Welfare, Women and Unjust Enrichment

Case 377/89 Cotter and McDermott v Minister For Social Welfare (No. 2)
[1991] IRLR 380 (ECJ)

INTRODUCTION

Two recent decisions of the European Court of Justice have demonstrated to the Irish Government that, where it has blatantly failed to implement an EC directive, it can run but it cannot hide. In Case 208/90 *Emmott v Minister for Social Welfare*, judgment of 25

July 1991, the Court flatly rejected an attempt by Ireland to rely on national provisions on time limits in order to defeat the applicant's claim taken under Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security, [hereafter the Directive], where that Directive had not been properly transposed into Irish law. In the earlier case of Case 377/89 *Cotter and McDermott v Minister for Social Welfare*, judgment of 13 March 1991, [hereafter *Cotter and McDermott (No. 2)*], which is the subject matter of this note, an attempt to invoke a novel application of the law on unjust enrichment towards the same end met with a similar fate.

In order to understand fully the Court's ruling in *Cotter and McDermott (No. 2)*, it is necessary to sketch briefly the history of Directive 79/7/EEC in Ireland. That Directive had provided for an exceptionally long six year transitional period, expiring on 22 December 1984, within which Member States were to comply with its terms. In Ireland, however, the authorities delayed until May 1986 before beginning the process of implementation, the first stage of which involved standardizing the duration of payment of unemployment benefit for men and married women and abolishing the reduced rates of certain welfare payments, including disability and unemployment benefit, payable to married women living with their husbands. [Social Welfare (No. 2) Act 1985; Social Welfare Act 1986; SI No. 173/1986—Social Welfare (No. 2) Act 1985 (Section 6) (Commencement) Order 1986].

The following November, married women living with their husbands finally became eligible for the means-tested unemployment assistance while, at the same time, the definition of 'adult dependant' in the Social Welfare code was amended so that henceforth it applied only to situations of actual dependency. [SI No. 365/86—Social Welfare (No. 2) Act 1985 (Commencement) Order 1986]. Previously a married woman living with her husband was automatically deemed to be dependent on him, irrespective of her circumstances. This last reform proved to be very controversial as it resulted in a significant reduction, in some cases by as much as IR£50 per week, in the level of welfare payments for many families. This occurred because, under the former definition, a husband on welfare could always claim dependency allowances in respect of his wife and all of their dependent children. Now, however, where the wife has income in excess of a prescribed limit (currently IR£55 per week) or is in receipt of a welfare payment in her own right, the husband cannot claim any adult dependant allowance and, furthermore, in most cases may only claim half of the appropriate child dependency allowances which would have been payable if his wife was an adult dependant.

In order to offset, at least to some degree, this reduction in welfare income, the Government introduced a system of transitional payments for the families affected by the November reforms [SI No. 422/1986—Social Welfare (Preservation of Rights) (No. 2) Regulations 1986]. Because these reforms did not affect families where the female partner only had been in receipt of welfare, the transitional payments were payable only to males claiming welfare for themselves and their dependants on the day immediately before the introduction of the amended definition of 'adult dependant'.

Various legal problems have arisen from the implementation of Directive 79/7/EEC in Ireland but we need to focus on two only of these, *viz*. first, between 23 December 1984

and mid-May 1986, Ireland continued to discriminate against married women contrary to this Directive and, in particular, failed to pay personal rates and dependency allowances to female welfare claimants on the same terms as those payable to their male counterparts; second, the system of transitional payments introduced in November 1986 amounted to the perpetuation of discriminatory treatment of female claimants who could not qualify for such payments.

THE *COTTER AND McDERMOTT* LITIGATION

These issues presented themselves in concrete fashion in the cases of Ann Cotter and Norah McDermott. Both were married women with child dependants and both had been unemployed after 22 December 1984. As a result of the failure of the State to implement the Directive on time, both women received lower personal rates of unemployment benefit, and for a shorter period of time, than their male counterparts. Nor did they qualify for the dependency allowances which were payable to their male equivalents. Finally, they did not qualify for the transitional payments introduced in November 1986 as such payments were reserved to male claimants with dependants.

On 4 February 1985, both women applied to the Irish High Court for an order challenging the legislative policy of paying unemployment benefit to married women for a shorter period of time than that applicable in the case of men or single women. In the context of those proceedings, Hamilton P in the High Court submitted two questions to the European Court of Justice for a preliminary ruling, essentially asking whether the Directive had direct effect in Ireland since 23 December 1984 so that it could be relied upon by the applicants even in the absence of implementing legislation. On 24 March 1987, the Court of Justice, following its earlier decisions in Case 150/85 *Drake v Chief Adjudication Officer* [1986] ECR 1995 and Case 71/85 *Netherlands v Federatie Nederlandse Vakbeweging* [1986] ECR 3855, answered in the affirmative—Case 286/85, [1987] ECR 1453 [hereafter *Cotter and McDermott (No. 1)*].

In anticipation of this ruling, both women had instituted a second set of proceedings in February 1987 in which they claimed, *inter alia*,

(a) unemployment benefit at the rate paid to a married man in similar circumstances for certain specified periods from 23 December 1984 onwards;
(b) increases in the appropriate rate of unemployment benefit in respect of adult and child dependants during the same periods; and
(c) payments under the transitional payments scheme introduced in November 1986.

Hamilton P delivered his judgment on these additional claims, and on the application of the ruling of the Court of Justice, on 10 June 1988—[1990] 2 CMLR 94; 141. His conclusion that the applicants were entitled to the same rate of unemployment benefit, and for the same maximum period of duration, as men in similar circumstances was hardly surprising, given the ruling of the Court of Justice. However, he dismissed the remaining aspects of the claim. In relation to the claim for transitional payments and child dependency allowances, he took the view, subsequently shown to be mistaken, that neither payment was discriminatory on grounds of sex. As for the claim for adult

dependant allowances, he applied a rather nebulous concept of 'the equity of the case' (to which we will return later) to deny the applicants' claim to such allowances where their husbands were not, in fact, actually dependant on them.

The applicants appealed to the Supreme Court where the respondents' main line of defence was to argue that to allow the claims for dependency allowances and transitional payments would offend against a principle prohibiting unjust enrichment. As the Supreme Court was uncertain whether that principle was compatible with the direct effect of the Directive, it referred certain questions to the Court of Justice for another preliminary ruling.

THE QUESTIONS REFERRED

The Supreme Court formulated the following questions for the opinion of the Court of Justice:

1. Is the ruling of the Court of Justice in Case 286/85, *Norah McDermott and Ann Cotter v Minister for Social Welfare and Attorney General* [1987] ECR 1453, whereby the Court of Justice answered the second question referred to it pursuant to Article 177 EEC by the High Court in its interpretation of the provisions of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 as follows:

> In the absence of measures implementing Article 4(1) of the directive, women are entitled to have the same rules applied to them as are applied to men who are in the same situation, since, where the directive has not been implemented, those rules remain the only valid point of reference

to be understood as meaning that married women are entitled to increases in Social Welfare benefits in respect of
(a) a husband as dependant, and
(b) a child as dependant
even where it is proved that no actual dependency existed or even if as a result double payments of such increases in respect of dependants would occur?

2. In a claim by women for compensatory payments in respect of discrimination alleged to have been suffered by reason of the failure to apply to them the rules applicable to men in the same situation, is Council Directive 79/7/EEC to be interpreted as meaning that a national court or tribunal may not apply rules of national law such as to restrict or refuse such compensation in circumstances where the granting of such compensation would offend against the principle prohibiting unjust enrichment?

Thus the issue of dependency allowances was addressed by question 1, while question 2 focused on the system of compensatory, or transitional, payments introduced in November 1986. Furthermore, a close reading of question 1 reveals the presence of two distinct issues, *viz.* first, whether the Directive demands the payment of dependency allowances even where it is shown that no actual dependency existed and, second, whether the Directive demands the payment of such allowances even if that should result in the State having to pay twice over in respect of the same dependency situation.

Both question 2 and the second limb of question 1 required the Court of Justice to consider the impact of legal principles prohibiting unjust enrichment on the Directive while the first limb of question 1 invited it to refuse to apply Article 4(1) of the Directive to situations of notional dependency.

APPLICATION OF DIRECTIVE TO SITUATIONS OF NOTIONAL DEPENDENCY

Article 4(1) of the Directive provides, in relevant part, that:

> The principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex . . . in particular as concerns . . . the calculation of benefits including increases due in respect of a spouse and for dependants . . .

The Irish Government argued that this prohibition of discrimination applied only to circumstances in which it could be shown that the person in respect of whom the increase in welfare was paid was actually dependent on the claimant. The Court had little difficulty in dismissing this argument, pointing out that the text of Article 4(1) itself encompassed increases in respect of spouses who were not dependants. As for payments in respect of dependants other than spouses, in particular children, the Court held that the Directive did not require proof of actual dependency as a prior condition for the application of the principle of equal treatment to such payments. Furthermore the Court, reaffirming its ruling in *Cotter and McDermott (No. 1)*, held that, in the absence of measures implementing Art. 4(1) of the Directive, women were entitled to have the same rules applied to them as were applied to men in a similar situation. In the instant case, married men automatically received dependency allowances without having to establish a relationship of actual dependency, prior to the reforms of November 1986, and consequently women were entitled to those increases under the same terms.

Of course, the more substantial issue raised by *Cotter and McDermott (No. 2)* was that of the potential impact of principles prohibiting unjust enrichment on the application of the Directive and it is that to which we now turn.

THE BACKGROUND TO THE 'UNJUST ENRICHMENT' PLEA

The ultimate root of the 'unjust enrichment' plea seems to be the earlier Supreme Court decision in *Murphy v A.G.* [1982] IR 241, where it was held that the impugned tax regime, which imposed a greater tax liability on married couples than on unmarried couples, was unconstitutional. Henchy J held that the liability of the State was made out on the basis of the law of Restitution: the State was unjustly enriched in the amount of the overpaid taxes and *prima facie* had to repay (at pp. 315–317). However, he denied this *prima facie* liability on the basis of the defence to restitution of change of position, to which he later referred as 'the equity of the case' (p. 321): the State had received the money in good faith, and changed its position by expending it before becoming aware of the (potential) unconstitutionality of the statute (at p. 319). He then went on to point out

that a comparable conclusion on different reasoning had been reached *inter alia* in Case 43/75 *Defrenne v Sabena* [1976] ECR 471 (at pp. 321–324). The effect of *Murphy* was to prioritize the public interest in the security of receipt of monies in the public purse, so that the retrospective effect of the holding of unconstitutionality was severely curtailed and the class of potential plaintiffs limited to those who had already begun proceedings at the time of the judgment.

As a result of the decision of the Court in *Cotter and McDermott (No. 1)* it seemed that each of the applicants was entitled to, *inter alia*, an adult dependant allowance in respect of her employed husband, notwithstanding that he was not factually dependent upon her. However, Hamilton P in the Irish High Court was motivated by similar considerations of security of the public purse to reject this claim. To that end, he referred to the passage of Henchy J's judgment in *Murphy* which quoted *Defrenne*, and proceeded to hold that he was

> entitled to have regard to what Mr Justice Henchy referred to as 'the equity of the case'.
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> The equity of this case requires that she be denied any claim for relief under this heading . . . In the circumstances it would be unjust and inequitable to pay to the applicant an adult dependent allowance, when the adult concerned, her husband, was not financially dependent upon her and it would be unjust and inequitable for the people of Ireland to pay her such increase ([1990] 2 CMLR 141, 158).

As noted above, the judgment of Henchy J in *Murphy* was predicated upon the law of Restitution, and reference to *Defrenne* was merely by way of comparative analogy. Hamilton P in *Cotter and McDermott* relied on two limbs: 'the equity of the case' and *Defrenne*. His reliance on *Defrenne* was, however, misplaced, as it is for the Court of Justice, and no other Court, to deny, or limit, the retroactivity of its rulings: see Case 309/85 *Barra v Belgium* [1988] ECR 355, Case 262/88 *Barber v Guardian Royal Exchange* [1991] 1 QB 344.

As to the invocation of the 'equity of the case', in Hamilton P's judgment, this phrase is at large, and seems almost like a mantra incanted to justify vague and undeveloped notions of justice. In *Murphy*, on the other hand, it is the defence of change of position in the law of Restitution which supplies 'the equity of the case'. Henchy J was using the principle against unjust enrichment, but Hamilton P emphatically was not. He does not canvass any of the recognized heads of 'injustice' sufficient for the law to require restitution. If he had, he would have found none to justify his holding. (This point will be returned to below).

Nevertheless, the Government seems to have assumed that since Henchy J was talking about the principle against unjust enrichment in *Murphy*, therefore Hamilton P, in following Henchy J, must also be talking about the principle against unjust enrichment in *Cotter and McDermott*. Thus by the time the notion of the 'equity of the case' had reached the Irish Supreme Court, to which the applicants appealed from the judgment of Hamilton P, his holding on this point had been transmuted into a 'principle against unjust enrichment'. In essence the Government's plea was that even if they were *prima facie* liable under Community law, the principle against unjust enrichment would provide a

defence. It is the correctness of this plea which is at issue in the second limb of question one and in question two.

THE ARGUMENTS ON THE FIRST QUESTION

The reason why anomalous excess and double payments could occur was the lack of a factual dependency requirement in the original Irish legislation, which, by virtue of the ruling of the Court in *Cotter and McDermott (No. 1)*, became the only valid point of reference for the determination of the existence of, and the calculation of, the amounts of allowances to which women in general, and the applicants in particular, would be entitled. Thus, an unemployed husband was paid increased allowances in respect of his wife and children simply because they were living with him, there being no requirement that they be actually dependent upon him. As a result of *Cotter and McDermott (No. 1)*, it seemed that an unemployed wife would now have to be given the same allowances on the same terms. Therefore, a wife would have to be paid the allowances for her husband and children simply because they were living with her. This would lead to many anomalies, including the following:

(i) where both husband and wife were in receipt of welfare payments covered by the Directive, each would now be entitled to the increased allowance in respect of the other (the facts which constituted double payment),

(ii) in such a situation, the husband would be entitled to an allowance in respect of any children, and his wife would also be entitled to an allowance in the same amount,

(iii) where the wife was in receipt of such a welfare payment, but her husband was employed, she would now nevertheless be entitled to the increased allowance in respect of her husband (the facts upon which Hamilton P applied 'equity' to deny the claim).

However, the Irish Government sought to argue that where double payments would occur, '[s]uch payments would be manifestly absurd and would infringe the prohibition on unjust enrichment laid down by national law' (para. 20).

THE FIRST QUESTION AND 'UNJUST ENRICHMENT'

The Court gave short shrift to this argument, holding that 'to permit reliance on that prohibition would enable the national authorities to use their own unlawful conduct as a ground for depriving Article 4(1) of the directive of its full effect' (para. 21). This constitutes the core of the rejection of the Government's plea that the principle against unjust enrichment provides it with a defence to the applicants' claims, since it is widely enough stated to cover all of the anomalous situations outlined above. This is fully consonant with the principle of supremacy of Community law so recently and ringingly endorsed by the Court in *Factortame*, (Case 213/89 *R. v Secretary of State for Transport, ex p. Factortame* [1990] 3 WLR 818). Any absurdity which would arise is one which is referable only to the Government's failure to implement the Directive properly in the

first place. In effect, therefore, the Government sought to rely on a result which occurred only because of the discriminatory drafting of the original legislation as a reason to evade the results of that discrimination. It would have been ironic in the extreme had this plea been successful, and, of course, it failed.

Thus, in reply to the first question referred to it, the Court held that Article 4(1) must be interpreted as meaning that if 'married men have automatically received increases in social security, married women without actual dependents are entitled to [the increases in their allowances] even if in some circumstances that will result in double payment of the increase' (para. 22).

THE SECOND QUESTION AND 'UNJUST ENRICHMENT'

The second question was interpreted by the Court as asking it to consider the effect of the anomalies which arose as a result of the introduction of the transitional compensatory payments for men who lost out by virtue of the implementation of the Directive. Since the Directive 'does not provide for any derogation from the principle of equal treatment laid down in Article 4(1)' (para. 24), any such benefit payable to the husband after the date from which the Directive acquired direct effect must also be payable to the wife.

Citing Case 80/89 *Dik v College van Burgemeester en Wethouders* [1988] ECR 1601 the Court affirmed that the 'belatedly adopted' transitional measures must 'fully respect the rights which Article 4(1) has conferred on individuals in a Member State from the expiry of the period allowed to the Member States for complying with it' (para. 25). Therefore, as with the dependency requirement in question one, the Court reiterated that since any 'unjust enrichment' would flow from the Government's prior 'unlawful conduct', the Government could not rely on such a principle of national law. Again this is an unsurprising reiteration of the doctrine of supremacy.

The Court therefore held that Article 4(1) of the Directive 'must be interpreted as meaning that where a Member State has included in the legislation intended to implement that article, adopted after the expiry of the period allowed by the directive, a transitional provision providing for compensatory payments to married men who have lost their entitlement to an increase in their social security benefits in respect of a spouse deemed to be dependent because actual dependency cannot be shown to exist, married women in the same family circumstances are entitled to the same payments even if that infringes the prohibition on unjust enrichment laid down by national law' (para. 27).

In other words, the liability of the Government to accord equal treatment to women under the transitional payments, like its liability to treat women equally under the old legislation, was affirmed. Further, it was no defence to this liability that in some situations the applicants might receive anomalous payments similar to those outlined above as arising from the original legislation, and thereby by 'unjustly enriched'.

THE PRINCIPLE AGAINST UNJUST ENRICHMENT

Throughout, it seems to have been assumed that, if the Court had held that the

Government was entitled to rely on the principle against unjust enrichment, then this principle would afford the Government a complete defence. It is by no means clear that this is the case. The principle against unjust enrichment requires that if the defendant is unjustly enriched at the expense of the plaintiff, then the defendant must make restitution to the plaintiff. The way in which the Government sought to make use of this principle was, to put the point charitably, novel. Its function is to allow recovery of money or other benefits; whereas, in *Cotter and McDermott (No. 2)* the Government sought to use it, paradoxically, to defeat the applicants' claim! It is difficult to see how any payment on the part of the State to the applicants could be classified as 'unjust' as understood by the law of Restitution. It is therefore submitted that the principle against unjust enrichment at Irish law would not have provided a ground to the Government upon which they could claim back any payments made, and which would therefore provide a defence in an action for the allowances.

The only possible application of the principle in this case is to support the applicants' claim. It has long been recognized that an action for restitution would lie for money paid in breach of Community law: Case 6/60 *Humblet v Belgium* [1960] ECR 559, 569. The majority of the leading cases have fact patterns which disclose an applicant seeking to recover money which had been paid on the basis of a tax which was imposed in breach of Community law. Procedural time bars or impossible standards of documentary evidence will not be permitted to defeat this *prima facie* right. See for example: Case 68/79 *Hans Just v Danish Ministry for Fiscal Affairs* [1980] ECR 501, Case 199/82 *State Finance Administration v San Giorgio SpA* [1983] ECR 3595, Cases 331, 376 and 378/85 *Bianco* [1988] ECR 1099, Case 104/86 *Re Illegal Taxes; Commission v Italy* [1988] ECR 1799, and *Emmott.* (*supra*).

Thus since the Government withheld money from the applicants in breach of Community law, and thereby had been unjustly enriched, the Government is liable to make restitution to the applicants, and not, as the Government sought to argue, *vice versa.*

CONCLUSION

The outcome of *Cotter and McDermott (No. 2)* is scarcely surprising. The ruling that the applicants were entitled to the transitional payments followed ineluctably from earlier decisions of the Court of Justice in Case 384/85 *Borrie Clark v Chief Adjudication Officer* [1987] ECR 2865 and Case 80/87 *Dik v College van Burgemeester en Wethouders* [1988] ECR 1601 and, indeed, had been anticipated by the Irish High Court in *Carberry v Minister for Social Welfare*, (28 April 1989, unreported). Nor were the arguments employed by the Irish Government to defeat the claim for dependency allowances very convincing. Furthermore the refusal of the Court to entertain arguments about unjust enrichment may be seen as an application of the principle of supremacy of Community law, for to have ruled otherwise would have been to recognize the possibility of principles of national law being used to impair the impact of Directive 79/7/EEC in Ireland.

On 6 June 1991, it was announced that the parties to *Cotter and McDermott (No. 2)* had settled the dispute and so attention now focuses on the 40,000 or so other married women

who were paid discriminatory rates of welfare between December 1984 and November 1986 and who have been denied access to the system of transitional payments ever since. Irish lawyers have instituted proceedings on behalf of approximately 2,000 such women while the European Commission has written to the Irish Department of Social Welfare as a first step leading to the possible institution of infringement proceedings under Article 169. There can be little difficulty in establishing the entitlement of such women to arrears of social insurance payments and to the transitional payments and in quantifying this entitlement. The same cannot be said about their entitlement to means-tested payments, especially unemployment assistance. In particular, it will be very difficult retrospectively to assess a claimant's means and to determine whether she satisfied the other conditions of eligibility for this payment. However these practical difficulties may not be sufficient to absolve the Government from liability to pay arrears of unemployment assistance. In both the instant case and *Emmott* the Court of Justice has clearly signalled that it has little sympathy for the Irish Government in the predicament in which it finds itself under the Directive. Furthermore in Case 31/90 *Johnson v Chief Adjudication Officer*, judgment of 11 July 1991, the Court held that Article 4 of the Directive could be invoked in order to set aside national legislation which makes entitlement to a benefit subject to the previous submission of a claim in respect of a different benefit which has since been abolished and which entailed a condition discriminating against female workers. It can surely be argued, therefore, in the Irish context, that married women cannot be denied arrears of unemployment assistance simply because they did not apply for that particular payment at a time when they were not eligible under discriminatory national law to receive it.

Despite the success of *Cotter and McDermott (No. 2)*, there is still cause for concern. The Department of Social Welfare has estimated that proper implementation of the Directive may cost in the region of IR£200m. Given the recurrent claims of economists that public expenditure in Ireland is once more out of control, it is at least very possible, one could even say, probable, that full implementation of the Directive will be financed by cuts in other aspects of social welfare. At what price, then, will we have achieved equality if it is associated with a worsening of the position of the welfare population as a whole?

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