduct of the board of directors in permitting the agent to occupy that position, upon which the contract relied, thus did not of itself amount to a representation that the agent had authority to enter into the contract sought to be enforced, that is, condition (1) was not fulfilled. The contractor, however, in each of these three cases sought to rely upon a provision of the articles giving to the board power to delegate wide authority to the agent as entitling him to treat the conduct of the board as a representation that the agent had had delegated to him wider powers than those usually exercised by persons occupying the position in relation to the company's business which the agent was in fact permitted by the board to occupy. Since this would involve proving that the representation on which he in fact relied as inducing him to enter into the contract comprised the articles of association of the company as well as the conduct of the board, it would be necessary for him to establish first that he knew that contents of the articles (that is, that condition (3) was fulfilled in respect of any representation contained in the articles) and secondly that the conduct of the board in the light of that knowledge would be understood by a reasonable man as a representation that the agent had authority to enter into the contract sought to be enforced, that is that condition (1) was fulfilled. The need to establish both these things was pointed out by Sargant L.J. in *Houghton's* case[70] in a judgment which was concurred in by Atkin L.J.[71] ; but his observations, as I read them, are directed only to a case where the contract sought to be enforced is not a contract of a kind which a person occupying the position which the agent was permitted by the board to occupy would normally by authorised to enter into on behalf of the company.
>
> I find some confirmation for this view of Sargant L.J.'s judgment in the dictum of Atkin L.J. in the *Kreditbank Cassel* case[72] another case of an "abnormal" contract. He says: "If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to inquire whether or not the formalities required by the articles have been complied with before he exercises that power. （507-508 頁）」

Diplock 法官的判詞可歸納成以下幾點：

1. 有表態足以讓一位合理的人（即客觀第三者）認為是表示代理人

具權限代表公司與承包商締結所涉種類的合約。

2. 有關表態乃由具實在權限管理公司業務的人或集體一般性地或特為所涉合約事宜所作出的。
3. 承包商受有關表態所誘使並倚賴有關表態而締結所涉合約。
4. 公司章程並無剝奪公司締結或下放締結所涉種類合約的能力。
5. 表面權限只適用於公司「正常」業務的合約。對於「非正常」合約，常見代理人如公司董事當然不可能是依常軌可代表主事人行事的。

23. 就第一和第二點而言，文大律師並沒有逐點數列構成表態的行為。他只是很籠統地說法團主席在開會時的表現、法團主席與宜高洽談、法團主席以法團信箋作出某些表示。本席不明白何以這些所謂法團主席的行為可以作為法團的表態。譬如法團主席使用法團信箋發信予宜高，極其量可以說法團容許法團主席以法團名義發信。實務上經常有需要由法團主席以法團名義用法團信箋向大廈各業主發出通告。法團不可能要法團主席事先獲得法團批准才使用法團信箋。然而，法團容許法團主席使用法團信箋是否就是 Diplock 法官所說的表態顯示代理人具權限代表法團與承包商締結所涉種類（或任何種類）的合約？本席認為不能將容許使用法團信箋無限引伸為容許締結任何合約。

24. 再者，表態須為由具實在權限管理業務的人或集體所作出。法團主席既無實在權限，怎可以將法團主席的行為視為具實在權限管理業務的人作出表態？

25. 就第三點而言，倘若已有明確訊息給予承包商，對方所指的代理人根本是沒有獲得授權的，承包商仍堅稱另有表態誘使其相信代理人有權行事，實在令人難以接受。前面已指出，法團主席 12 月 9 日的函件表明是管理委員會決定聘用宜高。顯然這是否定主席有締約決策權的表態。或謂宜高因而相信法團主席已獲管理委員會授權代表簽約。然而，當局訂下的「守則」規定決定權在於業主大會，不是管理委員會。作為管業公司，宜高怎可以說不知悉「守則」的規定，而妄信管理委員會可作決定授權法團主席代表簽約？

26. 又或謂業主大會可能已授權管理委員會處理，而管理委員會可能再授權予法團立席簽約。但是，本案兩造所同意的書面證據之中，有一份 1999 年 9 月 28 日管理委員會的會議錄，該會議錄的重要內容如下：—

「1. 摘錄九月廿一日業主大會議決事項如下：

（一） 全體業主一致通過法團堅持既定立場，並授權管理委員會全權處理天台問題。

（二） 全體業主一致通過授權管理會全權處理年尾管理公司續約問題。

……

5. 主席提出年尾管理公司合約期滿，是否續約？各委員商討後決定出信通知管理公司工作至約滿為止，為求公平法團將公開招標聘用管理公司，現行管理公司亦可參與投標。」

另外，還有一份 1999 年 10 月 28 日管理委員會的會議錄，其有關內容節錄如下：—

> 「4. 本法團已於 9 月 29 日去信港深物業管理公司通知年底約滿終止合約。主席將最近收到「港深」來函給各委員參閱，經商議後法團決定登報公開招聘管理公司於一月一日接手本廈保安管理工作，亦另行出通告給大廈業主推薦合適管理公司。」

27. 留意兩份會議錄註明宜高的總經理梁冠明先生是有列席該兩次管理委員會的會議。因此，梁先生和宜昌高必然是知悉業主大會只授權管理委員會全權處理「續約」，也就是說業主大會沒有授權管理委員會處理與新的管理公司締約。而管理委員會既決定不續約重新招標，是否接受某者投標的決定權自然回歸業主大會。如果對此尚有懷疑的話，10 月 28 日管理委員會的會議錄清楚有言「給大廈業主推薦合適管理公司」。所以，宜高透過出席管理委員會會議的梁冠明無可否認是知悉管理委員會無權處理「新約」，但會向「大廈業主推薦」。在這樣的前題之下，宜高聲稱被法團主席 12 月 9 日的函件所說管理委員會已決定聘用宜昌高誘使，跡近掩耳盜鈴。

28. 再者，雙方同意的書面證據中，紀錄顯示宜高梁冠明列席 1999 年 9 月 28 日、10 月 28 日、12 月 14 日的幾次管理委員會會議。還有一次管理委員會的會議，在 11 月 25 日舉行，會議錄上沒有註明梁冠明列席，但法團方面聲稱有簽到簿證明梁冠明也有列席該次會議。宜高方面暫時不承認梁冠明曾列席 11 月 25 日的會議。即使撇開有爭議的 11 月 25 日會議，文件確證宜高的高級行政人員梁冠明，在法團主席未簽署管理合約之前起碼兩次，其後起碼一次，列席管理委員會的會議。梁冠明列席的作用為何？各次會議紀錄可見，非業主出席管理委員會的會議，例如鐘沛林律師，有解答疑問的功能。但梁冠明每次出席都無紀錄他曾發言答話，可見他的列席純然是觀察。假如宜高是倚賴法團主席代表法團處理締結管理合約事宜，梁冠明只需與法團主席單獨面談，何需駕臨管理委員會作壁上觀？所以，本席毫無困難可以推論，宜高根本不是依賴法團主席的言行表態，而是派其高級職員梁冠明列席管理委員會的會議以瞭解實況。當然，正如前述，於 10 月 28 日的會議裏，梁冠明列席期間，管理委員會已表明將會向「大廈業主推薦管理公司」；當日，哪間管理公司將獲推薦仍是未知數呢！

29. 關於第四點，本席先前已裁定，法律上法團不得將締結管理合約此類的大額金錢合約的權限下放予任何個人。理論上，下放可至管理委員會這個層次。但本案各造當時明知沒有下放至管理委員會。

30. 關於第五點，本席毫無疑問認為管理合約此類合約乃「非正常」合約。故即使特克安德法則適用於業主立案法團，因管理合約屬於「非正常」合約，沒有任何個人可被視作有表面權力代表法團簽訂，該特克安德法則仍是無用武之地。

31. 宜高的聲請書沒有主張管理合約得到管理委員會或業主大會的追認。事實上，業主大會沒有追認而是否決了。至於管理委員會，根本無權也已明確地向宜高的代表表示了無權決定，就談不上可以追認。

<u>結論</u>

32. 基於法團主席無任何權限簽訂管理合約，同時宜高明知法團主席和管理委員會都無權代表法團締結或追認對法團有約束力的管理合約，而且宜高事實上沒有依賴任何表態作為締約權限的根據，本席裁定法團主席未經法團合法授權於 1999 年 12 月 9 日所簽署的管理合約對法團是無效及不可強制執行的。

33. 所以本席宣判原告敗訴及暫令原告須負責被告的訟費，如雙方不能就訟費金額達成協議，訟費金額由法庭評定。如無異議，此暫令於本判案書頒下之後二十一日後自動成為最終命令。

李宗鍔
區域法院法官

周卓立，陳啟球，陳一理律師事務所委派文本立大律師代表原告人
李宇祥，彭錦輝，郭威律師事務所彭錦輝律師代表被告人

註 1 通常權限，usual authority
註 2 表面權限，ostensible authority
註 3 實在權限，actual authority
註 4 默示權限，implied authority
註 5 特克安德法則，Turquand Rule

DCCJ 381/2006

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
CIVIL ACTION NO. 381 OF 2006

BETWEEN

YEUNG CHUNG LAU (楊宗鎏)	Plaintiff
and	
INCORPORATED OWNERS OF CENTURY INDUSTRIAL CENTRE	1st Defendant
CHONG LAI WAH (張麗華)	2nd Defendant
LEUNG KAR FAI (梁嘉輝)	3rd Defendant

Coram: Deputy District Judge Anthony Chow in Chambers
(open to public)
Date of Hearing: 17th July 2006
Date of Handing Down Decision: 24th July 2006

DECISION

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1. This is an Inter-Partes Summons, pursuant to O.29 r.1 of the Rules of District Court, of the Ex-parte injunction issued by His Honour Judge Chow on 23/1/2006.

Background:

2. D1 is the Incorporated Owners of Century Industrial Centre (the "Building"), D2 its chairlady and both the plaintiff and D3 are members of the Building's management committee.

3. On or about 6/9/2005, Mr. Wong Wing-ho ("Mr. Wong"), a co-owner of the Building, commenced an action for defamation (HCA 1948/2005) against D2 and D3. The main subject of Mr. Wong's action was two letters purportedly sent by D1.

4. On or about 9/11/2005, an action was filed in the Lands Tribunal (LDBM 340/2005) by Ka Hang Decoration Company Limited ("Ka Hang"), also a co-owner of the building against D2 for an order compelling D2, as chairlady of D1, to convene an owners' meeting to discuss the removal of the present members of the management committee.

5. Without first obtaining the approval of the owners of the Building, the management committee resolved to utilize management funds of the Building for the defence of D2 and D3 in HCA 1948/2005. On or about 27/10/2005, a sum of HK$25,000.00 was paid by D1 to D2 and D3's solicitors.

6. On or about 24/12/2005, D2 and D3's solicitors demanded a further sum of HK$30,000.00 as their legal fees in HCA 1948/2005.

7. On or about 20/10/2005, the plaintiff together with other owners, representing 5% of all shares of the Building, issued a notice requesting D2 to convene an Owners' Meeting for the re-election of the management committee.

8. D2 refused and on or about 9/11/2005, Ka Hang filed LDBM 340/2005 to compel D2 to convene an owners meeting. On or about 23/1/2006, the plaintiff applied by way of *Ex-Parte* Summons, to restrain D1 until further order or trial either by itself or its agents including the management company of the Building, to make further payments from the management funds of the Building to D2 and D3's solicitors, in respect to HCA 1948/2005 or LDBM 340/2005.

9. Upon reading the plaintiff's affirmation in support, His Honour Judge Chow granted the interim injunction order. The *Inter-Partes* Summons was set down for 21/2/2006. By consent the *Inter-Partes* Summons was later adjourned to 24/4/2006.

10. On or about 23/3/2006, D1's solicitors filed a summons to set aside His Honour Judge Chow's order. This summons was of course redundant, since by necessary implication this is already included in the *Inter-Partes* Summons.

11. On 21/4/2006, by consent, both *Inter-Partes* Summonses were vacated. Although there are two summonses in front of me, there is in fact only one issue I have to decide today: Whether the interlocutory injunction ordered by His Honour Judge Chow should be set aside?

12. Before the hearing, Mr. Lo of Messrs. Lo, Chan & Leung, solicitors for D2 and D3, applied to make submissions on behalf of D2 and D3. The sole purpose of this hearing is to determine if the interim injunction against D1 should be continued and neither D2 nor D3 are directly affected. D2 and D3 are of course entitled to submit evidence by way of affirmations

but I see no reason why their legal representative should be allowed to make submissions. Accordingly, Mr. Lo's application was not allowed.

The Law:

13. The law relating to interlocutory injunctions is well settled. In *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396, the House of Lords held there are two requirements: first, there is a serious question to be tried and second, the balance of convenience lies in favour of granting an injunction.

14. Hong Kong Civil Procedure 2006, at para. 29/1/9 derived 11 principles from Lord Diplock's judgment in *American Cyanamid Co.*:

> (1) The granting of an interlocutory injunction is a remedy that is both temporary and discretionary.
> (2) The evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination.
> (3) It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.
> (4) When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when *ex hypothesi* the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.
> (5) It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction.
> (6) But (at least the middle of the nineteenth century) this has been made subject to the plaintiff's undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do.
> (7) The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action

> if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighted against the corresponding need of the defendant to be protected against injury resulting from his having prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial.
> (8) The court must weight one need against another and determine where, " the balance of convenience" lies.
> (9) There is no rule of law or practice to the effect that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that upon the evidence adduced by both the parties on the hearing of the application the applicant had satisfied the court that on the balance of probabilities the acts of the other party sought to be enjoined would, if committed, violated the applicant's legal rights. The purpose sought to be achieved by giving to the court discretion to grant interlocutory injunctions would be stultified if the discretion were clogged by such a technical rule.
> (10) However, the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
> (11) So, unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.
> (12) It would be most exceptional for the House of Lords to give leave to appeal in a case which turned upon where the balance of convenience lay.

15. Mr. Ng, for D1, argued that if the claim is frivolous or vexatious or that there is no real prospect of succeeding in the plaintiff's claim for a permanent injunction at the trial, interlocutory injunction should not be given, but in Hong Kong Civil Procedure 2006, at para. 29/1/10, the learned author further stated:

> " The authority show a preference for stating the American Cyanamid threshold test in terms giving natural meaning to the expressions "a serious question to be tried" and "a real prospect of success" and for ignoring the expression "not frivolous or vexatious".

Whether there was "a serious question to be tried" or "a real prospect of success"?

16. Before I embark on answering this question, it is helpful to review the dispute between the plaintiff and D1. The plaintiff's case is succinctly stated in paragraph 10 of the Statement of Claim, which states:

> "10. The DMC contains no provision allowing the use of management funds for litigations involving individual owners in their personal capacity, whether they are at the time holding a position in the management committee of the 1st Defendant."

17. Although no Statement of Defence has been filed, one can adduce the D1's defence from paragraph 10 of Mr. Yu Cheuk Sing's, D1's vice chairman, second affirmation. Mr. Yu stated:

> " 10. On 6th May 2006, it was resolved in the Owners' Meeting, inter alia, that the 1st Defendant could appropriate the public funds for 2nd and 3rd Defendants in their defence in Court, i.e. LDBM No. 340 of 2005 and HCA No. 1984 of 2005. …"

18. In essence, the plaintiff's case is that D1 cannot use management funds to defend D2 and D3, when they are being sued in their personal capacity, because there is no provision in the Deed of Mutual Covenant of the Building (the "DMC") to allow them to do so. The D1's case is that so long as the payment is authorized by a majority of the owners in an owners' meeting, D1 has the power to do so.

19. The parties' argument depended solely on interpretation of the DMC, as modified by the Building Management Ordinance cap. 344 (the "BMO"), if applicable. This is a question of law and does not involve any "conflicts of evidence".

20. Mr. Ng, argued that the Court of Final Appeal's decision in *The Grande Properties Management Limited v. Sun Wah Ornament*

Manufactory Limited, FACV No 2 of 2006, a case that dealt with the validity of a resolution sanctioning unauthorized renovation works that was previously done without authority, stands for the proposition that the 6/5/2006 resolution gave the D1 retrospective authority to pay for the D2 and D3's legal fees.

21. My review of *The Grande Properties* reveals that ultimately, Mr. Justice Chan P.J. held the resolution at issue in *The Grande,* did not have retrospective effect and therefore legal and enforceable. In paragraph 32 of his judgment, Mr. Justice Chan stated:

> " In my view, there is no question of the owners including Sun Wah being liable before the resolutions in question were passed. The 2001 resolutions cannot be said to operate with retrospective effect. The trial judge's conclusion that they were contrary to the DMC because they had retrospective effect was therefore wrong."

22. Mr. Justice Chan also stated:

> " In the management of multi-storey buildings, it is important that the Manager and the owners are entitled to make appropriate decisions **unless such decisions are prohibited by the DMC**. Numerous matters, whether trivial or important, may surface from time to time and on very short notice. They need to be attended to. Things need to be done very quickly. However, there are procedural requirements for convening an owners meeting where approval can be obtained before action can be taken. That is why the Manager is given wide powers by the DMC. But however detailed and comprehensive the DMC may be, it cannot cover all exigencies. There must be occasions when it is necessary to sanction what has been done before the owners can meet, discuss and approve it. Subsequent sanction or approval is also necessary to correct mistakes, cure defects or remedy oversight. Resolutions for such purposes are very often retrospective in effect. If resolutions which take retrospective effects are to be regarded as invalid simply because they deal with matters which are not expressly empowered by the DMC, it would hinder the efficient management of the building." (Emphasis added.)

23. This part of Mr. Justice Chan P.J.'s decision was *obiter dictum* and of course referred only to resolutions that have the effect of retrospectively approving prior actions.

24. The issue remains: Was the resolution approving the payment of D2 and D3's legal fees valid? The oblivious place to look for that answer is in the text of the DMC and the BMO.

25. Mr. Ng's arguments in respect of the merits, or lack thereof, on Mr. Wong's claim and whether the two letters that triggered the defamation action were properly authorized by members of the management committee and Mr. Chu's arguments on champerty, maintenance and section 20A of the BMO, were all reaching for the far fetched and ignoring the oblivious.

The DMC:

26. Clause 15 of the DMC provides:

> " (a) From time to time there shall be meetings of the co-owners of the said Building to discuss and decide matter concerning the said Building as are hereinafter mentioned and in regard to such meetings the following provisions shall apply: -
> …
> (b) A meeting validly convened under paragraph (a) of this Clause shall have power to consider and determine any question, matter or thing relating to or connected with **the operation, servicing, maintenance, repairing, rebuilding, insurance or management of the said premises and Building** including the appointment of a Manager for the said management at the said Building PROVIDED THAT:-
> (1) **No resolution shall be valid in the extent that it is inconsistent with or purports to vary any of the provisions of this Deed**.
> (2) …" (Emphasis added.)

27. Unlike the deed of mutual covenant in *The Grande*, the DMC of the Building expressly provided that the owners' meeting only have power to

consider and determine questions relating to or connected with "the operation, servicing, maintenance, repairing, rebuilding, insurance or management of the said premises and Building" and all resolutions are invalid if "it is inconsistent with or purports to vary any of the provisions of this Deed".

The BMO:

28. Section 14 of the BMO provides:

> (1) Subject to this Ordinance, at a meeting of a corporation any resolution may be passed with respect to **the control, management and administration of the common parts or the renovation, improvement or decoration of those parts** and any such resolution shall be binding on the management committee and all the owners. (Emphasis added.)

29. Sections 34E and 34F of the BMO incorporated the provisions of the Seventh and Eighth Schedules (if consistent) into all deeds of mutual covenants. Neither of these schedules modified or changed clause 15 of the DMC.

30. The issue therefore becomes: Whether the 6/5/2006 resolution related to or connected with "the operation, servicing, maintenance, repairing, rebuilding, insurance or management of the Building" or "the control, management and administration of the common parts or the renovation, improvement or decoration of those parts"?

31. A review of the minutes of the 6/5/2006 owners meeting reveals that the resolution the owners voted on was:

"是否動用公帑爲張麗華及梁家輝其個人在進行抗辯?"

32. The resolution passed was:

"表決結果, 大會以 427 業權分數通過贊成可動用公帑爲張麗華及梁家輝兩人進行抗辯。"

33. Clearly, the 6/5/2006 resolution had nothing to do with: "the operation, servicing, maintenance, repairing, rebuilding, insurance or management of the said premises and Building" nor "the control, management and administration of the common parts or the renovation, improvement or decoration of those parts" and the resolution was accordingly invalid.

34. For the purpose of this application, there is no triable defence.

Whether the balance of convenience lies in favour of granting an injunction?

35. In *Yeko Trading Ltd. v Chow Sai Cheong Tony & Ors.* [2000] 2 HKC 612, Mr. Justice Chung held if there is no arguable defence, the court should not even consider the question of balance of convenience. It was stated:

> "The significance of this part of Mr. Yan's submissions is as follows. *American Cyanamid Co v Ethicon Ltd.* [1975] AC 396 decided that the court must be satisfied of two matters before granting an interim injunction order: (a) there is a serious question to be tried on the plaintiff's claim, and (b) the 'balance of convenience' justifies the granting of the order. Although Mr. Yan accepted this to be settled principle, he argued that where the defendant is not even able to show an arguable defence, the court does not need to (and should not) consider the question of 'balance of convenience'. He referred to two cases in support.
> …(Mr. Justice Chung considered the cases of *Manchester Corp v. Connolly* [1970] 1 Ch 420 and *Official Custodian for Charities v. Mackey* [1985] 1 Ch 168.)
> Based on the principles stated in the above cases, I agreed with Mr. Yan's argument that there is no need to consider the issue of 'balance of convenience', provided the plaintiff's claim for an injunction order is justified if it should succeed in proving its claim. I considered that this is such a case and there is therefore no need to consider the matter further."

36. So far as costs is concerned, I see no reason to depart from the usual costs order.

Order:

37. Order in terms of the Plaintiff's Summons dated 3/2/2006, namely,

(1) The 1st Defendant be restrained until further order or trial either by itself or its agents including its Management Company, to make further payment(s) from its management funds to Messrs. Lo Chan & Leung, and/or other solicitors' firms, for legal costs and disbursements incurred or to be incurred relating to HCA 1948 of 2005 and LDBM 340 of 2005; and

(2) Costs of this Summons be in the cause of the action herein.

38. Accordingly, D1's application by way of Summons dated 23/3/2006 for setting aside the injunction order granted by His Honour Judge Chow is dismissed.

(Anthony Chow)
Deputy District Judge

Mr. George Chu and Mr. Lawrence Cheung instructed by M/s Michael Pang & Co. for the Plaintiff.
Mr. Ken Ng instructed by M/s S.K. Lam, Alfred Chan & Co. for the 1st Defendant.
Mr. N. Lo of M/s Lo, Chan & Leung for the 2nd and 3rd Defendants.

由此

LC Paper No. CB(2)311/06-07(03)

HCMP 1841/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCEEDINGS NO. 1841 OF 2006
(ON AN INTENDED APPEAL FROM DCCJ 381/2006)

BETWEEN

Yeung Chung Lau	Plaintiff
and	
Incorporated Owners of Century Industrial Centre	1st Defendant
Chong Lai Wah	2nd Defendant
Leung Kar Fai	3rd Defendant

Before : Hon Cheung JA and Tang JA in Court
Date of Hearing : 26 October 2006
Date of Decision : 26 October 2006

D E C I S I O N

Hon Cheung JA (giving decision of the court) :

1. We shall grant the 1st defendant leave to appeal. Whether the resolution which authorised the use of the management funds for the defence of the 2nd and 3rd defendants is within the ambit of Clause 15 of the DMC is clearly an arguable point of law.

2. Costs of the application be in the cause of appeal.

(Peter Cheung)
Justice of Appeal

(Robert Tang)
Justice of Appeal

Mr. Samuel Chan, instructed by Messrs S. K. Lam, Alfred Chan & Co., for the 1st Defendant