

Evans v Davantage Group Pty Ltd [2019] FCA 884

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Facts

- This was a class action, with Evans representing the class of applicants.
- Between 1 July 2013 and 28 May 2015, Davantage Group Pty Ltd ("**Davantage**") issued financial products in the form of motor vehicle warranties.
- On 23 August 2014, Evans purchased a vehicle for \$17,295.00. Evans entered into a warranty agreement with Advantage and paid \$1,895.00. Approximately 26,000-28,000 other people purchased similar warranties for their respective motor vehicles.
- Clause 11.1 of the warranty, self-described as a "discretionary risk product", granted Davantage the absolute discretion as to whether it would pay any claim, in part or in whole or at all, or make a contribution to that claim. The only limitation was that the discretion had to be exercised in a "fair or just way".
- Evans brought a claim against Davantage, claiming that:
 - the warranty fails as an agreement for lack of consideration from Davantage;
 - Davantage engaged in unconscionable conduct under s 12CB of the ASIC Act due to cl 11.1; and
 - Cl 11.1 is an unfair term within the meaning of s 12BF(1)(a) of the ASIC Act and inseverable such that the warranty is void.

Issues

- Is a contractual promise in a "discretionary risk product" illusory?

Held

- Beach J of the Federal Court held that the warranty was illusory.
- The overriding discretion of cl 11.1 imposed no actual obligation on Davantage. The words "fair or just" were determined to be vacuous - they did not have any real substantive effect on Davantage when considering a claim.
- The general principle of an illusory promise, per Kitto J in *Placer Development Pty Ltd v Commonwealth* is "...It is that whenever words which by themselves constitute a promise are accompanied by words showing that the promisor is to have a discretion or option as to whether he carry out that which purports to be a promise, the result is that there is no contract on which an action can be brought at all..."
- There were no circumstances under which Davantage would be legally obligated to pay the applicant for any claim - the terms of cl 11.1 were held to be completely unfettered which rendered the promise to pay by Davantage as illusory.

Quotes

"Ultimately, the respondent's attempts to construct even a peppercorn from the language of cl 11.1 are unpersuasive. Moreover, even if I were to accept the respondent's contention that a discretion is only illusory when unfettered, the respondent's promises to pay under the Applicant Warranty, in substance, are to be regarded as unfettered. **The overriding discretion reserved to the respondent qualifies its promise to pay consumers to such a substantial extent that it renders the promise illusory.** The effect of the overriding discretion in cl 11.1 is that there is no circumstance in which the respondent may be legally obligated to pay money to the applicant."

(Beach J at [111])

Full Text

The full text is available here:

http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2019/884.html?context=1;query=Evans%20v%20Davantage;mask_path=

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