OPINION OF ADVOCATE GENERAL MISCHO

delivered on 18 May 2000 *

1. By application lodged on 29 July 1998 SCA Holding Limited ('SCA Holding') appealed against the judgment of the Court of First Instance of 14 May 1998 in *SCA Holding* v *Commission* [1] (hereinafter 'the contested judgment').

2. By that judgment the Court rejected SCA Holding's application contesting Commission Decision 94/601/EC of 13 July 1994 relating to a proceeding under Article 85 of the EC Treaty (IV/C/33.833 — Cartonboard) [2] ('the decision') in which the Commission imposed fines on 19 manufacturers supplying cartonboard on the Community market on the ground that they had infringed Article 85(1) of the EC Treaty (now Article 81(1) EC).

3. In that action SCA Holding asked the Court of First Instance to annul the decision both in so far as it found that SCA Holding had committed an infringement and in so far as it imposed a fine of ECU 2 200 000 on account of that infringement. In the alternative, it sought a substantial reduction of the fine. Reference is made to the contested judgment for a full explanation of the objections raised by SCA Holding in challenging the decision and the grounds on which the Court of First Instance considered that those objections had to be rejected in their entirety.

4. In its appeal SCA Holding claims that the Court of Justice should:

(a) set aside the contested judgment;

(b) annul Article 1 of the decision in so far as it concerns the appellant or, in the alternative, annul or substantially reduce the fine imposed on the appellant in Article 3 thereof;

(c) order the Commission to bear the costs.

* Original language: French.

1 — Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373.

2 — OJ 1994 L 243, p. 1.

5. The Commission, the respondent in the appeal and defendant at first instance, contends that the Court should:

(1) reject the appeal as inadmissible and in any event unfounded;

(2) alternatively, refer the case back to the Court of First Instance for reassessment of the fine in the exercise of its unlimited jurisdiction;

(3) in any event, order the appellant to pay the costs of the appeal.

6. In support of the form of order sought, SCA Holding puts forward two groups of pleas:

— pleas by which it seeks to show that the Court of First Instance wrongly rejected its argument that it should not have been the addressee of the decision;

— pleas by which it seeks to show that the Court could not, without infringing Community law, uphold the fine imposed on SCA Holding by the Commission either as a matter of principle or as regards the amount of that fine.

7. In order to avoid unnecessary repetition, the details of those pleas will be set out as and when I examine them.

The first plea: the addressee of the decision

8. Before the Court of First Instance, the appellant challenged the decision on the ground that it should not have been held responsible for the behaviour of the Colthrop Mill (hereinafter 'Colthrop') and that it was not therefore the correct addressee of the decision, which imposed fines in respect of practices by Colthrop that were contrary to Article 85 of the Treaty. The Court rejected that plea in the following terms:

'61. It is common ground that Colthrop was the factory at which cartonboard was manufactured and that throughout the full period of the infringement that factory was owned by Reed P&B, then by SCA Aylesford Ltd and lastly by SCA Holding.

62. Reed P&B, SCA Aylesford Ltd and SCA Holding (the applicant) are, however, the names successively adopted by one and the same legal person.

63. The circumstances of this case do not therefore give rise to any question of succession. The Court has held [3]... that an undertaking's infringement must be attributed to the legal person responsible for the operation of that undertaking when the infringement was committed. While that legal person exists, responsibility for the undertaking's infringement follows that legal person, even though the assets and personnel which contributed to the commission of the infringement have been transferred to third persons after the period of the infringement.

64. The Commission was therefore entitled to address the Decision to the legal person which was responsible for the unlawful conduct found during the period of the infringement and which still existed when the Decision was adopted.

65. Thus, even if Colthrop could be regarded as an undertaking within the meaning of Article 85 of the Treaty and on the day when the Decision was adopted it was owned by the legal person Colthrop Board Mill Ltd, the applicant's arguments would at the very most show only that the Commission had a choice as regards the addressee of the Decision. In those circumstances, the Commission's choice cannot therefore be validly called into question.

66. Furthermore, Reed P&B appeared in the list of members of the PG Paperboard.

67. According to point 143 of the Decision, the Commission, in principle, addressed the Decision to the entity named in the membership list of the PG Paperboard, except that:

"(1) where more than one company in a group [had] participated in the infringement;

or

(2) where there [was] express evidence implicating the parent company of the group in the participation of the subsidiary in the cartel,

3 — Case T-6/89 *Enichem Anic* v *Commission* [1991] ECR II-1623, paragraphs 236 to 238.

[in which cases] the proceedings have been addressed to the group (represented by the parent company)".

68. Since the Commission did not consider that either of the two conditions for making an exception to the principle in point 143 was satisfied, it was entitled to decide not to address the Decision to the successive parent companies of Reed P&B/SCA Aylesford/SCA Holding.

69. This plea must therefore be rejected as unfounded.'

9. Paragraph 65 of the contested judgment will be better understood if I point out that on 19 April 1991 Colthrop was incorporated as a limited company under the name Colthrop Board Mill Limited and that, according to Article 1 of the decision, the period of the infringement lasted 'until at least April 1991'.

10. In its appeal the appellant summarises its criticisms of that passage from the contested judgment as follows:

'(a) An issue of succession arises in circumstances where an infringement is committed by an undertaking which, notwithstanding one or more changes of ownership during or after the period of infringement, maintains "functional and economic continuity" throughout the period of infringement and up until the date of the Decision, continues to exist "in its essential form" at the date of the Decision and has legal personality at the date of the Decision. The Court's finding that there was no issue of succession in this case is based on deficient reasoning and is contrary to legal principle and the jurisprudence of the European courts;

(b) the Court erred in law in concluding that the Commission was entitled to choose, as between entities belonging to different corporate groups, which entity should be the addressee of the cartonboard Decision;

(c) the Court's consideration of the question whether the Commission exercised that choice correctly was inadequate. Even if (which is denied) the Commission was entitled to choose which entity from different corporate groups to make the addressee of the cartonboard Decision, the Court erred in law in finding that the Commission's choice could not be validly called into question.'

11. Are those criticisms founded?

12. Let me point out first of all that paragraphs 61 and 62 of the contested judgment, which constitute the premiss on which the Court's reasoning is based, refer to facts which the Court found to have been established and which, as such, cannot be questioned in the context of an appeal. Nor does the appellant dispute those facts. It challenges paragraph 63 of that judgment, in which it is asserted that those facts rule out any issue of succession.

13. As the Court of First Instance presented that assertion as a simple application to the case before it of the principles laid down in paragraphs 236 to 238 of the judgment in *Enichem Anic* v *Commission*, cited above, it is appropriate to set out those paragraphs, which are as follows:

'236. When such an infringement is found to have been committed, it is necessary to identify the natural or legal person who was responsible for the operation of the undertaking at the time when the infringement was committed, so that it can answer for it.

237. However, where between the commission of the infringement and the time when the undertaking in question must answer for it the person responsible for the operation of that undertaking has ceased to exist in law, it is necessary, first, to find the combination of physical and human elements which contributed to the commission of the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that because of the disappearance of the person responsible for its operation when the infringement was committed the undertaking may fail to answer for it.

238. In the case of the applicant, the legal person responsible for the operation of the undertaking when the infringement was committed continued to exist until the adoption of the Decision. The Commission was therefore entitled to hold it answerable for the infringement.'

14. If one analyses those principles, one finds that proceeding from the premiss that a distinction must be made between an undertaking, that is to say, the business active on the market, and the person responsible for its operation, two possible cases are envisaged.

15. In the first case, the person responsible for the undertaking at the moment when the practices restricting competition are implemented still exists in law when the decision finding them to be an infringement is adopted and it is then for that person to answer for those practices and it must therefore be the addressee of the decision.

There is not therefore any issue of succession in the sense of a transfer, from one legal person to another, of obligations arising out of a liability.

16. In the second case, the person responsible for the operation of the business has ceased to exist in law when the decision is adopted and it is then necessary, if the infringement is not to escape sanction, to establish who has replaced that person and, in order to do so, to trace the undertaking as an actual economic concept and not a legal concept, so as to identify the person who is now directing the operation. Through the use of a method of attributing liability, which, for convenience, is classified as 'succession', it is that person who will be the addressee of the decision and who will have to bear the fine imposed.

17. Under that approach, which could be summarised as the principle that 'responsibility must lie where the power is to be found', the undertaking is not itself required to bear responsibility for its actions. That principle serves to identify the person who is liable to bear the fine imposed, it being understood that that person may be selected to some extent by default if the person who directed the undertaking when the infringement was committed has disappeared and a sanction can therefore no longer be imposed on it.

18. Clearly, the present case falls within the first category, as SCA Holding is merely the new name of Reed Paper & Board Ltd (hereinafter 'P&B'), which was responsible for operating Colthrop at the material time. It is therefore wholly logical that, applying the principles laid down in the judgment in *Enichem Anic* v *Commission*, cited above, the Court of First Instance held that there was no issue of succession and took the view that SCA Holding had to be the addressee of the decision.

19. Where, according to the appellant, is the defect in that reasoning?

20. It lies, in so far as it is possible to make out a clear position from the lengthy arguments which the appeal devotes to this question, not in the incorrectness of the principles laid down in the judgment in *Enichem Anic* v *Commission*, which SCA Holding claims that it does not wish to call in question, but in their inapplicability to the present case. According to the applicant, the particular feature of the present case is the fact that, when the decision was adopted, the undertaking which had committed the infringement not only was no longer, for operational purposes, the responsibility of the legal person bearing that responsibility at the time when the infringements occurred, but had itself acquired legal personality, the business unit which had been constituted by Colthrop having been incorporated into a separate limited company before being sold.

21. At first sight it is difficult to see how those facts — which no one disputes — preclude application of the principles laid down in the judgment in *Enichem Anic* v *Commission*: they do not provide any

grounds for the view that this is not a case falling within the first category envisaged above, in which the legal person responsible for operating the undertaking over the period of the infringement still exists on the day on which the Commission adopts its decision.

22. Consequently, even if not expressly stated, SCA Holding is in fact seeking to contest or, more subtly, modify the very approach adopted in the judgment in *Enichem Anic* v *Commission*, in order to show that there is an issue of succession through which it could escape the consequences of its conduct over the period when it directed the operation of Colthrop.

23. Its fundamental objection is that the Commission and the Court of First Instance did not accept that once it had divested itself of Colthrop it was discharged from liability incurred as the legal person responsible for operating it over the period in which the infringements of the competition rules took place.

24. Although it does not make a frontal attack on the premisses underlying the reasoning in the judgment in *Enichem Anic* v *Commission* (namely that a distinction must be made between the undertaking and the legal person responsible for its operation), it constructs a line of reasoning which ultimately leaves liability at the level of the undertaking itself.

25. In that subtle argument, the legal person taking on responsibility for the operation of the undertaking is no longer the person truly responsible for the practices contrary to the competition rules, it is no more than a representative to which the undertaking, the entity with real responsibility, is attached. That undertaking, when it changes hands, is of course going to retain responsibility — it cannot divest itself of it — and when the Commission, after having discovered the anti-competitive practices, proposes to impose sanctions in respect of them, the proceedings will have to be addressed to the person who has become the new representative of the undertaking. However, if the undertaking has gained its independence as it were, through incorporation as a limited company — like a minor reaching his majority, like succession in family law to take a rather strained analogy, — it will have to answer for its responsibilities itself. Applied to the present case, that theory would mean that Colthrop Board Mill Ltd would have to answer for the anti-competitive acts committed by the Colthrop mill when it was managed by SCA Holding.

26. Incidentally it will be noted that when the issue is considered in that way, recourse to the concept of 'succession' seems rather artificial, since Colthrop would in fact have been responsible for its own actions from the very beginning, and have remained so until the end.

27. Be that as it may, I consider that such a line of argument must be challenged and that it is necessary to retain the wholly unambiguous approach which the Court of First Instance adopted in its judgment in *Enichem Anic* v *Commission* and which it merely applied in the present case; it seems to me to be a basically sound principle that responsibility should be linked to power.

28. SCA Holding managed Colthrop throughout the period of the infringement and it is only normal that it should now shoulder its responsibilities for its past conduct.

29. I would have finished my appraisal of this plea if the Court of First Instance had not sought to support its conclusion by other arguments, the correctness of which is disputed by the appellant with, let me say, more reason.

30. SCA Holding states that paragraph 65 of the contested judgment not only contradicts paragraph 63 but is also erroneous in that it accepts that the Commission may in certain circumstances have a choice as to the addressee of its decision imposing fines in respect of practices contrary to the competition rules and asserts that this choice cannot be validly called into question once made.

31. I acknowledge that paragraph 65 of the contested judgment must puzzle the reader in various respects. First of all it is astonishing that the Court of First Instance refers to Colthrop's status as an undertaking as a mere hypothesis. Admittedly, in the preceding paragraphs it is not expressly stated that Colthrop is an undertaking, paragraph 61 merely stating that it was 'the factory at which cartonboard was manufactured'.

32. But the entire reasoning in paragraph 63 of the contested judgment, constructed by reference to the judgment in *Enichem Anic* v *Commission*, is posited on the existence of Colthrop as an undertaking, since it makes the distinction between an undertaking and the legal person responsible for its operation. If the Court of First Instance had intended to find that Colthrop was not an undertaking and was only a mere asset of P&B, which subsequently became SCA Holding, there would have been no need to refer to the judgment in *Enichem Anic* v *Commission*. In that case, the only identifiable undertaking would have been P&B and no problem of liability for the infringement would have arisen because the decision would quite simply have been addressed to the 'company undertaking' which had itself infringed the competition rules, the subsequent sale of Colthrop's assets being wholly irrelevant.

33. The very fact that, in paragraph 65 of the contested decision, Colthrop's status as an undertaking was put forward as a mere hypothesis clearly cannot substantiate the above arguments.

34. Moreover, over and above that contradiction, it seems to me to be highly questionable to refer in hypothetical terms to the existence of Colthrop as an undertaking within the meaning of Article 85(1) of the Treaty when the issue being discussed is what entity must be the addressee of a Commission decision which has just found an infringement of the competition rules. I consider that the competition rules must be applied clearly and not in the haze left by paragraph 65 of the contested judgment.

35. I can only express the same reservations regarding the consequences which the Court of First Instance attaches to a finding that Colthrop may be an undertaking. In no way does it seem to me to be desirable that the Commission should have a choice as to the addressee of its decision. I do not dispute that in some cases, such as that with which we are presently dealing, problems may arise when determining the addressee of the decision. But it is certainly not a ground for allowing a choice. The complexity of a problem does not mean that any approach whatever to that problem is correct. The identification of the addressee must follow rules of law, such as those laid down in the judgment in *Enichem Anic* v *Commission*, and it is through their application, after a rigorous examination, that the addressee must be identified and not through the exercise of a choice. It will always be extremely difficult to persuade the persons concerned that the choice was not capricious.

36. In my opinion, there is therefore no choice. But even supposing that there might be a choice, that is to say that the rule of law allows a decision which has just imposed a fine in respect of conduct contrary to Article 85(1) of the Treaty by an economic operator to be addressed just as well to A as to B, is it not then possible, as the Court of First Instance asserts, for the Commission's choice to be disputed by the person chosen as addressee?

37. One might be tempted to reply that that is in fact the case. Once it is accepted that the decision could be addressed just as well to A as to B, then A, if he has been chosen, may be able to show that B could just as well have been the addressee, but doing so would not alter the fact that the choice of A was not contrary to the legal rule. It seems to me that that is the answer which the Court wished to give to SCA Holding.

38. But can it be accepted that the only reason given for choosing A is that nothing precluded the choice of A, or even that no reasons have to be given for choosing A? That would amount to allowing the Commission such a wide discretion as to border on arbitrariness.

39. However, if it is required that a real statement of reasons be given for choosing A, then A will at the same time have to be

given the right to challenge that statement of reasons before the Court. If the Court censures that decision, will the consequence not automatically be that B should have been chosen and, in that case, what remains of the Commission's alleged choice?

40. It can be seen, from that point of view too, that, if one wishes to avoid being locked in the contradictions inherent in the existence of a choice and, at the same time, of a minimum of review by the courts, it is clearly not desirable to accept that the Commission may, even if only in quite specific cases, have a choice as to the addressee of its decision.

41. Suppression of infringements of the competition rules is too serious a matter for there to be room in it for approximation. The Commission may be in two minds, but it must take a decision, that is to say, choose between the approaches which seem to it to be conceivable. Ultimately it is for the Community judicature to decide whether it made the right choice, which is another way of saying that at the level of the Commission there is no real choice, merely options, only one of which correctly applies the particular rule of law.

42. Must the view therefore be taken that what is stated in paragraph 65 of the contested judgment is not only incorrect but also demolishes what is said in the preceding paragraph? I am most reluctant to suggest that the Court take that view.

43. First, to find fault with that paragraph of the contested judgment would not mean that SCA Holding was not the correct addressee of the decision. Quite the contrary, because, in my view, taken on their own, paragraphs 61 to 64 must escape censure.

44. Second, in paragraph 66 et seq. of the contested judgment the Court gave another reason for dismissing the action brought before it by SCA Holding to contest the decision in so far as it was addressed to it, namely the fact that P&B, that is to say SCA Holding under its former name, was on the list of members of the PG Paperboard, that is to say, the body within which the cartel was organised.

45. That factor seems to me to be decisive, since it reinforces what has been stated in paragraphs 61 to 64 of the contested judgment. It shows that it was indeed SCA Holding which caused Colthrop to become involved in the cartel, which was the partner of the other members of the cartel, and which committed itself in its own name. SCA Holding's participation in the activities of the PG Paperboard rules out the possibility that it could now refuse to shoulder responsibility for the anti-competitive practices implemented on the

market by Colthrop and thus justifies its being the addressee of the decision.

46. All things considered, I therefore take the view that the Court of First Instance was fully entitled to reject SCA Holding's plea and that paragraph 65 of the contested judgment must be regarded as merely an unfortunate *obiter dictum*, which is not of such a nature as to call into question the correctness of the approach adopted by the Court.

The second plea: the amount of the fine

47. SCA Holding complains that the Court of First Instance erred in law in exercising its unlimited jurisdiction when reviewing the fine imposed on it. This plea is itself divided into three parts. First, the Court is alleged to have erred in law in holding that the position adopted by the appellant during the administrative procedure did not justify a reduction in the fine. Second, it erred in law in holding that the decision was not vitiated by defective reasoning which justified annulment or reduction of the fine. Third, the Court could not accept that the Commission could choose SCA Holding as the addressee of the decision relating to Colthrop and simultaneously also refuse to take into account, when reviewing the level of the fine, the fact that this had involved the exercise of a choice. I will examine those three parts in turn.

The first part of the second plea

48. Before the Court of First Instance, SCA Holding claimed that the position it adopted during the administrative procedure, which consisted in not commenting on the existence of the facts constituting the infringement alleged against it, whilst stating that it had no knowledge of the cartonboard sector, having owned Colthrop only for a very short period before transferring it to another company, entitled it to benefit, like other addressees of the decision, from a reduction in the amount of the fine. The Court rejected that claim in the following terms:

> '156. The Commission correctly considered that the applicant, by replying in that way, did not conduct itself in a manner which justified a reduction in the fine on grounds of cooperation during the administrative procedure. A reduction on that ground is justified only if the conduct enabled the Commission to establish an infringe-

ment more easily and, where relevant, to bring it to an end (see Case T-13/89 *ICI* v *Commission* [1992] ECR II-1021, paragraph 393).

Commission's task of finding infringements of the Community competition rules and bringing them to an end.'

157. An undertaking which expressly states that it is not contesting the factual allegations on which the Commission bases its objections may be regarded as having furthered the Commission's task of finding infringements of the Community competition rules and bringing them to an end. In its decisions finding infringements of those rules, the Commission is entitled to take the view that such conduct constitutes an acknowledgement of the factual allegations and thus proves that those allegations are correct. Such conduct may therefore justify a reduction in the fine.

49. SCA Holding contests that analysis and asserts that it is impossible to treat an undertaking which does not express a view by tactical choice, when it would have been perfectly well able to do so as it was in possession of all the necessary information, in the same way as an undertaking which, like itself, does not express a view because it is unable to do so, as it does not have any information allowing it to assess whether the Commission's assertions are in fact correct. It also claims that the position which it adopted facilitated the Commission's task.

158. The situation is different where the essential allegations made by the Commission in its statement of objections are contested by an undertaking in its reply to that statement, or where the undertaking does not reply or merely states, as the applicant did, that it is not expressly any view on the Commission's factual allegations. By adopting such an attitude during the administrative procedure the undertaking does not further the

50. Contrary to the Commission's submission, this plea is not inadmissible. The applicant is not calling in question simply findings of fact made by the Court of First Instance but is alleging that the Court wrongly held that the position which it had adopted could not be regarded as the same as that of the undertakings which had not contested the facts on which the Commission's objections were based and which, on that ground, received a reduction in the fine merited by their participation in

the cartel, the correctness of that reduction not being at issue.

51. However, that allegation cannot withstand examination. One cannot but agree with the Court of First Instance when it explains, in paragraph 157 of the contested judgment, in what respect the Commission's task is truly alleviated where the factual allegations are not contested, and that it is not at all alleviated when the undertaking immures itself in silence.

52. In the former case, the undertaking is definitely prevented from putting forward certain grounds of challenge, because the *venire contra factum* rule would be raised against it, whereas in the latter case the undertaking is free to put forward, at the appropriate time, all pleas in defence which seem to it to be effective.

53. That is perfectly illustrated, as the Commission states, by the fact that during the oral procedure before the Court of First Instance SCA Holding wished to adopt one of the heads of common oral argument contesting certain facts found by the Commission, that is to say, it attempted to gain an advantage before the Court from the fact that it had prudently refrained during the administrative procedure from acknowledging the correctness of the Commission's factual allegations. While it was prevented from doing so, that was solely on the ground that it had not challenged those facts in its originating application.

54. As the Commission also states, SCA Holding could not back both horses at the same time. It could not both try to appear to be an innocent bystander with regard to the cartel and derive the benefits from the minimum cooperation with the Commission which the acknowledgement of the existence of certain facts represented. It made a choice which turned out to be unwise, but that tactical error cannot constitute a ground of appeal.

55. Even assuming that SCA Holding were not playing a role in presenting itself as an innocent bystander, that is to say, that it did not refuse to acknowledge facts of which it was perfectly aware, there would still be no reason to find fault with the Court's reasoning. The Court did not reject SCA Holding's plea on the ground that it had not shown a real desire to cooperate. It did not mean to sanction any negative attitude on the part of SCA Holding. It simply found that, when viewed objectively and without any value judgment, the attitude adopted by SCA Holding was not of such a nature as to facilitate the Commission's task and that there was therefore no possible objective justification for reducing

the fine which had been imposed on it, because the only criterion for the award of such a reduction was the actual facilitation of the Commission's task.

56. SCA Holding has not been 'punished' for its attitude. It is merely that its attitude, as regards its consequences, cannot be treated in the same way as that of the undertakings to which a reduction was awarded. The refusal by the Court of First Instance to exercise its unlimited jurisdiction and reduce the fine on SCA Holding does not appear to me to be in any way arbitrary or contrary to law and I therefore propose that the Court of Justice should reject that part of the second plea.

The second part of the second plea

57. In the second part of the second plea the appellant considers that the Court of First Instance erred in law in finding that the lack of specific reasons in the decision as to the method of calculating the fines should not, in the present case, be regarded as an infringement of the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC) which justified the annulment in whole or in part of the fines imposed (paragraph 207 of the contested judgment). As that plea has also been submitted in the eight other appeals, I express a view on it only in my opinion in Case C-283/98 P *Mo och Domsjö* v *Commission*. In that opinion I have proposed that the plea should be rejected.

The third part of the second plea

58. The last part of the plea directed at the Court's refusal to annul or reduce the fine imposed on the applicant does not call for lengthy argument. First, I have already explained above why it seems to me that there is no question of a true choice made by the Commission, endorsed by the Court of First Instance, so that the very premiss on which it is based turns out to be incorrect.

59. Second, even assuming that there could have been room for a choice, it is quite clear that a fine had to be imposed on the legal person chosen as addressee of the decision in respect of the gravity and duration of the infringement committed by the undertaking whose conduct was attributed to it; there should be no discrimination as against the other addressees of the decision which had to answer for infringements committed by the undertakings that were parties to the cartel, and therefore there should be no reduction in the amount of its fine. This last ground of appeal by SCA Holding cannot therefore succeed any more than any of its other grounds.

Conclusion

60. Since none of the pleas raised by SCA Holding Ltd in contesting the judgment of the Court of First Instance of 14 May 1998 in Case T-327/94 *SCA Holding* v *Commission* seems to me to be well founded, I can only propose that the Court should:

(1) dismiss the appeal in its entirety; and

(2) order the appellant to pay the costs.