The decline of the principle of equal treatment – greater scope for the decision making in tenant-owners' associations

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The question of equal and just treatment is often put to the test in tenant-owners' associations where ultimate justice for the individual member stands not infrequently in contrast to the needs of the collective. The majority of case law in this area shows that it is possible for the general meeting to decide on measures that concern, for example development of the property, even if the decision in practice is unequally beneficial to the members but encumbers them all equally financially.

Decisions in tenant-owners associations are passed as a main rule by way of a simple majority, i.e. by more than half of the votes. The rule has practical advantages and often shortens the decision-making process. To counteract the risk that a minority or an individual member is disadvantaged, the law imposes more stringent requirements in certain cases. For example, to decide on a change in the by-laws, a qualified majority is required. In addition to these so-called minority protection rules, there are some general limitations to the decision-making powers of the general meeting. The first is expressed in section 16, chapter 7 of the Act on Economic Associations and is usually called the general clause.[1] According to this clause, *"The general meeting may not reach a decision that is intended to convey unjust benefit to a member or any other person to the detriment of the entire association or other member."* It is evident from the Tenant-Owners' Association Act that the provision is also applicable to tenant-owners' associations.[2] The terms "*benefit*" and "*detriment*" relate in the first place to economic advantages and economic disadvantages respectively. Inherent to the term "*unjust*" is that someone has manifestly been disadvantaged. In assessment of unjustness, aspects other than purely economic are to be considered.

The other limitation is the so-called equal treatment principle under association law that, in the context of a tenant-owners' association, means that the organs of the association must treat all members equally unless unequal treatment is justified on objective grounds.

It has been stated in literature in the area, that the choice of the general clause or the equal treatment principle is significant to the burden of proof. If the general clause is invoked, the claimant must adduce evidence, in part that an advantage has arisen, and in part that the advantage as such is unjust. If the claimant instead choses to invoke the equal treatment principle, it is sufficient for the claimant to show that that unequal treatment has taken place. In other words, it is not a requirement that the action entailed an advantage for any member. It falls to the association to show that the treatment was objectively justified.[3] From the association's perspective, the equal treatment principle can be said in this way to be more stringent that the general clause.

In one of the earlier cases in the area, a member had been excluded from an economic association because she had not paid a certain fee to the association. Several other members had not been excluded despite the fact they had not paid the fee either. The Supreme Court found that the association had violated the equal treatment principle by excluding only her.[4]

1 The corresponding applies to board decisions in tenant-owners' associations pursuant to section 13, chapter 6 of the Act on Economic Associations and section12, chapter 9 of the Act on Tenant-Owners' Associations.
2 S. 14 chap. 9 Tenant-Owners' Association Act.
3 Mallmén, Lagen om ekonomiska föreningar, 3rd Ed., p 224.
4 NJA 1977 p. 393.

The fact that unequal treatment does not of itself violate the principle of equal treatment is illustrated by a case from 2009. Two members of a tenant-owner's association had obtained permission each to build a balcony whilst a third member was denied permission. In its consideration of whether there were objective grounds for the decision, the Court of Appeal held that the association had based their decision on architectural and aesthetic assessments. The third member's flat was on the uppermost storey and a balcony there would be of greater disruption because the decoration of the façade would be affected. The Court of Appeal found, therefore, that the association had shown sufficient objective grounds to treat the members differently.[5]

In a case from 1989, it was accepted that cable TV fees should be divided on the basis of an owner's share in the association, which meant that holders of larger flats paid more that holders of smaller flats, despite the fact that the benefit for all members was equally great.[6]

In a 2010 case from the Court of Appeal, the board of a newly formed tenant-owner's association decided that down payments for the tenant-owners' rights were to be determined on the basis of the rents that applied to the flats at the time of the transfer of the property.[7] Some of the flats were so called patrician flats, that, although they had not been renovated and modernised in many years, were nonetheless large in area and enjoyed high ceilings, tiled stoves and balconies. At the uppermost levels of the property were some smaller flats that had undergone renovation at the beginning of the 1990s and had then been fitted with new plastic flooring, new electrical installations and plumbing. After renovation, the rent for these flats had been raised whilst the non-renovated patrician flats remained at the same rental levels. At the time of the transfer of the property to the tenant-owners' association, seventeen years had passed since the renovation of the smaller flats had taken place and the standard was no longer particularly high. The decision of the association to determine down payments on the basis of the previous rents resulted in the smaller flats having a considerably higher down payment per square metre than the patrician flats. Two of the holders of the smaller flats claimed that the association should repay part of the down payments because they felt that the association's decision to determine down payments on the basis of rents contravened the equal treatment principle. They submitted that the market value was higher for the patrician flats with their original features and that the patrician flats were additionally significantly bigger than the other flats in the building. If the down payments had instead been decided only on the basis of the floor area of the different flats - instead of the previous rents – the down payments would have been markedly higher for the patrician flats than for the smaller flats.

The Court of Appeal in changing the ruling of the District Court, took no consideration however of the model the board had used to determine the down payments but instead concluded that the "*model had been used for all flats concerned*", i.e. no unequal treatment had taken place and stated that "*a relatively good deal of leeway must be deemed to be at hand for the board when it comes to determining the down-payments.*" The court of appeal was of the opinion that the principle of equal treatment had not been set aside.

The summer of 2015 saw a new case in which the court held that the equal treatment principle had been set aside.[8] The case concerned a tenant-owners' association in which a dispute had arisen as to how each member's share of the association was to be calculated. According to the by-laws, the annual fee was to be divided in proportion to each flat's share of the association and the decision thus acquired immediate significance for how much each individual flat should be responsible for. The two proposals were in part a share based on the flats' floor space and in part on shares in a partnership that had previously owned the property and where the right to dispose over the flats was connected to this shareholding. On a vote, the alternative of setting each member's share based on previous ownership won. This alternative was advanced in particular by one of the members whose flat under this calculation would receive a lower proportional share of the association. For other members, the decision entailed that their flats received a significantly higher proportional share. The decision also resulted in flats that had almost equally large floor areas receiving large differences in their proportional share. Two of the members brought a claim to have the decision nullified.

The court concluded that there may exist differences in annual fees per square metre without this meaning that, per definition, this will be seen to contravene the principle of equal treatment. In other words, there is some leeway within which the members must accept certain inequalities. However, the court held that the decision had meant an unequal treatment from perspective of the law of association because the burden of costs for certain members became considerably higher than for one specific member. The court held that it has not been proved that the decision was objectively justified by the association. However, the court found that it was customary, logical and for the

5 NJA 2009 p. 153.
6 NJA 1989 p. 751.
7 RH 2010:71.
8 T 6909-14.

most part appropriate that the proportional share is determined by way of the previous rental levels. However, the court was of the view that *"the existence of a previous proportional share in a partnership cannot be said to have corresponding significance for the division of an association's forthcoming costs as the proportional share in a partnership also corresponds to the partners' ownership relationship between themselves within the framework of a joint business venture."* The court found the benefit to be unjust because the computational grounds upon which it was based were not appropriate and the association had not shown any objective support for the decision.

The development of case law has long indicated that the principle of equal treatment is on the wane in the law of association. The board and the general meeting in tenant-owners' associations are granted a large degree of freedom when it comes to decisions as to how their own property is to be managed. That a decision in such questions has different effects for members is acceptable as long as it is reached on notably objective grounds. Whether or not the decision is suitable is not a matter for the court to take a view on in this type of matter. To succeed in litigation with a claim based on an incorrect application of the principle of equal treatment seems to be very difficult unless it is a question of exclusion of a member or an economic disadvantage because case law indicates that it is only in these situations that a court will make a substantive judgment on the suitability of the decision. Members who wish to challenge their tenant-owners' association in other questions ought, therefore, to consider carefully before bringing an action. Future rulings will show whether case law is facing a new change of direction after the latest ruling in the matter or if it can instead be said to set an outer limit for what can be accepted as objective grounds for unequal treatment.