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SOCIAL SECURITY Reporter

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Including Student Assistance Decisions

Opinion

Good faith

Part 5.4 of the *Social Security Act 1991* (the Act) sets out those circumstances in which an overpayment, which would otherwise be a debt due to the Commonwealth, must or may be waived. In particular section 1237A(1) provides:

> **1237A.(1)** Subject to subsection (1A), the Secretary must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Commonwealth if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt.

The 'good faith' criterion was discussed at length in the Federal Court decision *Secretary to the DEETYA v Prince* (1997) ALR 127; (1998) 3(3) *SSR* 37 in the context of a similar provision in the *Student and Youth Assistance Act 1973*. In that case, a student continued receiving AUSTUDY payments after he had cancelled his entitlement. For a time, he was unaware that the payments had been credited to his account. After becoming aware of the continuing payments, he made several attempts to notify DEETYA of the problem.

Finn J considered that Prince's lack of knowledge of the continuing payments could not constitute good faith. It was clear that Prince was aware that he was not entitled to any further payments and therefore he could not be said to have received them in good faith. Finn J said:

> The section asks that a quite specific question be addressed: was the payment *received* in good faith? It is quite unconcerned, for example, with whether, after 22 December, Mr Prince *acted* in good faith towards DEETYA. Its sole concern is with whether a particular state of affairs exists at the time a payment (or payments) is received ...
>
> For my own part, I consider the burden of the formula in the s 289 setting to be obvious enough. Its concern is with the state of mind of a person concerning his or her receipt of the payment: **if that person knows or has reason to know that he or she is not entitled to a payment received** — ie is not entitled to use the moneys received as his or her own — that person does not receive the payment in good faith. Absent such knowledge **or reason to know**, the receipt would be in good faith. (Emphases added)

The words used by Finn J 'reason to know' have effectively been relied upon to narrow the focus of the 'good faith' test. (See for example, *Secretary to the DSS and Abeyratne* (1998) 3(5) *SSR* 64, *Webb and Secretary to the DSS* (1998) 50 ALD, *Bestel and Secretary to the DFaCS* (1999) decided 18 November 1999.) In *Falconer and Secretary to the Department of Social Security* (1996) 41 ALD 187, the AAT adopted the following test:

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> I take the view that 'received in good faith' in the context of section 1237A(1) of the Act refers to receipt of the payment by the debtor in circumstances without notice of any irregularity which is contrary to the Act.

The issue arose in *Haggerty and Secretary to the DETYA* (1999) decided 5 November 1999. The AAT held in that case that a student had not received AUSTUDY in good faith because his sister, who was living with him in a family home, had applied for AUSTUDY at the same time and was rejected on the basis of actual means. The Tribunal was satisfied that 'there was reason for the applicant to know that he was not eligible for AUSTUDY payments as well as reason for him to make further inquiries'. The want of good faith was drawn from the findings that:

- there was concern and puzzlement within the family about entitlement;
- the situation was so unusual that Mr Haggerty snr had contacted the Department seeking to know why one child's application had been rejected and another accepted;
- the circumstances were such that the applicant had reason for concern;
- Haggerty had theories about the possible reasons for the decision to grant AUSTUDY to him and not his sister and had put his mind to the discrepancy;
- there was sufficient reason for Haggerty to have made an enquiry to clarify the situation.

Haggerty's evidence had been that he believed the different outcome for his own AUSTUDY application and that of his sister had been due to their age difference and differences in the courses of study they were undertaking.

It was argued in the Federal Court appeal that the AAT's finding, that Haggerty had sufficient reason or concern to make further enquiry to clarify the situation, was not sufficient in law to amount to a lack of good faith. The AAT had failed to make sufficient findings about Haggerty's actual state of mind regarding the receipt of the payments and had instead placed undue weight on the view of his family members.

The Federal Court accepted these submissions. French J looked to the words used in *Prince* and stated:

> I do not take what his Honour said in that case as supporting the proposition that a person can be found to be receiving payments other than in good faith simply by reason of the fact that there are facts in existence which are known to the recipient to negative the recipient's entitlement. In my opinion that is not a sufficient criterion. Knowledge of relevant facts is not enough to generate reason to know of the lack of entitlement.
>
> The criterion of receipt in good faith may be characterised as a positive one as counsel for the respondent submitted. That is not to say that a recipient of a mistaken payment must prove that he or she has considered the entitlement to the money and positively concluded that there is an entitlement. There is no question of an onus here to be met by the recipient who claims benefit of the mandatory waiver. Nor is there some twilight zone between good faith and want of good faith. A waiver can only, in my opinion, be declined where there has been a receipt, without good faith, of moneys mistakenly paid ...
>
> Consistently with what his Honour said in the *Prince* case, want of good faith will arise where there is a suspicion held by the recipient that he or she may not be entitled to the payment made or a doubt as to the entitlement coupled with some objective basis for such suspicion or doubt. The provision does not, however, authorise the imputation of want of good faith in any of the senses above described simply because there are in existence objective facts which would raise a belief or a doubt or a suspicion of non-entitlement in the mind of some imaginary recipient. That proposition is quite consistent with the view that the existence of such facts may support an inference that the recipient disbelieved or doubted or was suspicious about his or her entitlement. 'Reason to know' as Finn J used that term in *Prince* does not necessarily import a criterion of imputed as distinct from actual want of good faith as I have described it.

Thus, the decision affirms that the good faith criterion is a subjective test, which requires a positive finding as to the state of mind of the recipient of the overpayment. Objective evidence may be looked to as supporting evidence for a finding on that issue, but such objective evidence cannot be used to conclude there is a want of good faith on the basis of what a reasonable person might have done or believed in response to such information. Further 'concern, puzzlement, upset and a perception of unusual circumstances, coupled with an absence of further enquiry', are not enough in themselves to constitute want of good faith. However, it is clear that a more positive finding, that there has been 'a degree of wilful blindness' (*see Mallows and Secretary to the DSS* decided 12 September 1997), for example, will support a conclusion that there has been a want of good faith.

[A.T.]

Administrative Appeals Tribunal Decisions

Notice of decision: formal requirements

SECRETARY TO THE DFaCS and PLUG
(No. 2000/744)

Decided: 25 August 2000 by O'Connor J, R.D. Fayle and S. McKnight.

Background

Plug was receiving family allowance of $299.45 a fortnight when she separated from her husband in January 1996. She advised the DSS that she was receiving private maintenance of $100 a fortnight. On 23 January 1996 she was notified by letter that the rate of family allowance would reduce to $277.95 a fortnight from 1 February 1996 because her maintenance had changed, and that she must advise if the amount of maintenance she received changed.

On 6 March 1996 Plug notified the DSS that she and her husband had reconciled. She also applied for a parenting allowance and later provided full details about her husband. On 26 March 1996 a letter was sent to Plug advising that family allowance would be paid at $246.45 a fortnight from 11 April 1996, and the amount was lower because she was no longer eligible for guardian allowance. It did not explain that maintenance of $100 a fortnight was still taken into account in calculating the rate.

On 7 July 1997 the DSS wrote to Plug stating that the Child Support Agency had worked out that she should get at least $124.33 a month as child support, but 'as you are getting at least this amount you do not have to do anything further'. Plug did not contact the DSS to query that letter.

Centrelink advised Plug on 16 March 1998 that her family allowance would be paid at $264 a fortnight (effective from 12 March 1998) 'because you are now getting more Rent Assistance'.