Application No. 12 of 2004

IN THE SECURITIES AND FUTURES APPEALS TRIBUNAL

IN THE MATTER OF a Decision made by the Securities and Futures Commission under section 56 of the Securities Ordinance, Cap. 333

AND IN THE MATTER of section 217 of the Securities and Futures Ordinance, Cap. 571

BETWEEN

ANDREW NICHOLAS BARBER Applicant

and

SECURITIES AND FUTURES COMMISSION Respondent

Tribunal: Hon Mr Justice Stone, Chairman
Mr FONG Hup, Member
Dr KWOK Chi Piu, Bill, Member

Dates of Hearing: 11 - 13 January 2005

Date of Determination: 30 June 2005

DETERMINATION

The application

1. This is an application by Mr Andrew Nicholas Barber, lodged herein on 27 September 2004, for a review of the decision of the Securities and Futures Commission wherein, by its Notice of Decision and Statement of Reasons issued on 3 September 2004, the SFC communicated its Decision to suspend Mr Barber's registration and licence as an investment adviser for a period of six (6) months.

2. This decision was made pursuant to the powers of the SFC under section 56 of the Securities Ordinance, Cap.333, which powers remain exercisable after 1 April 2003 pursuant to sections 64 and 65 within Part 1, Schedule 10 of the Securities and Futures Ordinance, Cap.571.

3. Mr Barber is dissatisfied with, and aggrieved by, this decision. Hence these proceedings.

The background

4. This case is somewhat out of the ordinary in that the action of the SFC has been taken upon the basis of that which has happened in the civil courts of Hong Kong, and absent independent investigation on the part of the SFC. We should, therefore, briefly sketch the events which caused this situation to come to pass.

5. Mr Barber has an extensive background in financial services.

6. His *curriculum vitae* shows that after resigning his commission in the British army in 1984 he held a number of positions with financial institutions, be they banks or advisory bodies, prior to setting up, in June 1995, his own company, Barber Asia Limited, of which at the material time he was Managing Director.

7. Barber Asia Ltd was at the material time, and remains, a private client investment advisory company.

8. In or about May 1997 Mr Barber was introduced by a mutual friend to a lady by the name of Ms Susan Field.

9. Ms Field was, and remains, a successful business woman in Hong Kong : she is the Managing Director and majority shareholder of her own company, The Impact Group Ltd, specializing in the field of marketing and communications, which she established in 1997 in succession to her earlier business within the like field, Susan Field & Associates.

10. Although she was expert in her own discipline, Ms Field did not have much experience in investment. As she began to accumulate some wealth her attention turned to the future, and the necessity, as she perceived it, to invest the monies she had earned rather than simply retaining her assets in the bank.

11. Although she had had an initial ‘official’ meeting with Mr Barber in June 1997 in order to discuss possible investment with his company, wherein personal information and investment aims were canvassed, nothing further occurred in terms of investment activity until March 1998; by this time it is not disputed that a friendship had been formed, and Ms Field had become comfortable with the idea that she should pursue investment with Mr Barber and/or his company.

12. In fact, through Mr Barber she initially decided to invest her capital in a life assurance product offered by Old Mutual Hong Kong; this consisted of investment in a portfolio of different overseas funds under the global product name of 'Alpha Capital Investment Plan'.

13. Some GBP190,000 was thus invested in April 1998 in conservative and relatively low risk funds within this plan. Had matters stayed thus, this case would not have seen the light of day. The investment which subsequently occurred, however, and that which Ms Field maintains was made on the advice of Mr Barber, constitutes the genesis of the present application.

The investment in question

14. In mid-1998 Ms Field was introduced by Mr Barber to a new investment product, a 'Loan and Guarantee Scheme' which was being offered by N.M. Rothschild & Sons (C.I.) Limited, which in turn involved a geared investment in a policy offered by a well-established insurance company, Scottish Life International.

15. That which was to happen under this scheme was that Ms Field's existing investment with Old Mutual (then worth

approximately GBP187,000) would be assigned to Rothschilds as security for a loan, the proceeds of which would be used to acquire an investment in a Scottish Life policy, which would also be assigned to Rothschilds as security for the loan.

16. The key to this scheme was that the loan was to be denominated in yen, which could be taken out at a low rate of interest, and the loan proceeds would be converted into sterling, a higher yielding currency, and thereafter remitted to Scottish Life for investment in their 'International Secure Investment Portfolio' using the 100% Capital Protected Deposit Bonus Fund.

17. Shorn of detail, therefore, the essence of this scheme was a borrowing in yen for investment in sterling, the financial mix being spiced by a gearing factor of 2.5 times applied to the value of the existing Old Mutual investment.

18. By 17 August 1998 Rothschild had approved a loan facility for Ms Field of some 110 million yen, which was equivalent to GBP461,913.16 at the then prevailing yen/sterling exchange rate of 238.14 yen to the pound, and had effected a drawdown of slightly more than 107.5 million yen by remitting

its sterling equivalent of GBP451,500 to Scottish Life to be invested in the Scottish Life investment product.

19. Other things being equal, this perhaps may not have turned out to have been a bad investment. The difficulty, however, is that in the world of foreign exchange the element of constancy in exchange rates is often elusive.

20. Unfortunately, from the point of view of investors in this scheme, including Ms Field, the worst possible scenario soon began to unfold. Shortly after the loan drawdown, the yen began to appreciate very considerably upon the international money markets.

21. The result of this appreciation of the base loan currency against the investment currency meant that the sterling equivalent of the loan had increased, by March 1999, from GBP451,500 to GBP566,610, with the consequence that the value of the collateral cover was short of the minimum cover required under the 'Loan and Guarantee' scheme.

22. Accordingly Ms Field was met with a margin call issued by Rothschild. She met this first margin call by taking

a term loan of HK$650,000 from the Hong Kong Bank, at an interest rate of 11.5%. She also had recourse to funds from another loan source, and thus was able to provide a total of GBP76,000 by way of fortification for security of the Rothschild loan. These sums were placed on deposit with Rothschild earning a small amount of monthly interest.

23. Regrettably, however, matters did not stop there.

24. The yen continued to strengthen against sterling (and indeed against every other major currency) and the Rothschild minimum collateral requirement again was breached.

25. On this occasion Ms Field did not meet the requisite margin call, and on 15 September 1999 Rothschild wrote to her to say that it had decided to switch the loan into sterling.

26. This switch was effected at the then current exchange rate of 166.25 yen to the pound, the effect of which was that the outstanding loan then stood at GBP662,330, nearly GBP210,000 more than the loan value as at the date of drawdown.

27. In early December 1999, Ms Field decided to close out her whole position. This was effected by the surrender of the Old Mutual and Scottish Life policies, attracting penalties therefor, and the cash deposit with Rothschild was realized.

28. The Rothschild loan was repaid out of the proceeds, and Ms Field received back a total of GBP44,152.36 which, in sterling terms, represented less than 25% of the worth of her pre-existing Old Mutual investment before she had entered the Rothschild scheme.

29. Ms Field was much traumatized. She decided to sue Mr Barber or, rather, his company, Barber Asia Ltd.

Civil action

30. In High Court Action 7119 of 2000 Ms Field claimed damages in respect of financial advice given to her by Barber Asia Limited in terms of her participation in the Rothschild scheme. She alleged that the advice that had been given to her had been negligent, and that the loss she had suffered as the result of placing reliance upon such advice was recoverable either on the basis of

breach of contract by Barber Asia or because that company was in breach of a duty of care in tort in relation to such advice.

31. In essence her complaint was that she was an inexperienced investor, and that from the outset she had made it clear to Mr Barber that she had wanted to invest her savings, which represented substantially all her capital, in a conservative manner. She asserted that she had not changed her guidelines at any time, but that notwithstanding this, Mr Barber had advised her to enter into an investment structure which was unsuitable for her and was inconsistent with her objectives, in that it had involved a significant element of risk, without having explained the nature of the risk involved.

32. For its part Barber Asia's position in this action was that Ms Field was a fairly sophisticated investor, who wished to retain control of her investments and had chosen not to enter into any formal contractual relationship with Barber Asia, but simply wished to obtain from Barber Asia information as to investment opportunities which might suit her needs, and to make her own decisions as to such investments. Whilst accepting that Ms Field's initial request had been for a conservative investment strategy, Barber Asia claimed that this had changed over time, and that by

the time the investment of which complaint now was made was entered into, that Ms Field wanted (or at least was prepared to accept) a strategy that was much riskier in order to obtain the prospect of better returns.

33. Barber Asia maintained the position that it had complied with all relevant regulatory requirements and codes of practice, and that it owed Ms Field no further duties. In any event, Barber Asia denied having acted negligently, as alleged or at all, and emphasized the fact that Ms Field had entered into direct contractual relationships with the financial institutions in whose products she had invested and from whom she had borrowed. Accordingly, any loss suffered by Ms Field was caused, wholly or in part, by her own acts and decisions, in particular her decision to close her position and not to continue with the investment or loan arrangement at the time of the second demand for security, and not by any default on its part.

34. The trial of this action was heard by Deputy Judge Barma (as he then was) between 17-26 March 2003, and for the purpose of the present review we have in the preceding paragraphs adopted his review of the ambit of the case then before him. At this trial Ms Field was represented by counsel, but

Mr Barber represented himself. Both Ms Field and Mr Barber gave evidence.

35. On 17 June 2003 the learned Deputy Judge handed down an exhaustive 92 page judgment. He found that in the circumstances of this case that there was no contractual relationship between Ms Field and Barber Asia. However, he did find that there was a duty of care in tort owed by Barber Asia to Ms Field to act with reasonable care and skill in relation to the advice which was given to her, that in the circumstances Barber Asia had been in breach of that duty of care and had been negligent in advising Ms Field as it had, and that Ms Field had suffered consequential loss, which was quantified at GBP219,890.25.

36. Accordingly judgment in this sum, together with interest and costs, was entered against Barber Asia Ltd.

37. Barber Asia sought to appeal this judgment to the Court of Appeal in Civil Appeal No.194 of 2003. This appeal was heard on 15 July 2004 before Vice President Rogers, Hon Le Pichon JA and Hon Sakhrani J, and was dismissed at the conclusion of the hearing. Written reasons subsequently were handed down by Le Pichon JA explaining this decision.

38. Both the judgment of Deputy Judge Barma and of the Court of Appeal are matters of public record, and speak for themselves.

Reaction of the SFC

39. The SFC had been monitoring the progress of the civil proceedings between Ms Field and Barber Asia Ltd.

40. The regulator initially had written to Mr Barber, by letter dated 18 November 2003, informing him that the conclusions of the Court of First Instance provided grounds for concern as to the competence of himself and Barber Asia as investment advisers, and then had proposed a 6 month suspension.

41. In response to this letter, Mr Barber's solicitors, M/s John Pickavant & Co., submitted strong representations to the SFC by letter of 17 December 2003. This letter referred, *inter alia*, to this being a case of "judicial activism and interventionism" in that that the judge at first instance had appeared to extend the tort of negligence "well beyond the existing authorities not only in Hong Kong but also in England and Australia, thereby transgressing on the authority of the SFC".

42. This letter further referred to the fact that the loss of the plaintiff was sustained consequent upon the "historic appreciation" of the yen against sterling during the Asian financial crisis of that period, to the fact that there were "myriads of investors worldwide" who had sustained financial loss in this period, and that it was "extremely doubtful whether any financial advice in the world could possibly have averted losses in such extreme market conditions."

43. This letter also enclosed Mr Barber's Notice of Appeal to the Court of Appeal, and further noted that Barber Asia Ltd had provided security for the costs of the appeal.

44. In response thereto, the SFC took the view, which it notified to Messrs John Pickavant by letter of 23 December 2003, that in light of the forthcoming appeal the proposed disciplinary action would be withheld pending the result of that appeal.

45. On 19 July 2004, and subsequent to the dismissal of the appeal a few days earlier, the SFC notified Mr Barber that it wished to re-open the disciplinary action, and asked for further representations from him prior to a final decision being made.

46. Mr Barber responded to the SFC on 4 August 2004. By his letter of this date he set out in detail his reasons for his belief that this case merited neither the suspension of Barber Asia nor that of himself. He made a significant number of points, particular among them being the assertion that the Rothschild loan documentation contained clear warning about the dangers of currency fluctuation in terms of such a multi-currency loan structure, that Ms Field was an 'execution only' client, and thus that the loan documentation, documentation which she had acknowledged he had taken her through, should have been taken as speaking for itself, that even had she been unaware of the risk element that she certainly became so aware at the time of the first margin call, and that, at bottom, it was the "extreme and unprecedented market conditions", not foreseen or foreseeable by anyone, which had caused the capital loss suffered by Ms Field.

47. It was further asserted that this was the first case of its type wherein the tort of negligence had been found against a financial intermediary in an 'Execution Only' relationship. It was said that Barber Asia never had disputed the existence of a duty of care, but had taken issue with the degree of that duty within an 'Execution Only' relationship wherein the relevant loan scheme documentation had been rehearsed with the client whom, as a

result of this judgment, effectively had been able to remove herself from responsibility for her actions and decisions. Complaint was also made regarding criticism by the appeal court about the Rothschild 2.5 times geared loan scheme when this scheme was well structured and clearly had been explained in all the literature, the content of which had been approved by the relevant regulator.

48. Having "taken into full consideration" these representations, by formal Notice of Decision and Statement of Reasons dated 3 September 2004, the SFC communicated its decision to suspend Mr Barber for a period of six months.

49. The Statement of Reasons issued by the SFC is a lengthy and detailed document, and we do not intend to rehearse its content in great detail. Suffice to say that heavy reliance was placed by the regulator upon the findings of Deputy Judge Barma in the High Court action; indeed no less than ten *verbatim* extracts from this judgment were reproduced in this letter, and it is fair to observe that the gravamen of the SFC decision was the relative investment experience of Ms Field, and her stated preference for conservative risk, in comparison with the high risk strategy inherent in the investment she had been advised to take out, particularly in light of the gearing element of 2.5 times.

50. The SFC stated that the disciplinary proceedings thus instituted "do not seek to blame you for her loss", and that if Ms Field had asked for a high risk investment strategy, "there would have been no disciplinary concerns despite her loss of capital", and that that which had caused the loss "is not as important as the discrepancy between the risk levels of the investment you recommended and Ms Field's stated objectives."

51. It is against this factual backdrop that Mr Barber now pursues his application for review of this SFC Decision.

Form of the present proceedings

52. The initial view of the SFC, at least as adumbrated at the preliminary directions hearing, was that the finding of negligence by the Court of First Instance in effect was determinative of the issue before this Tribunal upon this review.

53. The Tribunal, at that time consisting of the Chairman sitting alone, took a different view. The Tribunal was unable to grasp how the decision of another tribunal in a civil action between two different parties (Field/Barber Asia Ltd), neither of whom are privy to the present application for review (Barber/SFC), could be

determinative of an issue (breach of the regulatory Code of Conduct) demonstrably *not* the subject of the civil action (common law negligence).

54. Accordingly, whilst the existence and result of the civil action forms part of the broad factual matrix, without which, as the history of events demonstrates, Mr Barber would not have been the subject of the regulatory sanction he has received, and which he now wishes reviewed, the result of that earlier litigation cannot be decisive of the present application, and in determining the case now before it this Tribunal is *not* bound by the findings or conclusions of the learned Deputy Judge in the Court of First Instance.

55. Whilst in light of the way in which this hearing has progressed it perhaps does not greatly matter, in the circumstances we find it difficult to, and do not accept the submission made on behalf of the SFC that, in light of the findings of the Court of First Instance in terms of negligence against the corporate defendant, that in the present application the *persuasive* burden necessarily thus passes to Mr Barber to refute the case levelled against him by the SFC in his personal capacity on the basis of breach of the applicable Code of Conduct.

56. Be that as it may. Against this background, the procedure before this Tribunal on this application took the form of a rehearing upon the totality of the evidence now available, with *viva voce* evidence being received on both sides.

57. We take the opportunity to note that this procedure by way of rehearing, involving reception of evidence *de novo*, is *not* something that this Tribunal, essentially an appellate/review body, is likely to be persuaded to do other than in appropriate and relatively rare cases, of which in our view this is one.

The SFC case

58. The case of the SFC, following on the back of the High Court judgment in favour of Ms Field, is that Mr Barber is not a fit and proper person to remain registered, and is subject to regulatory sanction, by reason of the fact that he "negligently advised Ms Field, causing her financial loss" and that "This calls into question [his] competence as an investment adviser" (*vide* paragraph 8 of the Notice of Decision and Statement of Reasons dated 3 September 2004).

59. Although the Notice of Decision and Statement of Reasons refers to negligence, it is clear from this document that the conceptual underpinning of the SFC regulatory action against Mr Barber is the alleged breach of the Code of Conduct, to which reference was made in the Notice of Decision and Statement of Reasons (*vide* paragraphs 28, 30 and 33 of that document). Indeed, in this Notice the SFC specifically recognised (at paragraph 47) that "the Court, in reaching its conclusion that you negligently advised Ms Field, did not have to concern itself with the question whether the Code of Conduct was breached. Findings it made in relation to this question, if any, are not binding upon us …"

60. It is the 1996 version of the 'Code of Conduct for Persons Registered with the Securities and Futures Commission', which was the version in force at the time of the events in question, that is cited by the SFC in its Notice to Mr Barber.

61. Mr Harris, Counsel appearing on behalf of the SFC in this review, has clarified in submission that the relevant provisions relied upon by the SFC are as follows:

> "**2. Diligence**
>
> 'In conducting its business activities, a registered person should act with due skill, care and diligence, in the best interests of its clients and the integrity of the market.'

> **C3. Diligence**
>
> ……
>
> C4. 'When providing advice to a client a registered person shall act diligently and ensure that his advice and recommendations in relation to clients are based on thorough analysis and take into account available alternatives.'
>
> **C5. Information about Clients**
>
> …….
>
> 5.2 'Having regard to information disclosed by a client and other circumstances relating to the client which the registered person is or should be aware of through the exercise of due diligence, the registered person shall, when making a recommendation or solicitation, ensure the suitability of such recommendation or solicitation for that client as is reasonable in all the circumstances.'
>
> 5.3 'A registered person providing services to any client in relation to derivative products, including futures contracts or options, or any leveraged transaction shall assure himself 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 issues for this Tribunal

62. The issues for this Tribunal, therefore, are twofold: in light of the evidence which has been led before us, (1) was the SFC justified in its finding that Mr Barber was in breach of the 1996 Code of Conduct?, and (2) if the answer is yes, should the sanction thus imposed of a licence suspension of 6 months be upheld, or should it be varied in the particular circumstances of this case?

The evidence before the Tribunal

63. On behalf of the applicant, Mr Pickavant called two witnesses, Mr Barber himself and a former colleague and employee of Barber Asia Limited, Mr Charles Dunford.

64. On behalf of the SFC, Mr Harris called but one witness, Ms Susan Field, whose investment it was, made on the advice of Mr Barber, that had come to grief at the hands of the rising yen.

65. There was also a considerable amount of documentary evidence placed before the Tribunal.

66. The vast bulk of such documentation constituted that which had been placed before the court during the trial of the negligence action before Deputy Judge Barma wherein, if we may say so, Mr Barber conspicuously failed to act in his own interests in choosing to represent himself.

67. In addition to such documentation, Mr Barber introduced into evidence an additional number of documents which, he said, he now had been able to locate from storage, and which had been unavailable at the date of the earlier civil trial. We

mention this because certain of these documents are of importance, as we will shortly describe, in light of a dispute as to when Mr Barber had had meetings with Ms Field, and for what purpose.

68. After the conclusion of the hearing before us additional written submissions were received from the parties in the context of such rules and regulations as exist relating to the manner in which an investment adviser should utilize such financial product information as has been placed into the public domain by the particular house which has issued such product.

69. We note this latter element solely to complete the review of the evidential material placed before us. We did not find these additional submissions, whilst of interest, to be of assistance in our consideration of the present application, and such further submissions were in no sense determinative in terms of the conclusion that we now have reached.

70. Perhaps not unnaturally, in terms of the *viva voce* evidence which was led, heavy reliance was placed upon that which had been the witness statements employed in the civil proceedings, although, as we have indicated, this material was

supplemented, in particular by Mr Barber in the context of the new documentation he had uncovered.

Entry into the Rothschild's scheme: the respective versions

71. In terms of the broad background to, and the development of, the relationship between Mr Barber and Ms Field, there was room for little evidential dispute; much indeed was common ground, as, of course, was the fact of the specific investment which was entered into by Ms Field, the failure of which ultimately spawned her complaint to the Court of First Instance, to the SFC, and finally, these proceedings.

72. However there *was* significant variation in the recollection of the respective parties regarding the events immediately preceding the entry by Ms Field into the Rothschild 'Loan and Guarantee Scheme'.

73. The case put forward by Ms Field is that on 10 July 1998 she had had lunch with Mr Barber to discuss that which he had described on the telephone shortly before as an "exciting new investment product". At this stage, of course, the undisputed history shows that Ms Field already had invested, on Mr Barber's

advice, in the uncontroversial ‘Old Mutual Alpha Plan’. However, that which Mr Barber had now wished to discuss was something different.

74. This product was the geared sterling investment in the Scottish Life policy which would be purchased with the N.M. Rothschild yen-denominated loan, with the existing Old Mutual investment and the new Scottish Life investment constituting security for that loan. Ms Field said that Mr Barber had had to explain ‘gearing’ to her, as she did not understand, but that he did not explain the effects of a variation in interest rates or exchange rates, and the possible effect of such upon the underlying assets, and hence upon her financial position.

75. Nor, Ms Field said, did Mr Barber mention the nature of the risk involved or that, in the event of the strengthening of the yen, she may have to borrow to support the Rothschild loan, albeit she did recall Mr Barber commenting that “if anything happens to the yen, you could always switch the loan to another low interest currency, such as the Swiss franc.”

76. Ms Field stated that on the face of things this new investment sounded promising, especially when Mr Barber had

said that she would earn a 20% return (as opposed to the earlier forecast of 10% under the original investment) upon the same amount of money that she had earlier put up, and that there had been "no indication" that she could lose any of this money. She was also "reassured" that this new scheme involved Rothschild, which was a major financial institution in the United Kingdom of which she had heard, and accordingly she was receptive when Mr Barber suggested that she should "go with it".

77. Her case was that after the lunch at which this had been discussed she had received a memorandum from Mr Barber, together with a set of relevant forms for investing in the scheme; however she had not received the document ('Attachment D' to Mr Barber's memorandum) explaining in example form how the whole investment gearing structure operated.

78. She said that the forms requiring his signature were filled in by Mr Barber a day or so after this lunch meeting on 10 July 1998, and that she had signed them in his presence. She emphasised the anticipated growth that Mr Barber had said would be forthcoming, which was considerably higher than the return she was then getting from the original Old Mutual investment, but she

reiterated that there was no explanation of the currency risk involved.

79. In particular Ms Field was "quite sure" that she was *not* given the Rothschild's explanatory document on the 'Loan and Guarantee Scheme', which she said that she had seen for the first time following the discovery process in the High Court civil action, notwithstanding Mr Barber's suggestion at trial that he had provided her with all the documents relating to this proposed investment at or before 10 July lunch, and that therefore she had had time to read and to absorb these documents.

80. It was this latter suggestion that provided the main point of factual departure between Mr Barber and Ms Field.

81. With regard to Ms Field's investment in the Rothschild 'Loan and Guarantee Scheme' Mr Barber's evidence before this Tribunal was that events in this regard had been not nearly as concentrated as Ms Field had suggested.

82. His records, which he now had discovered, indicated that prior to bringing this scheme to her notice that he had had three business meetings with Ms Field : on 19 June 1997 at the

Mandarin Hotel, on 23 March 1998 in her office (at which meeting he had told her that she now intended to invest some US$300,000 and not the US$190,000 as initially discussed), and on 26 May 1998, at which her then existing investment in the Old Mutual Plan, a medium risk capital growth funds portfolio, was discussed with a view to adjusting her existing fund selection to include a European fund, Ms Field having noted that her own researches had indicated that "everybody is talking about Europe".

83. His fourth meeting with Ms Field, said Mr Barber, was on 3 June 1998, and was in specific response to a telephone call from her requesting a review of her overall investment objectives; in fact, he said, he had been surprised to receive this call so soon after the previous meeting.

84. At this meeting Ms Field had told him that she had made some "important decisions" concerning her personal life and that this materially had affected her investment objectives. She had said that she was planning to remain in Hong Kong for a further three to five years in order to build up her business, and then to sell it and return to the UK. She thus wished to maximize the return upon her investments in the next three years, and confirmed to him that her investment objective was to target

capital growth and to look for ways to "make her money work harder". He gathered from this, he said, that she had abandoned her originally-stated 'conservative risk' strategy in order to maximize her return.

85. In fact, at this meeting on 3 June 1998 Mr Barber maintained that he had spent some time with Ms Field looking at performance/risk factors in several markets, including emerging South American markets, and to switching her underlying investments in the Old Mutual plan she then had in place in order to enter narrow 'sector funds'. However, he had pointed out the volatility in these markets, and Ms Field had rejected these options and had asked for other alternatives to maximize her investments.

86. Mr Barber's evidence was that it was at this stage that he had told Ms Field that a number of his company's clients were enhancing their returns by using a 5 year term loan gearing facility offered by NM Rothschild, and had explained that this scheme involved borrowing yen from Rothschild at a low interest rate, converting that yen into sterling, and investing that money in sterling-denominated investments which would produce a higher return, such investments being used as collateral for the loan.

87. He stated that he had further explained that this strategy carried a greater risk than her existing investment, and that in particular there was a risk of currency loss if the loan currency (yen) was to appreciate against the investment currency (sterling). He had told Ms Field that she should read carefully the relevant Rothschild brochure and application documents and also had told her that, if an adverse currency trend developed, she could consider switching into another low interest rate currency, and further that, if she were to invest in the Rothschild scheme, he would recommend that she invest the loan proceeds in low risk capital protected funds, and had suggested a fund offered by Scottish Life. He said that he had emphasized that this was a five year facility and should be viewed as a medium to long term strategy, and that he also had told her that his company would be paid a 0.25% introduction fee for introducing her to Rothschild, and also that Rothschild would conduct due diligence upon her as a client before approving her as a client and loaning her the money.

88. At this meeting Ms Field had said that she was interested in the strategy, and had asked Mr Barber to send her details of the ‘Loan and Guarantee Scheme’ and of the Scottish Life funds into which the resultant sterling would be invested. Mr Barber stated that, in line with his established business practice,

he had provided her with details of the Scheme, which was in form of a set of standard *pro forma* documents, and examples from Rothschild as to how the gearing worked.

89. This meeting on the 3 June 1998 had been followed by a further meeting, the fifth in total, with Ms Field at her office on 10 July 1998, wherein Mr Barber had gone through each section of the 'Loan and Guarantee Scheme' documentation step by step, highlighting the risk clauses in particular and the Rothschild illustrations of investment gearing. He had further explained that under this Scheme it was necessary to maintain margin security at all times, and specifically had drawn her attention to the warning notice on the front of the Rothschild documentation which referred to the importance of the terms and conditions of the Loan and Guarantee Scheme as constituting a contract with the lending institution, advising individuals to seek legal advice prior to signing, and noting that enforcement by the bank of its rights under the scheme may result in the loss of all or part of the collateral.

90. In the event, said Mr Barber, Ms Field had said that she did not wish to take legal advice because she had understood the terms and conditions, and she completed the necessary forms. A Memorandum from Mr Barber to Ms Field of later that day

confirmed that which she needed to do to enter into the scheme, and thereafter Rothschild began to correspond directly with Ms Field; in fact on 17 August they sent her details of her new loan account, and the investment in question thus was put into motion.

91. At face value, therefore, there is a fundamental conflict in the respective accounts of the events, and of the inter-action of Mr Barber and Ms Field, in terms of that which occurred immediately prior to Ms Field entering into the Rothschild investment.

92. The difference is stark, and there is no room for any middle ground given Ms Field's insistence that, absent preliminaries, Mr Barber had telephoned her out of the blue on 10 July 1998 with this "exciting new scheme", that he immediately came around to her office with the details, and that within that day, or perhaps the following day, she had effectively signed up and committed herself to the course of action which thereafter led to her loss.

93. It is noteworthy that in her evidence Ms Field was unable to recall the meeting of 3 June 1998; in fact, in the High Court action she had *denied* any such meeting. Shorn of detail, her

unequivocal case was that she had not begun to appreciate the risks involved, that such did not conform with her previously expressed preference for a conservative risk profile, and that in no meaningful sense did Mr Barber seek to clarify the situation. The picture thus sought to be painted, at least impliedly, is of a financial intermediary more concerned with the obtaining of commission than with serving the best interests of his client.

94. To the contrary, Mr Barber's unequivocal position is that entry into the Rothschild scheme followed directly upon an inquiry specifically stimulated by Ms Field's desire to maximize the return on her investment, that he had introduced the idea of the scheme to her at the meeting on 3 June 1998, that he had followed this up with the 'Loan and Guarantee Scheme' documentation which he had carefully reviewed with her at the meeting on 10 July 1998, and that thereafter he had sent her a Memorandum detailing the steps that were needed to be taken (as in fact they were).

Factual findings

95. Faced with such differing accounts upon an essential part of the factual matrix, this Tribunal clearly is required to make

some findings of primary fact in terms of that which took place between Ms Field and Mr Barber.

96. We have reviewed and reflected upon the evidence, *viva voce* and documentary. Within the documentary context we note that contemporaneous computer records which Mr Barber now has been able to locate (and which, we understand, were *not* made available to the learned Deputy Judge in the High Court action), detail all client contact with Ms Field. These records show that on 3 June 1998 at 1800 hours there was a "Meeting Held" regarding "Review investments for higher return", and that on 10 July 1998 there was a further "Meeting Held" regarding "Explain & Sign NMR & SLI apps/Lunch".

97. We have been told, and accept, that Mr Barber had employed a particular software application to sort and consolidate recorded contacts with clients, of which Ms Field was but one. We attach importance to this contemporaneous record, which tends to underpin Mr Barber's oral evidence as to the all-important meeting on 3 June 1998 wherein the Rothschild scheme first was introduced to Ms Field. We thus find as a fact that there was such a meeting on 3 June 1998, and we further find that that which

occurred at that meeting was as has been described to us by Mr Barber.

98. We also accept Mr Barber's evidence, which in this regard again was directly contrary to that of Ms Field, that she did have sight of the full documentation regarding the Rothschild 'Loan and Guarantee' scheme (the originals of which were called for, and examined, at the hearing of this review) and that, as he had stated, he had been through this documentation with her at the meeting on 10 July 1998. We so find.

99. Whilst the evidence is unclear as to precisely when Ms Field first had sight of this material, in any event we entertain no doubt that Mr Barber had made every effort to review it with her. We also accept his evidence, and so find, that when he left Ms Field on 10 July 1998, copies of all the relevant documentation remained with her and were available for her further consideration, and that he did indeed suggest that she reread them.

100. Accordingly, having seen and heard the witnesses, and having had the advantage of considering all the available documentation in terms of the events which led up to the investment in question, we are minded to accept the evidence of

Mr Barber, who gave evidence in a rational and straightforward manner, and whose evidence was supported in the material particulars. Our findings of primary fact reflect such acceptance.

101. In so doing we do not go so far as to suggest that in her evidence Ms Field sought deliberately to mislead this Tribunal, although in submission Mr Pickavant felt no such constraint: he submitted that in the witness box Ms Field was "selective and evasive". As is often the case with 'battered investors', in our view Ms Field has been hugely affected by this highly adverse investment experience, and we are inclined to think that her recollection of the history of this matter has been coloured by her very discernible resentment towards Mr Barber, her erstwhile friend, for his introduction to her of the investment vehicle which has occasioned her so much concern and, ultimately, significant loss. We think that the history of this case, including the High Court action against Barber Asia Limited, has caused her to assume an antagonistic and highly pejorative mindset regarding Mr Barber, and of his advice to her, which does not conform to the objective reality as we have found it to be upon the available evidence.

102. It also is not unfair to observe that initially Ms Field's ire appears to have been directed toward Rothschild as the lending bank in this scheme. A letter to her from Rothschild dated 14 September 1999, demanding repayment of the loan under the 'Loan and Guarantee Scheme', whilst unexceptional in itself, has been written upon by Ms Field in bold black marker pen: "Attn: Chris Barber. I'm going to the South China about this company. Susan". What is unfortunate and perhaps somewhat disturbing about this letter is not the sentiment therein expressed, which was understandable in the circumstances, but in the fact that at the trial of this action before Deputy Judge Barma this document, listed in Ms Field's discovery, was produced with the handwritten comment 'tip-exed' out. In response to a direct question from this Tribunal Ms Field admitted that she had been responsible for this deletion (because at the time she had thought the document "looked messy"), although it appears that she had told the learned trial judge in the High Court trial that she was unsure how this deletion had occurred. We are constrained to say that we found her explanation difficult to accept in light of the content of the statement which thus had been excised.

103. Finally, in context of the evidence available to the Tribunal pertaining to the Rothschild investment, we make brief

mention of the evidence of Mr Charles Dunford, who was called on behalf of Mr Barber. Mr Dunford was a director of Barber Asia Ltd at the relevant time. His evidence was that during the summer of 1998 a number of that company's clients had entered into leveraged investments taking advantage of the low interest rates associated with borrowing in yen, and that his company had gone to great lengths to be sure that clients understood that there was a risk; in fact, some had discussed with the company the issue of management of the currency risk through the 'hedging' of such risk.

104. Mr Dunford stated that he recalled making a telephone call to Ms Field at her office at some time in mid to late August 1998, when he had a brief conversation with her. He said that in this conversation he established that she had understood the risk in borrowing in a currency different from that which constituted the security, and that she had indicated that, on the basis of her independent sources, she felt that the yen would weaken. When Mr Dunford had touched upon the mechanics and cost of hedging, Mr Dunford said that she had told him that the costs were too high, and that he had agreed, commenting that she might as well switch to the same currency as the collateral. He stated that Ms Field had said that she saw her investment as

working best whilst it could take advantage of a weak yen with its low interest rate; accordingly Ms Field expressly had chosen not to take steps to reduce her risk.

105. Thus, in Mr Dunford's view Ms Field both had understood and had accepted the risks inherent in this investment.

106. We accept Mr Dunford's evidence; indeed, he was but barely cross-examined.

Commentary

107. In light of the history of this case, and not least the judgment in the High Court proceedings, this review application has caused us concern. We have reflected at length upon it.

108. There is little doubt, as matters transpired, that this was a calamitous investment. It is also clear, in light of the events which occurred, that this was an investment which contained a significant element of risk. We also bear in mind, however, that in different currency markets, absent extraordinary shifts in relative currency values over a relatively short period, that this investment might well have been regarded as a good call, Ms Field would

have made her desired 20% annual growth, and that Mr Barber's investment acumen doubtless would have been lauded to the skies.

109. Sadly matters did not turn out this way. The hard fact is that a multitude of investors lost very large amounts of money in various ways during the period now characterized as the 'Asian financial crisis', in which the rapid and unanticipated appreciation of the yen against major currencies constituted a discernible feature. The inescapable point is that at this time the investment picture generally undoubtedly was difficult.

110. In the case of Ms Field's investment the High Court within this jurisdiction has decided that Barber Asia Limited should recompense Ms Field for her loss, and has given judgment in her favour. However, the entirely separate and distinct question with which we must wrestle upon this review is whether the SFC has been correct to discipline Mr Barber consequent upon these events.

111. During the course of this case a number of disparate arguments have been raised on behalf of Mr Barber. It has been said, for example, that Ms Field was an 'Execution Only' client, and that by reason thereof, and by reason of her direct contractual

nexus with Rothschild/Scottish Life, that this element *in itself* is sufficient to divest the financial adviser of responsibility. We do not consider this to be correct. There is no doubt that in his relationship with Ms Field that Mr Barber was acting *qua* adviser – in fact the Application Form for the 'Loan and Guarantee Scheme' which was completed by Ms Field contained a section, entitled 'Financial Adviser Details', wherein Mr Barber and/or Mr Dunford are specified as her financial adviser; indeed, this document concludes with the stamp of Barber Asia Limited, together with Mr Barber's signature.

112. Moreover, whilst it is appreciated that Mr Barber may have received remuneration in the form of commission from the institution to whom he introduced his client, as opposed to being remunerated directly by the client, it is clear that this does not detract from the regulatory obligations under which he is permitted to practice his profession in Hong Kong. Nor is there any issue in this case as to disclosure of such receipt to Ms Field.

113. Another argument which has been ventilated is that Ms Field acted precipitously in closing her position when she did, and that had she taken the advice proffered by Mr Barber her situation would have been much improved and her losses

mitigated. Once again, this seems to us to be nothing to the immediate point, which has as its focus whether Mr Barber should be subject to regulatory sanction for introducing her to this particular investment in the first place.

114. Accordingly the only issue with which we are concerned is whether, in recommending this investment to Ms Field, Mr Barber legitimately can be said to have acted in breach of his responsibility under the regulatory Code of Conduct, the relevant passages from which we have set out earlier in this Determination. It is with regard to this aspect, and no other, upon which this Tribunal must keep its eye.

115. The particular provisions of the Code relied upon by the SFC rehearse the twin themes of diligence and suitability. In essence, has the adviser exercised due diligence in order to ensure the suitability of the particular investment recommendation of which complaint now is made, and in respect of which the disciplinary jurisdiction has been invoked?

116. It is when viewed through this prism that the relevance of the events leading up to the 10 July 1998 meeting becomes apparent. If, for example, the impression which emerges is that of

an adviser who suddenly produces an investment idea and ‘bulldozes’ the client into that investment, irrespective of its suitability or otherwise for that client, then fairly obviously the provisions of the Code become engaged.

117. This is not, however, the situation which we have found to have existed in the present case. It is in this context that the ‘disputed’ meeting of 3 June 1998 assumes considerable significance. On the evidence before us we have specifically found that this meeting, which Ms Field did not recall, indeed took place, and we have accepted, further, Mr Barber’s evidence as to that which occurred thereat.

118. Of signal importance within this account is the alteration which occurred in terms of Ms Field’s risk profile, or at least alteration in terms of such profile as such then reasonably must have been perceived by Mr Barber.

119. Although she did not recall, and indeed expressed doubt, as to the existence of the meeting of 3 June 1998, Ms Field nevertheless accepted in her evidence to this Tribunal that in July 1998 she had expressed the wish to Mr Barber that her money should be made to “work harder”; nor was it disputed, as

Mr Barber had said, that she had been considering changes to the underlying investments within her existing Old Mutual plan in order to introduce a European equity element, changes which in themselves are indicative of an increased appetite for risk.

120. We note that in her evidence Ms Field maintained that she was always under the impression that despite some risks involved with the Rothschild investment, that nevertheless "the structure of this investment scheme would still be consistent with my stated desire for a conservative risk investment strategy", and that she did not appreciate that the new scheme had increased her risk. We reject this contention. It is a virtually immutable law known to all that increase in prospective gain is commensurate with increase in prospective risk; there are no free lunches. If Ms Field wanted more out of her money, as on her own case she most certainly did, she cannot validly maintain that nevertheless she understood that her risk level was to remain constant.

121. It is against this background, therefore, that Mr Barber was prompted to bring the Rothschild 'Loan and Guarantee Scheme' to Ms Field for her consideration. He does not demur that he did so, nor that ultimately he expressed the view to Ms Field that she should "go with it". However, the important

point is that he did this in face of a perception, garnered, it seems to us, reasonably in the circumstances, as to an increased appetite for risk on the part of a client whom, he accepts, originally had come to him with a ‘conservative’ investment philosophy.

122. In this connection we further bear in mind that, as we have found, Mr Barber had reviewed with Ms Field the Rothschild documentation relating to this investment, documentation which describes in detail the proposed scheme, and which expressly condescends, on its face, to warnings as to ‘Risk Considerations’ and to examples of ‘Investment Gearing’, the latter section of the document containing a black-bordered box wherein the dangers of gearing as a “high risk strategy” are emphasized, and the point made that while gearing can increase potential gains, any losses are likewise magnified.

123. Viewed thus, can it validly be said that the investment thus introduced to Ms Field was so ‘out of whack’ with her announced new investment ambition that it merited the SFC action? At the time of his recommendation did Mr Barber, in the express words of Clause 5.2 of the Code, fail “ensure the suitability of such recommendation … for that client as is reasonable in all the

circumstances"? At bottom we consider that it is this question which is decisive upon this review.

Decision

124. Upon the fundamental issue of liability for regulatory breach, we regret to say that the Tribunal is, and remains, firmly divided.

125. The minority view is most strongly of the opinion, in light of the findings of fact which we have made on the basis of the evidence before us, that the applicant herein, Mr Barber, cannot be said to have been in breach of the provisions of the Code of Conduct as prayed in aid by the SFC, and that, on the facts as found by this Tribunal, he was deficient neither in terms of the diligence with which he served Ms Field, his erstwhile friend and client, nor with regard to the suitability of the investment recommendation he made to her and which has led to the loss of which she has made complaint.

126. The minority opinion further holds that Mr Barber acted reasonably as an investment adviser in the particular circumstances which then confronted him, and that any issues about the

suitability of this particular investment for this client – this patently was not an investment product which initially he had brought to Ms Field's attention – were reasonably assuaged by her subsequent declaration to him that she wished to make her money "work harder", the declaration that had led to the highly significant meeting of 3 June 1998, and ultimately to the introduction to Ms Field of the Rothschild scheme.

127. The minority view is that Mr Barber's admitted omission to emphasise the potential for loss within this scheme is to be balanced against the express warnings on the face of the Rothschild literature of which this client had clear notice, and that such omission in itself does not merit the imposition of a suspension such as that which has been imposed upon him by the regulator, or at all. This view would go further, and would hold that in this case the treatment meted out to Mr Barber represents an unfortunate consequence of a situation in which he had reacted to a clear departure by the client from her earlier 'conservative' risk strategy, and thereafter had taken the trouble to review in detail with her the explanatory documentation issued by a reputable finance house regulated by the Guernsey Financial Services Commission. In short, this demonstrably was *not* a situation in which the adviser failed to follow the 'know your client' rule in

terms of the sale of a product for commission notwithstanding high client risk.

128. To the contrary, the majority within this Tribunal has formed the view that *prima facie* liability indeed has been established under both the 'diligence' and the 'suitability' regulatory rubrics.

129. More particularly this view holds that, notwithstanding the express warnings on the face of the Rothschild literature, at bottom Mr Barber had been insufficiently diligent in explaining and amplifying to his client the downside risks within this investment, which clearly involved a leveraged forex position, and further, and ultimately, that he had failed properly to assess the suitability of this investment to this particular client notwithstanding her announced, and admitted, increase in risk profile.

130. In short, the majority view acknowledges the arguments which have been extensively rehearsed in favour of Mr Barber, but remains of the opinion that these are matters which sound in mitigation as opposed to liability for breach of the regulatory code.

131. The position, therefore, is that by a 2/1 majority, this Tribunal has answered the first issue with which it is seized – namely, whether the SFC was justified in finding that Mr Barber was in breach of the 1996 Code of Conduct – in the affirmative.

132. In light of this primary decision, the Tribunal has proceeded to consider the second and correlative issue, namely whether the existing sanction of a licence suspension of 6 months should be upheld, or whether such sanction should be varied?

133. Upon the element of sentence, in contradistinction to liability, this Tribunal happily is undivided.

134. We are agreed that the particular circumstances of this case manifestly do *not* merit the 6 month suspension which the regulator has seen fit to impose absent any form of independent investigation, and consequent solely upon the determination of the civil proceedings and the findings made within those proceedings.

135. We take a demonstrably different view of the situation on the basis of the evidence which we have received during the course of this review, and upon the findings of fact which we have

made on the basis of such evidence, which in our view differed in material part from that presented to the High Court.

136. In our judgment the sentence imposed upon Mr Barber in the particular circumstances of this case must be regarded as manifestly excessive.

137. In our view such sentence should be that of a suspension of Mr Barber's registration and licence as an investment adviser for a period of one month only. We consider that a sentence in these terms sufficiently reflects the gravity of the case as we have perceived it.

138. The Order of this tribunal accordingly is as follows:

> That the application for review of the Decision of the SFC, dated 27 September 2004, whereby the applicant's registration and licence were suspended for a period of six (6) months, be allowed to the extent that the sentence be varied and reduced to a period of one (1) month, such suspension to commence upon the day following the date of the handing down of this Determination.

139. As to the issue of costs, in the circumstances of this case we consider that the fairness of the situation, wherein the conviction has been upheld by a majority, but the sentence substantially reduced, is best met by making no order as to costs. Accordingly make an order *nisi* to this effect.

140. We thank counsel for their assistance in what has been a difficult and contentious case.

Hon Mr Justice Stone (Chairman)	Mr Fong Hup (Member)	Dr Kwok Chi Piu, Bill (Member)

Mr John Pickavant of Messrs John M Pickavant & Co.,
for the applicant

Mr Jonathan Harris, instructed by the Securities and Futures Commission