

# Court of Appeal Upholds SFAT Ruling regarding the SFC's Decision to Suspend Andrew Nicholas Barber for Mis-selling

13 Sep 2006

The Court of Appeal today dismissed an appeal by Mr Andrew Nicholas Barber against the decision of the Securities and Futures Appeals Tribunal (SFAT) dated 30 June 2005. In that SFAT decision, the SFAT affirmed the SFC's decision to suspend Barber's licence for giving unsuitable investment advice, but reduced the period of suspension based on the new evidence adduced by Barber at the SFAT hearing (Note 1).

The Court of Appeal, comprising Mr Justice Stock JA, Madam Justice Yuen JA and Mr Justice Burrell, unanimously dismissed Barber's appeal and awarded costs to the SFC. The Court made important rulings regarding the duty of an investment adviser.

## Civil proceedings against Barber Asia Limited

On 17 June 2003, in a civil action commenced by Ms Susan Field against Barber Asia Limited (BAL), the Court of First Instance (CFI) decided that BAL had, through Barber, given negligent investment advice to Ms Field (Note 2). The CFI awarded damages to Ms Field and decided that BAL owed Ms Field a tortious duty of care to act with reasonable skill and care when giving investment advice and BAL had breached its duty by, among other things, recommending a high risk investment strategy to Ms Field when she, being an inexperienced investor, had previously stated to Barber that she desired a conservative risk strategy (Note 3).

BAL appealed to the Court of Appeal against the CFI's decision, but the Court of Appeal unanimously dismissed the appeal on 15 July 2004 (Note 4).

## Disciplinary proceedings against Barber

In view of the findings in the CFI judgment as affirmed by the Court of Appeal in the civil proceedings, the SFC considered that Barber's fitness and properness as a licensed person had been impugned by giving negligent investment advice to Ms Field. On 3 September 2004, the SFC issued a decision to suspend Barber for six months. On 27 September 2004, Barber lodged an appeal to the SFAT against the SFC's decision.

At the SFAT hearing, Barber submitted new evidence which had not been previously submitted to the SFC or the courts in civil proceedings. On 30 June 2005, the SFAT handed down its determination. The SFAT arrived at factual findings which were different from those of CFI in the civil proceedings. The majority of the SFAT agreed with the SFC that Barber had been insufficiently diligent in explaining and amplifying to Ms Field the downside risks of the investment scheme and failed to assess properly the suitability of the investment to Ms Field. However, in view of the new factual findings, it decided to reduce the period of suspension from six months to one month (Note 5).

## Court of Appeal's ruling

On 28 July 2005, Barber lodged an appeal against the SFAT's decision on the ground that, in view of the new factual findings, the SFAT should not have reached the decision to suspend him. He, among other things, argued that he had already gone through the documentation of the investment scheme with Ms Field.

The Court of Appeal decided that the majority of the SFAT was fully entitled to suspend Barber. The Court considered that it was insufficient for Barber to present an investment product to Ms Field and talk her through the documentation because an investment adviser was not merely an agent or product marketer. As an independent investment adviser, Barber had the duty to diligently assess the suitability of the investment for the particular client and to ensure that she was properly informed of the risks. The Court also considered that an investment adviser not only needed to show the potential gains that might be generated by the investment product in question, he must also emphasise the potential losses that could result from the product, so that the client could make an informed decision as to whether she could afford the risks involved and whether she was prepared to

take the risks in light of her investment objectives.

Mr Eugène Goyne, an SFC Senior Director of Enforcement, said: "The SFC welcomes the Court of Appeal's decision. The Court of Appeal reaffirms the importance of the twin requirements of "diligence" and "suitability" in the context of giving investment advice. Investment advisers will not be able to discharge their duty by merely showing their client all the documentation and referring the clauses in it to the client. They must do more than that and use their professional judgement to diligently assess whether the proposed investment product is actually suitable on reasonable grounds for the client after considering the client's financial means and investment objectives. It is also not enough for them to only show the potential gains to the client. They must emphasise to the client all the known potential risks involved in the investment and ensure that the client understands the nature and risks of the investment product so that the client can make an informed investment decision."

"The investment advising industry should view this case as a strong warning of the standards expected of them in Hong Kong and revise their practices to ensure that they meet those standards. The SFC will continue to take action against those investment advisers who mis-sell products to clients," Mr Goyne added.

Ends

Notes:

1. Please see SFC press release dated 4 July 2005 for details of the SFAT's decision. [A copy of the Court of Appeal judgment \(Civil Appeal No. 236 of 2005\)](#) is attached for your reference and will be available on the Judiciary's website at [www.judiciary.gov.hk](http://www.judiciary.gov.hk).
2. A copy of the CFI judgment (HCA No. 7119 of 2000) is available on the Judiciary's website.
3. Please refer to the press release dated 4 July 2005 for details of the investment scheme recommended by Barber to Ms Field.
4. The Court of Appeal handed down its reasons for judgment (Civil Appeal No. 194 of 2003) on 1 September 2004. A copy of the reasons for judgment is available on the Judiciary's website.
5. The SFAT determination (SFAT No. 12 of 2004) is available on the SFAT's website at [www.sfat.gov.hk](http://www.sfat.gov.hk).

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