CLIFTONHALL

Deposits, Gift Cards and Lay-bys – Where do you stand when a liquidator is appointed?

Creditors come in all shapes and sizes. As well as finding suppliers owed money in our appointments, we often find claims for unreturned deposits, incomplete lay-bys and unused gift cards.

But where do these claims rank in an administration or liquidation? Unfortunately they are all treated as unsecured creditors, but sometimes there are options to improve the return from the liquidation or avoid being caught up in the first place.

Deposits

Paying a deposit is often a pre-requisite to arrange a specific item to be ordered or to enable the manufacture of goods. Unfortunately, in the event that the recipient is experiencing cashflow or solvency issues, the deposit funds are normally mixed and then used for general operating expenses. It can then become difficult for the customer to exert any influence to be refunded their deposit or to have the goods ordered.

This was certainly the case with a caravan retailer we were appointed to deal with. In this matter, many of the deposit holders were asked to pay further funds to ensure their new caravan could be delivered, with the funds never used for their intended purpose.

Adding to the financial pain for many customers was that they had also left their old caravan with the retailer on consignment, together with signed registration papers, only to find that their caravan had been sold and the funds mixed or spent.

In a similar situation earlier this year, 80 customers were owed $1.5m in deposits when Gidget Retro Teardrop Campers went into voluntary administration. You can read more about it here.

Trust accounts can provide protection to parties paying deposits, given the very technical and legal requirements around the operation of such accounts. There are requirements for operators in certain industries, such as auctioneers and solicitors, to have trust accounts. However in many industries it is not mandatory, and their use brings with it regulatory and cost burdens.

A number of parties were unwittingly caught out in one of our appointments earlier this year due to unintended confusion over the account they paid their deposit into. The company in question, XYZ, traded a function centre through a trust, XYZ Trust. With the bank account for the function venue (unintentionally) styled as 'XYZ Trust Account', it lead some parties to believe they were paying into a proper trust account with the associated protections. Unfortunately this wasn't the case and the funds were used for general trading as XYZ attempted to deal with its solvency issues.

Gift cards

With Christmas just around the corner, many of us will choose the gift card option for presents. Australians collectively spend about $2 - $2.5 billion a year on gift cards – but in 2017 we also wasted $70 million in unredeemed (or partially unredeemed) gift cards.

Recent changes to certain store gift cards and gift cards generally in some states have the seen the removal or extension of expiry dates. While consumers will therefore have more flexibility on when to redeem, the lack of urgency makes it even more likely that cards will be lost or forgotten. And of course inflation will slowly see the purchasing power of gift cards reduce over time.

But what if you are left holding a gift card upon the insolvency of a retailer? Gift cards have been a hot topic in the last couple of years with the collapse of a number of high profile retailers such as Dick Smith, Pumpkin Patch, and Toys R Us. In some of those administrations (including Toys R Us), the appointee agreed to allow gift cards to be redeemed where the consumer spent an equivalent cash amount to value of the gift card. This is however not a legal requirement, and will depend on the circumstances and long-term trading prospects of the particular administration.

Lay-bys

The traditional store lay-by is slowly being replaced by third party providers (such as Afterpay) who provide the option to buy now and pay later.

We still see some retail appointments with lay-by schemes in place, although in smaller stores these are more akin to a deposit. But what can be done if the lay-by is incomplete when an administrator or liquidator is appointed?

It will usually be a commercial decision for the appointee – if the goods are on hand (and not subject to specific claims to title by a supplier) the appointee will often allow the lay-by balance to be paid, if it exceeds the likely discounted sale options for the subject goods. Similarly if the amount owing on the lay-by allows for the appointee to still make a sufficient margin on the sale to benefit creditors generally, the appointee (if trading the business) may still order the goods in question.

Is there any protection?

As set out above, once an administrator or liquidator is appointed, there is often little joy for those that have paid deposits, lay-bys or purchased gift cards. If payments were made on a credit card, some cards provide insurance cover in the event that goods or services purchased on the card are not provided.

Deposit holders may receive the benefit of trust account protections, provided the funds have been properly dealt with.

Otherwise, it is unfortunately a simple case of undertaking research and using common sense. In our caravan retailer example, the business had particularly untidy premises and seemingly poor systems in signing up customers. These certainly rang alarm bells with us, but unfortunately not with enough customers.

If the intended deposit is large enough to warrant it, purchasing a credit report on the business or at least some internet research may assist in flagging potential problems that may put the deposit at risk.

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