

# High Court to hear challenge to common fund order in class actions

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The High Court has agreed to examine the legality of court orders that bind all members of class actions to pay litigation funders, even if they don't sign up to a funding agreement.

So-called “common fund orders”, which also allow the court to supervise the amount litigation funders can reap, have been commonplace since October 2016, when a Federal Court ruling opened the door to them.

However, the High Court yesterday accepted a special leave application challenging the validity of a common fund order lodged by Westpac, which is fighting a class action brought by Shine Lawyers on behalf of more than 80,000 superannuation customers allegedly ripped off by the big bank.

Westpac is appealing a ruling made by the Full Federal Court in March during an unusual joint sitting with the NSW Court of Appeal to decide the issue.

The bank argued that legislation governing the Federal Court did not allow it to make a common fund order and said that making such orders was in any case outside the powers of any judge. It also said common fund orders were unconstitutional because they amounted to the Commonwealth taking property without paying “just terms” — the same part of the Constitution, section 51, that was litigated in 1997 comedy film *The Castle*.

In addition, Westpac argued that even if the court had the power to make a common fund order, the original judge in its case made the wrong decision.

However, the Full Court judges — Chief Justice James Allsop, judge John Middleton and judge Alan Robertson — dismissed all Westpac's arguments. They said Westpac's argument that rights were being taken away from group members was misconceived.

“What is occurring is not to be seen as the imposition on, or interference with, or acquisition of, valuable rights, but the provision of a stable funding arrangement, at a proper fee as supervised by the court, that will facilitate the vindication and realisation of the claims of applicants and group members,” the judges said.