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SFC Suspends Andrew Nicholas Barber for Unsuitable Investment Advice

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The Securities and Futures Appeals Tribunal (SFAT) has affirmed an SFC decision to suspend the licence of Mr Andrew Nicholas Barber. The SFAT has reduced the length of the suspension after Barber put forward important new evidence at the hearing.

Barber was a deemed licensed representative and responsible officer of Barber Asia Limited (Note 1).

Background

On 17 June 2003, a judgment was entered against Barber Asia Limited (BAL) in the civil proceedings that one of its clients, Ms Susan Field, had brought against the firm. BAL was held liable in negligence for losses suffered by the client. The Court of First Instance in those proceedings concluded that Barber had negligently advised the client, causing her financial loss.

The subject matter of the civil suit was an investment product known as a "Loan and Guarantee Scheme", which the client entered into in reliance on Barber's advice in August 1998. The scheme involved the client gearing her original investment by assigning it to a lender as security for a loan, the proceeds of which would be used to acquire another investment, which would also be assigned to the lender as security for the loan. The essence of the scheme was a borrowing in Japanese Yen for investment in Pounds Sterling, and a gearing factor of 2.5 times being applied to the client's original investment. Following a substantial appreciation of the Yen, the client was required to make additional margin payments (i.e. to provide extra collateral to secure the gearing loan). When the client decided to close out her whole position in early December 1999 after repeated margin calls, she received back less than a quarter of the value of her original investment.

On the basis of the Court of First Instance judgment, and having taken into account detailed representations submitted on Barber's behalf before and after the dismissal by the Court of Appeal in September 2004 of BAL's appeal against the Court of First Instance judgment, the SFC found that the negligent advice Barber gave his client had called into question his fitness and properness.

Review by the SFAT

The SFC decided to suspend Barber's licence for six months in September 2004. Barber appealed to the SFAT. Taking into account new oral and documentary evidence put forward by Barber, which he had not submitted during the civil proceedings in the High Court or the SFC disciplinary proceedings, the SFAT reached factual findings which are different from those of the Court of First Instance, the Court of Appeal, and the SFC and which are more favourable to Barber.

The SFAT held that Barber had been insufficiently diligent in explaining to his client the downside risks of the investment he had introduced, and that he had failed to properly assess the suitability of this investment to this particular client. However, in view of the new factual findings, the SFAT reduced the length of the suspension to one month (Note 2).

The SFAT's Reasons for Determination confirm that express warnings on the face of the investment product documentation do not absolve an investment adviser from their duty to properly explain the risks involved to the client. Although the SFAT accepted that Barber had gone over the documentation with the client, the Code of Conduct for Persons Licensed by or Registered with the SFC requires an investment adviser, when providing services to a client in derivative products, including futures contracts or options, or any leveraged transaction, to assure themselves that the client understands the nature and risks of the products and has sufficient net worth to be able to assume the risks and bear the potential losses of trading in such products.

The SFAT also rejected Barber's argument that the fact that the client concerned was an "Execution Only" client (Note 3) was in itself sufficient to divest the investment adviser of responsibility for any advice given.

Mr Alan Linning, SFC's Executive Director of Enforcement, said: "Substandard investment advice

remains an enforcement priority. The SFAT decision has confirmed that breaches of the diligence and suitability requirements under the Code of Conduct deserve serious sanctions. The Code of Conduct requirements of diligence and suitability apply whenever a licensee makes a recommendation or solicitation, including where the client is an "Execution Only" client. In appropriate cases, the Securities and Futures Ordinance now also empowers the SFC to fine people guilty of mis-selling."

A copy of the SFAT's Reasons for Determination is posted on the SFAT's website (<http://www.sfat.gov.hk>).

Ends

Notes to Editors:

1. Barber Asia Limited's licence was suspended under section 195(1)(d) of the Securities and Futures Ordinance (SFO) in July 2004 after it notified the SFC that, after losing the appeal in *Susan Field v Barber Asia Limited*, its liquid capital had fallen short of the required liquid capital under the Securities and Futures (Financial Resources) Rules. Neither BAL nor Barber applied for a full licence under the SFO, and their deemed licences expired on 31 March 2005. Although the SFC no longer has disciplinary jurisdiction over Barber and so the suspension will have no formal effect, the SFC will consider the suspension decision and the grounds for it, should Barber ever reapply for a regulatory approval, e.g. a licence.
2. The SFAT ordered each party to pay his/its legal costs.
3. Barber emphasised that Ms Field was an "Execution Only" client, i.e. where no advice was contracted for, and BAL would merely execute the client's instructions to buy, sell, subscribe or redeem the investment products.

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