COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Gibbs v. HSBC Global Asset Management (Canada) Limited,* 2025 BCCA 31

Date: 20250204
Docket: CA49701

Between:

Linnea Gibbs

Appellant
(Plaintiff)

And

HSBC Global Asset Management (Canada) Limited and HSBC Investment Funds (Canada) Inc.

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Fenlon
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Orders of the Supreme Court of British Columbia, dated February 26, 2024 (*Gibbs v. HSBC Global Asset Management (Canada) Limited*, 2024 BCSC 324, Vancouver Docket S207242) and April 4, 2024 (*Gibbs v. HSBC Global Asset Management (Canada) Limited*, 2024 BCSC 536, Vancouver Docket S207242).

Counsel for the Appellant:	J.R.E. Archibald P.J. Bates
Counsel for the Respondents:	D.R. McGowan M.T. Maniago C. Fawcett
Place and Date of Hearing:	Vancouver, British Columbia October 21, 2024
Place and Date of Judgment:	Vancouver, British Columbia February 4, 2025

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals an order refusing to certify a class action. The proposed class action alleges the respondent investment managers represented to investors that mutual funds were actively managed when they were actually passively managed. The appellant claims investors were charged fees that were "unfair and unreasonable" for a passively managed fund. The certification application was addressed over three hearings. In the first certification hearing, the judge found that the pleadings disclosed four expressly pleaded causes of action (breach of trust, breach of fiduciary duty, prospectus misrepresentation, and unjust enrichment) as well as the tort of civil fraud, which the appellant had not pleaded. He adjourned the hearing to allow the appellant to file evidence supporting the primary common issue. Between the first and second hearings, the appellant amended the claim to address the judge's conclusion that her claim included fraud. At the second hearing, the judge found that the amended pleading, having disclaimed fraud, no longer disclosed a cause of action. He adjourned again to allow the appellant to clarify the pleadings. At the third hearing, the judge dismissed the certification application. The judge found that the amended pleading was confounding and awarded costs against the appellant for the second hearing, despite the presumption against costs in class proceedings.

Held: Appeal allowed. All three versions of the appellant's claim pleaded causes of action for breaches of fiduciary duty and trust, failure to comply with statutory disclosure obligations, and unjust enrichment. Fraud is not a requisite element of those causes of action. The appellant could have pleaded the tort of civil fraud but chose not to. Because the judge found in the first hearing that the appellant had satisfied the other requirements for certification, this court should certify the class action. The judge erred in awarding costs against the appellant because any deficiencies in the pleadings did not amount to exceptional circumstances justifying a departure from the presumption against costs in class proceedings.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] This is an appeal from an order refusing to certify a class action on the basis that the notice of civil claim did not disclose a cause of action. The appellant also appeals an award of costs made against her.

[2] In broad strokes, the proposed class action alleges the respondents HSBC Global Asset Management (Canada) Limited and HSBC Investment Funds (Canada) Inc. represented to investors that their mutual funds were "actively managed," when in reality they were "passively managed." The foundational complaint relates to the Equity Fund; as in the court below, I will refer to that fund in assessing the issues on appeal. Some background information is necessary.

[3] The difference between actively and passively managed funds is explained by Prof. M. Peihani in "Unveiling Closet Indexing: Insights into Canadian Mutual Fund Fee Litigation" (2024) 68 C.B.L.J. 256 at 257–258*:*

> Mutual funds are a type of investment fund that pool money from investors to buy a diversified portfolio of stocks, bonds, or other securities. The mutual fund is managed by an investment fund manager, often a trustee, who makes investment decisions on behalf of the investors. This collective investment model allows individuals who want to save for retirement or achieve other financial goals to participate in a diversified portfolio, which they may not have been able to do on their own due to limited resources or expertise. Investment funds can be either actively or passively managed. Active funds are managed by fund managers who use their skills and expertise to pick investments and aim to outperform a certain benchmark. On the other hand, passive funds, namely index funds and exchange traded funds (ETFs), simply aim to replicate the performance of a specific market index.
>
> A significant issue with actively managed mutual funds especially in Canada is their cost. They tend to charge much higher fees compared to passive funds due to the resources involved in selecting and managing the investments.
>
> [Emphasis added.]

[4] Where a fund charges for active management but in reality holds investments very similar to those in a passively managed fund, it is said to be engaging in "closet indexing." As noted in the passage quoted above, passive funds aim to replicate the performance of a specific market index known as a benchmark by holding a similar portfolio of assets: *Turpin v. TD Asset Management Inc.*, 2022 BCSC 1083 at para. 38 [*Turpin*]. In the present case, the relevant benchmark is the S&P/TSX Composite Index (up to July 2015) and the S&P/TSX Capped Composite Index (from July 2015 on). Passively managed funds mirror that Index, holding shares of the same type and overall weighting. Investors are willing to pay higher fees for actively managed funds because they have the prospect of outperforming passively managed funds.

[5] The appellant says fees paid by investors in passive funds are typically in the range of 0.05%–0.25% of the holder's investment, whereas the fees charged for the Equity Fund are in the range of 1.97%. The appellant claims that she and other investors in the Equity Fund were overcharged for what was in reality a passively

managed fund that had no prospect of doing better than a less expensive passively managed fund.

[6] With that general background, I turn to the appellant's efforts to have the class action certified in the court below.

The BCSC Certification Hearings

[7] The order under appeal was pronounced after the third certification hearing. In order to appreciate the context in which those hearings occurred, it is important to understand that the judge hearing the certification application was the case management judge for three other class proceedings as well—all of which alleged closet indexing: *Turpin; McCorquodale v. RBC Global Asset Management Inc.*, 2021 BCSC 144 [*McCorquodale*]; and *Pope v. Canadian Imperial Bank of Commerce*, 2022 BCSC 1857. Appellant's counsel in the present case were also counsel for the plaintiffs in the other proceedings.

[8] The first certification hearing took place at the end of June 2021, with a decision rendered on August 2, 2022; the second hearing occurred in June 2023, and the third in September 2023. As the certification application proceeded over three years, the judge was hearing and deciding matters in the other closet indexing cases. This made for something of a shifting legal landscape. I turn now to the first of the three certification hearings.

1) Gibbs v. HSBC Global Asset Management (Canada) Limited, 2022 BCSC 1291 *[Gibbs #1]*

[9] In *Gibbs #1*, the judge began by reviewing the well-settled principles governing certification set out by Bauman C.J. in *Watson v. Bank of America Corporation*, 2014 BCSC 532:

> [58] The certification stage of a class proceeding is not meant to test the merits of the claim, or to determine if it is likely to succeed. Instead, this stage is concerned with the form of the action and whether it can properly proceed as a class proceeding: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16; [*Pro-Sys Consultants Ltd. v*. *Microsoft*, 2013 SCC 57] at para. 99.
>
> [59] To this end, s. 4(1) of the *CPA* contains the five requirements for certification:

> 4(1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
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> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> [Emphasis added.]

[10] In accordance with the requirements of s. 4(1)(a) of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50, the judge began by considering whether the notice of civil claim ("NOCC") disclosed a cause of action. Although the appellant had neither pleaded nor relied on the tort of civil fraud (also known as fraudulent misrepresentation), the judge on his own initiative determined that the NOCC met all the requisite elements of that tort: (1) a false representation made by the defendant; (2) some level of knowledge by the defendant of the falsehood of the representation; (3) the false representation caused the plaintiff to act; and (4) the plaintiff's actions resulted in a loss (*Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21). The judge's characterization of the appellant's claim in this way ultimately became the lens through which he assessed the viability of the certification application—a matter of some import to which I will return later in these reasons.

[11] The judge then turned to the causes of action expressly pleaded by the appellant: (a) breach of trust, (b) breach of fiduciary duty, (c) breach of securities

prospectus disclosure requirements, and (d) unjust enrichment. He concluded that the NOCC effectively pleaded all four: *Gibbs #1* at paras. 60, 62, and 64–69.

[12] Having found that the NOCC disclosed causes of action, the judge moved on to consider the remaining criteria for certification under s. 4(1)(b)–(e) of the *Class Proceedings Act*. He was satisfied that the claim involved an identifiable class, that the appellant was an appropriate representative, that a class action was the preferable procedure, and that the proposed common issues "would advance the litigation toward resolution." However, he identified the need for evidence to demonstrate "some basis in fact" for the foundational common issue: whether the respondents had used a closet indexing strategy.

[13] In this regard, the judge noted that although the appellant had provided an affidavit of Prof. M. Simutin (a Professor of Finance at the Rotman School of Management at the University of Toronto) that described metrics that may be used to identify closet indexing, the affidavit did not apply those metrics to the Equity Fund. The judge observed that Prof. Simutin had applied the metrics to the funds in issue in *Turpin* and *McCorquodale*: *Gibbs #1* at para. 90. He therefore adjourned the application to give the appellant an opportunity to file a further affidavit from Prof. Simutin supplying that evidence.

2) *Gibbs v. HSBC Global Asset Management (Canada) Limited,* 2023 BCSC 1152 *[Gibbs #2]*

[14] The appellant proceeded to file a second affidavit from Prof. Simutin in which he applied objective metrics to the Equity Fund and opined that the fund met the parameters for closet indexing. One of those metrics was "active risk," which he explained as follows:

> [6] The "activeness" of a mutual fund manager refers to the degree to which the manager selects holdings and weightings of particular securities for the mutual fund that differ from the holdings and weightings of securities in the benchmark against which the fund's performance is measured.
>
> [7] The "active risk" of a fund refers to the risk of fund performance deviating from benchmark performance. Active risk is a function of the differences between the weights of securities holdings of the fund and its benchmark.

…

> [9] Active share, proposed by Cremers and Petajisto (2009), "represents the share of portfolio holdings". For a fund whose portfolio perfectly matches the portfolio of the benchmark index, active share is zero. Active share increases as the fund deviates more from the index, which it can do by overweighting or underweighting securities relative to their weights in the index. Active share of a fund without positions in any index constituents is at its theoretically maximum of one.
>
> …
>
> [11] The lower the active share of a fund, the less likely it is to outperform its benchmark after expenses are deducted. Intuitively, this is the case because holdings of a fund with low active share are similar to holdings of the benchmark, and so before-expenses performance of the fund and the benchmark can be expected to be similar. After expenses are deducted, fund performance can be expected to trail benchmark performance. This effect amplifies over time: the longer the time over which a fund has low active share, the less likely it is to outperform the benchmark after expenses over that time. Put differently, active share below a certain threshold is consistent with closet indexing.
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> [Footnotes removed; emphasis added.]

[15] In hindsight, had the appellant simply left the NOCC in its original form, filed Prof. Simutin's affidavit, and reset the matter for hearing, it seems likely certification would have followed as a matter of course. However, counsel for the appellant chose to amend the NOCC to address two developments: first, the judge's unanticipated reliance on civil fraud as a cause of action in *Gibbs #1*; second, the judge's dismissal of the sister claim in *Turpin* on the basis that the plaintiff had failed to establish fraud and had not pleaded the concept of active risk.

[16] In *Turpin,* both the certification order and the pleadings defined closet indexing as "an investment strategy designed to closely track or replicate, not exceed, the performance of the [b]enchmark" (at para. 6). The judge concluded that the use of the word "designed" in the definition was significant. In his view, that definition "requires deceit, fraud, or dishonesty by one or more individual portfolio managers or by [the respondent] operating as an institution": *Turpin* at para. 68.

[17] Given the judge's reliance on fraud in dismissing a similar claim in *Turpin*, and his interpretation of the pleading in *Gibbs #1* as including a claim in fraud, the appellant sought to make it crystal clear that she was not relying on fraud. She

accordingly amended the NOCC to expressly disclaim fraud. The appellant also made amendments to emphasize her claims in negligence, breach of fiduciary duties, and failure to comply with statutory disclosure obligations:

> [16] … The Defendants were negligent in failing to recognize the materiality of the Closet Indexing Strategy and its associated risks and to make the required disclosure under NI 81-101 requiring disclosure of Investment Strategies and their risks and section 63 of the *BCSA* (and equivalent provisions of the Other Canadian Securities Legislation) requiring that investors receive full, plain, and true disclosure about the issued securities in prospectuses. The Defendants were also negligent in failing to ensure that their management fees were commensurate with the level of Active Risk in the *Equity Fund*. The Plaintiff expressly disclaims that the Defendants' misconduct was fraudulent.

The amendments also stressed the appellant's reliance on, and the importance of, the metric of active risk in determining whether a Closet Indexing Strategy had been used.

[18] The judge rejected the amendments, describing the pleading as "confounding" (at para. 12.) In his view, it was unclear how a failure to disclose that a closet indexing strategy was being used could be negligent, given that an investment strategy must be intentional. The judge echoed his reasoning in *Turpin*, finding that a failure to make the requisite securities law disclosure would have to be intentional and could not simply be negligent: *Gibbs #2* at para. 32. He recognized, however, that there might be a scenario where an intentional strategy was not disclosed as a result of negligence, saying:

> [33] Possibly, the plaintiff is saying that in the defendants' institutional environment the "left hand didn't know what the right hand was doing" and were negligent in this regard. That is, the portfolio adviser had a strategy or plan to take little risk relative to the Benchmark and did not realize that such would require disclosure and those responsible for compliance did not appreciate the nature of the strategy and, accordingly, did not include it in the description required under NI 81-101F1. If such is the case, such needs to be clearly pleaded, possibly with particulars, so that the defendants and the Court may understand the plaintiff's claim.
>
> [34] Also possibly, the plaintiff is saying that the defendants, over time, with hindsight, should have realized that their strategy would not result in significant returns for investors having regard to the fees the defendants charged.

[19] Once again, the judge adjourned the certification application to allow the appellant to file a further amended notice of civil claim to correct the deficiencies he had identified.

3) *Gibbs v. HSBC Global Asset Management (Canada) Limited,* 2024 BCSC 324 *[Gibbs #3]*

[20] The appellant tried again, filing a "Fresh as Amended" Notice of Civil Claim ("FANOCC"), which provided further particulars to explain how a failure to disclose an investment strategy would not necessarily involve fraud:

> [38] As institutional investment fund managers, the Defendants had separate employee-teams in the areas of portfolio and risk management, fee-setting, and regulatory disclosure during the Class Period. Individual portfolio and risk managers involved in day-to-day managing of the *Equity Fund*'s portfolio securities were not involved in reviewing and setting management fees charged to the *Equity Fund* and *World Selection Funds*, nor in determining the content of Simplified Prospectuses for the *Equity Fund*. As a result, there were institutional-level failures to (i) recognize, for disclosure purposes, the materiality of the Closet Indexing Strategy, the substantial linkage of the *Equity Fund*'s performance to the Benchmark's performance before fees, and the associated substantial risk of the *Equity Fund* underperforming the Benchmark after fees; and (ii) review, reduce, rebate, and waive management fees in light of the *Equity Fund*'s performance relative to the Benchmark before and after fees.
>
> [39] The Defendants breached the standard of care as a trustee and fiduciary, as set out in section 9.6 of the Current DOT, by failing to recognize the materiality of the Closet Indexing Strategy, the *Equity Fund*'s performance being substantially linked to the Benchmark's performance, and the associated substantial risk of the *Equity Fund* underperforming the Benchmark after fees. As such, the Defendants never disclosed this material information to Class Members in breach of their disclosure obligations as a trustee and fiduciary and under NI 81-101 and section 63 of the *BCSA* (and equivalent provisions of the Other Canadian Securities Legislation).
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> [Emphasis added.]

[21] The judge remained unconvinced that the FANOCC disclosed a valid cause of action as required by s. 4(1)(a) of the *Class Proceedings Act.* In his view, the pleading lacked material facts about closet indexing and failed to disclose a fraudulent intent to mislead investors about the Equity Fund's investment strategy. The judge once again set out the elements of the tort of civil fraud and said:

> [23] Without fraud, what meaning is to be given to "investment strategy" or to "closely track"? Intent is required. A strategy or tracking does not arise from chance or negligence. The portfolio manager of an index fund, with intent, develops and implements an investment strategy to closely track the fund's benchmark. The portfolio manager of an index fund is not acting fraudulently because the strategy to closely track the fund's benchmark is disclosed.
>
> [24] Without using the word fraud, fraud is pleaded, but then expressly disavowed…
>
> [Emphasis added.]

[22] The judge concluded that the FANOCC was "confounding and confusing" (at paras. 28, 35, 41) and did not meet the requirements in s. 4(1)(a) of the *Class Proceedings Act* to plead a cause of action. He therefore dismissed the application for certification.

4) *The Costs Hearing: Gibbs v. HSBC Global Asset Management (Canada) Limited, 2024 BCSC 536 [Gibbs #4]*

[23] The appellants had applied in *Gibbs #2* for costs of the second hearing. Having dismissed the certification application, the judge in *Gibbs #3* invited the respondents to reset the costs application. In *Gibbs #4*, he awarded costs against the appellant despite the presumption against costs in s. 37 of the *Class Proceedings Act*.

Grounds of Appeal

[24] The appellant contends the certification judge made two errors:

> (1) In law, by determining that the FANOCC did not disclose a cause of action as required by s. 4(1)(a) of the *Class Proceedings Act*; and
>
> (2) in principle, by awarding costs against the appellant for the second certification hearing.

[25] For the reasons that follow, I am of the view that both grounds of appeal have been made out and would accordingly allow the appeal.

Analysis

1) *The FANOCC Discloses a Cause of Action*

[26] Whether a pleading raises a cause of action is a question of law reviewable on a standard of correctness: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 52. The question before the Court, therefore, is whether it is plain and obvious that the FANOCC discloses no cause of action and is bound to fail: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

[27] Earlier in these reasons, I described the judge's reliance on the unpleaded tort of civil fraud. It became the lens through which he assessed whether the amended pleadings disclosed a cause of action. In his view, failure to disclose a closet indexing strategy could not occur without an intent to deceive investors, and therefore required the appellant to plead and prove fraudulent intent. In *Gibbs #1*, the judge's liberal reading of the NOCC as implicitly pleading civil fraud reflected this view. When the appellant disclaimed fraud in her amended pleading, the judge concluded that the appellant had pulled the rug out from under what he considered to be the essential cause of action.

[28] It bears repeating that the appellant did not plead civil fraud in the original NOCC. I therefore cannot agree with the respondents' contention that the disclaimer of fraud and other amendments to the ANOCC amounted to a "wholly revised claim." Nor can I agree with the judge's assessment in *Gibbs #4* that "the ANOCC changed the thrust (*i.e.*, fraud) of the plaintiff's NOCC and replaced it with a pleading that failed to comply with the principles of pleadings": at para. 26. To the contrary, all three versions of the appellant's claim pleaded the same four causes of action.

[29] In my view, and with respect, the judge erred in concluding that without civil fraud, the FANOCC no longer disclosed a cause of action. The judge's focus on what he perceived as the abandonment of that claim caused him to overlook the four causes of action he had recognized in *Gibbs #1:*

1. Breach of trust (in relation to the Declaration of Trust): at para 60;

2. Breach of fiduciary duty (which largely mirrored the first cause of action): at para.60;

3. Failure to comply with disclosure obligations in the *Securities Act*, R.S.B.C. 1996, c. 418 at para.62; and

4. Unjust enrichment: at para. 69.

[30] These causes of action were consistently pleaded in each version of the appellant's claim. The ANOCC pleaded breach of trust and fiduciary duty in the same terms used in the original NOCC. The list of ways the respondents were alleged to have breached their trust and fiduciary duties remained substantially the same in both versions, although it was moved to a different point in the ANOCC. Prospectus misrepresentation too was substantially the same as pleaded in the NOCC, with some additions to clarify how the appellant defined "misrepresentation." Those additions simply clarified, but did not change, the pleading. While the NOCC said that the active management misrepresentation was a misrepresentation within the meaning of the *Securities Act*, the ANOCC included the definition of a misrepresentation from s. 1 of the *Act*. That definition was then reflected in the rest of the statutory breach claim. The unjust enrichment claim remained unchanged.

[31] The FANOCC made stylistic edits to the breach of trust and fiduciary duty claims and again relocated the list of ways in which the respondents were said to have breached their trust and fiduciary duties to class members. The only change to that list was a reference to the acts and omissions also constituting "disclosure deficiencies." The pleading of prospectus misrepresentation was virtually identical to that claim in the ANOCC, as was the unjust enrichment claim.

[32] Although I agree with the judge that the FANOCC could have been clearer and more concise, I do not agree that it is "confounding". Read as a whole, it is evident that the FANOCC, as in each version of the claim, relies on causes of action that do not require proof of fraud. Trustees may breach their obligations under a trust without engaging in fraud—for example by purchasing a type of investment prohibited by the trust deed. Similarly, a fiduciary may fall short of the expected

standard of utmost good faith without intending to deceive the person to whom a fiduciary duty is owed: Ellis, *Fiduciary Duties in Canada* (Thomson Reuters, 2020) at s. 1:5; a prospectus may fail to disclose material information through oversight rather than deceit.

[33] In my view the FANOCC, like the earlier versions of the claim, pleads the material facts necessary to support the causes of action described above. It alleges that the respondents either intentionally used a Closet Indexing Strategy and kept this information from investors, or through negligence were unaware that their investment choices were not sufficiently different from the benchmark to give unit holders the prospect of outperforming the benchmark. In either case, the FANOCC claims the respondents' failure to disclose this information to investors was a breach of their disclosure obligations under the *Securities Act*, as well as a breach of their trust and fiduciary duties. Fraud is not a requisite element of any of those wrongs.

[34] It is evident from the allegation of intentional nondisclosure that the appellant could have pleaded the tort of civil fraud. However, she chose not to. That decision was hers to make. Allegations of fraud, if unproved, can result in an award of special costs against a plaintiff. Further, it is more difficult to prove intent to deceive than to prove failure to comply with statutory disclosure requirements and common law trust and fiduciary duties. A plaintiff is not required to plead every available cause of action. Section 4(1)(a) requires only that the plaintiff's pleading disclose a cause of action.

[35] As I have noted, the judge in *Gibbs #1* found that (in addition to civil fraud) the NOCC disclosed four causes of action. With respect, in *Gibbs #2* and *Gibbs #3*, he seemed to lose sight of these causes of action as he grappled with the amendments to the ANOCC and FANOCC, and in particular the appellant's disclaimer of fraud.

[36] In this regard it is noteworthy that in *McCorquodale*, decided prior to *Gibbs #1*, the judge certified a class action on the basis of breach of fiduciary duty, breach of trust, prospectus misrepresentation and unjust enrichment, among others, on substantially the same pleading as the one used in the present case.

[37] In summary on this ground of appeal, I conclude that the FANOCC meets the requirement in s. 4(1)(a) of the *Class Proceedings Act*. I turn now to consider whether this Court should certify the class action or remit it to the trial court to address the remaining requirements in s. 4(1)(b) through (e).

2) *Should the class action be certified?*

[38] The judge in *Gibbs #1* determined that the remaining requirements in s. 4(1)(b)–(e) had been met. The appellant relies on those findings, asserting they remain on foot, are determinative, and should not be reconsidered.

[39] The respondents take the contrary view. First, they say that any findings made in *Gibbs #1* "were made with respect to a wholly different claim" and therefore cannot stand. As I have concluded that the NOCC and FANOCC are not "wholly different claims," I would not accede to this argument.

[40] Second, the respondents point out that the criteria in s. 4(1)(b)–(e) have an evidentiary component—they require "some basis in fact." It is therefore significant, they say, that *Gibbs* #1 was based on a different evidentiary record—one which could not, and did not, include evidence filed in the subsequent hearings. They contend this additional evidence could have changed the outcome of the judge's assessment of the remaining criteria, relying on his statement at para. 50 of *Gibbs #2*:

> [50] Without pleadings that comply with the principles of pleadings, the Court is not in a position to consider the requirements of ss. 4(1)(a)–(e) of the *CPA* or the [proposed common issues].

[41] As I read this passage, the judge is simply recognizing that a claim that fails to disclose a cause of action does not even "get out of the gate" i.e., if s. 4(1)(a) is not satisfied, then there is no basis for continuing the inquiry.

[42] In the present case, the judge correctly identified as essential the first three proposed common issues relating to the factual allegations of misconduct:

> 1. In managing the Equity Fund, did [the respondents] use the Closet Indexing Strategy?

> 2. Was the (before fees) performance of the Equity Fund substantially linked to the performance of the benchmark because of low active risk in the Equity fund?; and
>
> 3. Was there a substantial risk that the Equity Fund would not outperform the benchmark after fees?

Support for these proposed common issues is found in the pleaded facts concerning the Equity Fund's low active risk. The appellant asserts that, as sophisticated asset managers, the respondents knew, or ought to have known, that they were managing a fund that was substantially the same as the benchmark.

[43] In *Gibbs #1*, the judge found the record before him satisfied all five requirements of s. 4(1) of the *Class Proceedings Act* but sought some evidence to support the foundational common issue of whether the Equity Fund reflected closet indexing. Prof. Simutin's second affidavit provided that evidence. Nothing in the supplementary evidence filed by the respondents challenged Prof. Simutin's opinion. Instead, the respondents filed an affidavit from James Hudden, their Chief Investment Officer, containing disputed trading information and performance calculations. The affidavit was based on hearsay and did not identify how the information was compiled. Recognizing its frailty, the judge did not rely on that evidence in the subsequent hearings.

[44] As I see it, the supplementary evidence did not undermine the record relied on by the judge in finding that the appellant had satisfied the requirements in s. 4(1)(b)–(e) — if anything, that evidence had been strengthened.

[45] On appeal, the respondents repeat the arguments concerning s. 4(1)(b)–(e) raised in *Gibbs #1*. The judge addressed those arguments and was satisfied that the requirements had been met. He concluded there was an identifiable class (unitholders in the Equity Fund during the Class Period); the Class Period was not overbroad despite potential issues with limitation periods (since discoverability was a live issue); there were common issues; and a class proceeding was a preferable procedure. He also concluded the appellant was a suitable representative plaintiff

despite the fact that she had not held units in the Equity Fund for the entire class period: *Gibbs #1* at paras. 75–78, 97.

[46] Some of the respondents' submissions go to the merits of the appellant's case. There is no doubt that the appellant's claims arise in a complex investment environment, and that the respondents have arguable defences, including limitation bars. Further, as *Turpin* demonstrates, the appellant's claims may be difficult to prove at trial. Nonetheless, the class action must be certified if the requirements in s. 4(1) are met. At this stage, the court is not concerned with the merits and ultimate success of the proceeding.

[47] In my view, the respondents have not demonstrated an error in the judge's general reasoning at this early stage of the proceeding. I am satisfied that his findings on s. 4(1)(b) to (e) continue to apply, and that this court should accordingly certify the proceeding.

3) *The Costs Award*

[48] Section 37 of the *Class* Proceedings *Act* generally precludes costs against any party to an application for certification unless there are "exceptional circumstances":

> 37 (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.
>
> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
>
> (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> [Emphasis added.]

[49] The judge found there were exceptional circumstances warranting costs against the appellant in the present case for three reasons. First, he noted that the appellant had amended the NOCC without being invited to do so (*Gibbs #4* at para. 21). In his view, that amendment "changed the thrust (*i.e*., fraud) of the plaintiff's NOCC and replaced it with a pleading that failed to comply with the principles of pleadings": *Gibbs #4* at para. 26. Second, he found that an objective observer would be "astonished" that experienced class counsel would frame a pleading that was "confounding" and unclear: at para. 23. Third, the judge observed that the amendments to the NOCC changed the pleading from one disclosing a cause of action in civil fraud to one without a cause of action, thus defeating judicial economy.

[50] With respect, I conclude that the judge erred in awarding costs against the appellant. Although the ANOCC disclaimed fraud, it did not "change the thrust" of the NOCC—fraud had never been pleaded. Nor did the ANOCC fail to disclose a cause of action. Although the ANOCC complicated the definition of closet indexing unnecessarily, it did not "defeat judicial economy" by removing the only viable cause of action. To the contrary, the ANOCC pleaded the same causes of action accepted by the judge in *Gibbs #1* as meeting the cause of action requirement in s.4(1)(a).

[51] I acknowledge that the judge had reason to be critical of the lengthy and complex iterations of the pleadings. However, the changes reflected in the ANOCC were made in response to the judge's focus on fraud as a component of the claims. In my view the pleading, although flawed, did not rise to the level of an exceptional circumstance of the kind required to depart from the strong presumption against awarding costs in class proceedings. The Federal Court of Appeal in *Wenham v. Canada (Attorney General),* 2021 FCA 208 at para. 37 addressed a comparable costs provision in the Court's Rules, saying:

> [37] "Exceptional" connotes something quite remarkable, extraordinary or, if not rare, at least very far from common. Perhaps it would be described as requiring something that would cause an objective observer, familiar with the no costs rule and its rationale, and with all the facts and circumstances of the particular case, to be astonished at the injustice of the successful party not being awarded costs…

[52] In summary on this ground of appeal, I conclude that an award of costs should not have been made against the appellant.

Further Direction Sought

[53] On appeal, the appellant seeks a direction from this Court that a new case management judge be assigned to oversee the proceeding below. However, case assignments are generally within the discretion of the Chief Justice of the Supreme Court. I see no basis upon which this Court could properly interfere with the exercise of that discretion in the circumstances of this case.

Disposition

[54] I would allow the appeal, grant the application for certification, and set aside the costs award against the appellant. In keeping with s. 37 of the *Class Proceeding Act*, I would not award costs of the appeal to either party.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"