17

Bankruptcy, Housing, 'Have Nots', and the Limits of Legal Landmarks: *Places for People Homes Ltd v Sharples*

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I. INTRODUCTION

Given that bankruptcy law protects an insolvent individual from creditor debt recovery actions, can a tenant in rent arrears rely on bankruptcy to prevent their eviction? In the case of *Places for People Homes Ltd. v Sharples*,[1] the English Court of Appeal provided a negative answer to this question, effectively holding that bankruptcy's protection does not extend to saving renters from losing their homes. This is a perplexing decision on several levels. First, a central feature of bankruptcy law is the freezing or 'staying' of all creditor debt collection activities and processes against an insolvent individual on commencement of insolvency proceedings (the 'stay of enforcement'). This is prior to (most of) the individual's debts being 'discharged' or cancelled at the end of the bankruptcy process (the 'debt discharge'). So, it seems contrary to this basic principle for a court decision to allow a landlord to continue with eviction proceedings on the grounds of rental debt (under English law terminology, a 'possession order' procedure) while a tenant is under bankruptcy protection. Second, contemporary understandings of bankruptcy law emphasise the centrality of the 'fresh start' policy, the idea that many important economic and social objectives can be advanced by providing over-indebted households with relief from unpayable debt.[2] A court decision which permits a landlord to evict a bankrupt tenant seems to conflict patently with this idea of offering insolvent individuals a fresh start.

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[1] *Places for People Homes Ltd v Sharples; A2 Dominion Homes Ltd v Godfrey* [2011] EWCA Civ 813, [2011] HLR 45.

[2] J Spooner, *Bankruptcy: The Case for Relief in an Economy of Debt* (Cambridge, Cambridge University Press 2019) ch 3.

The *Sharples* case is perhaps an unusual landmark in consumer law. Rather than marking an expansion of consumer protections, the Court of Appeal decision extends landlord rights in the face of an eminently plausible pro-debtor reading of the relevant legislation.[3] I have written elsewhere on the weakness of the substantive reasoning of the Court, and its negative policy consequences in the context of a housing crisis and mass household over-indebtedness.[4] This chapter reflects on what the *Sharples* story tells us about the challenges of realising landmark litigation in favour of low-income groups. The case was a dispute between a 'Repeat Player' and a 'One-Shotter', between representatives of the 'haves' and 'have nots' – its story illustrates how structural features of the legal system limit the ability of society's 'have nots' to advance their interests in the courts.[5] A failure of our legal system to facilitate cases 'with precedent-setting potential', means that legal development 'remains worryingly haphazard'.[6] Obstacles to strategic litigation on behalf of the poor, however, mean that this haphazard trend is not random – it skews against the likelihood of legal landmarks on behalf of lower-income groups such as consumers. This chapter draws extensively on an interview I conducted with Mr Richard Holland, the debt advisor who advised Ms Sharples and who was responsible for initiating the central legal arguments ultimately raised before the Court of Appeal.[7] After setting out key features of the case and the Court of Appeal's decision, the chapter continues to discuss theories of dispute resolution, which illustrate the challenges to bringing strategic litigation on behalf of low-income consumers. Mr Holland's fascinating insight into the reality behind the Court decision then illustrates how the case represented a creative defence of a client's interests in the face of a desperate emergency. The result was a legal campaign born of necessity, rather than one developed under ideal conditions for strategic litigation in the pursuit of legal landmarks.

II. SUMMARY OF THE CASE

The Court of Appeal decision in *Sharples* opened promisingly with an acknowledgement that the case raised 'important issues of general principle' about the interface between housing and bankruptcy or personal insolvency law.[8] A functionalist account would see as inevitable the intersection of bankruptcy with social policy areas such as housing, given that many legal systems understand consumer bankruptcy laws as a form of social insurance.[9] In providing relief and a 'fresh start' to financially troubled households who fall through gaps in welfare state provision, bankruptcy can

[3] Insolvency Act 1986, s. 251G.

[4] J Spooner, 'Seeking Shelter in Personal Insolvency Law: Recession, Eviction, and Bankruptcy's Social Safety Net' (2017) 44 *Journal of Law and Society* 374.

[5] M Galanter, 'Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.

[6] L Mulcahy, 'The Collective Interest in Private Dispute Resolution' (2013) 33 *Oxford Journal of Legal Studies* 59, 60.

[7] Interview conducted on 5 November 2021.

[8] '*Sharples*' (n 1) [5].

[9] Spooner (n 4) 378–79; I Ramsay, 'Comparative Consumer Bankruptcy' (2007) 2007 *University of Illinois Law Review* 241.

be seen as a social safety net of last resort, but also as an ultimate consumer protection mechanism.[10] Irrespective of an ability to establish firm liability or consumer defences, bankruptcy law initially protects individuals unable to repay their debts from creditor enforcement, before subsequently discharging or cancelling those debts. This is how the bankruptcy system operates for debt advisers such as Mr Holland, who each day see clients like Ms Sharples invoke bankruptcy to obtain respite from over-indebtedness. From the point of view of English legal institutions, perhaps more used to dealing in abstractions of contractual enforcement and property rights, bankruptcy law however seems to hold a dual identity. Sometimes the law appears to emphasise the aim of household debt relief, but at other times it seems to operate as a tool of creditor wealth maximisation.[11] The *Sharples* case raised the question of which of these views of bankruptcy should take priority.

The Court of Appeal heard joined appeals in two cases where housing associations sought to evict tenants who had fallen behind on rent and sought insolvency protection. The two cases differed in the form of insolvency procedure used by each tenant. Ms Sharples had entered the Bankruptcy procedure,[12] a mechanism existing for centuries through many amendments and policy evolutions, which essentially involves the freezing of all debt collection activity against an insolvent individual; the pooling of their non-essential assets (into a 'bankruptcy estate') and the liquidation of their estate for the benefit of creditors; and finally, the discharge of their debts. Mr Godfrey entered the Debt Relief Order (DRO) procedure, a form of 'bankruptcy light' for 'no income, no assets' cases introduced by 2007 legislation.[13] This mechanism involves the freezing of debt collection and the discharge of debt, but no seizure or distribution of debtor assets. Distinctions between the two procedures are limited due to the reality that most individuals entering Bankruptcy are now consumers with low incomes and few assets, meaning that in most cases there is no 'bankruptcy estate' and no distribution of assets to creditors. One key difference lies in the condition that access to the DRO procedure is limited to individuals owing debts of less than £30,000. The DRO was introduced specifically to deal with modern problems of over-indebtedness among low-income groups, and courts have recognised it as serving the sole purpose of providing 'unadulterated debt relief'.[14] This makes the DRO procedure resemble bespoke 'consumer bankruptcy' laws of the types enacted in many European countries to address the emergence of a problem of mass household over-indebtedness.[15] In contrast, the Bankruptcy procedure has existed for centuries,

[10] WC Whitford, 'The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy' (1994) 68 *American Bankruptcy Law Journal* 397.

[11] Spooner (n 2) ch 3.

[12] In this chapter, 'Bankruptcy' refers to the specific personal insolvency procedure under English law, while 'bankruptcy' refers more broadly to the concept of a law which addresses the insolvency of an individual, whether that law falls under the label of personal insolvency, bankruptcy, debt settlement, debt restructuring etc.

[13] I Ramsay, 'The New Poor Person's Bankruptcy: Comparative Perspectives' (2020) 29 *International Insolvency Review* S4.

[14] *R (Cooper and Payne) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1431, [2011] BPIR 223 [85].

[15] See, eg, I Ramsay, *Personal Insolvency in the 21st Century: A Comparative Analysis of the US and Europe* (Oxford, Hart Publishing, 2017).

from a time when it was first primarily used as a debt collection tool against debtors who actually held assets capable of constituting a 'bankruptcy estate'. This historical baggage means that some courts and lawyers persist in seeing Bankruptcy as serving an aim of debt collection or maximising returns to creditors, embracing only partly (if at all) the aims of debt relief and the 'fresh start' policy.[16]

Given the lack of other material differences between the two appeals, this chapter focuses on the dispute between Ms Sharples and her landlord, Places for People Homes Limited. Places for People is the largest housing association in the UK. Its status seems emblematic of how recent decades have seen the commercialisation of social housing under a 'business ethos', alongside the consolidation of the sector among a small number of large firms.[17] According to its promotional material, it 'provide[s] and manage[s] every kind of housing, plans and builds new developments, manages leisure facilities and offers customer-friendly financial products'.[18] Only approximately half of its business activity is now in the area of 'affordable housing'. The company's turnover in 2021 reached over £800 million, with profits exceeding £200 million, reserves over £700 million, and fixed assets of almost £5 billion.

In December 1997, Ms Sharples rented Denbigh Place from Places for People under an assured tenancy.[19] The next details in the court judgment are that Ms Sharples fell into difficulty paying rent, apparently after almost eight years at Denbigh Place. In September 2005, Places for People commenced possession proceedings against Ms Sharples at Salford County Court, having previously served on her a notice seeking possession. The court adjourned these proceedings on terms that Ms Sharples would pay current rent and a weekly amount towards her arrears, but reinstated them in early 2009 after this repayment plan broke down. A possession order hearing was listed for 19 May 2009, but on 14 May Ms Sharples filed a bankruptcy petition in Salford County Court and was declared bankrupt. The possession order hearing proceeded on 19 May and District Judge Hovington awarded the possession order to Places for People, finding that a mandatory ground for a possession order was established (the ground being at least eight weeks' unpaid rent).[20] Ms Sharples appealed this decision to Judge Tetlow, who rejected the appeal on 28 August 2009. Ms Sharples then took her case to the Court of Appeal.

The Court of Appeal answered negatively the central question raised of 'whether a bankruptcy order … preclude[s] the making of an order for possession of a dwelling let on an assured tenancy on the ground of rent arrears'.[21] The Court held, first, that

[16] Spooner (n 2) 65–77.

[17] D Cowan, C Hunter and H Pawson, 'Jurisdiction and Scale: Rent Arrears, Social Housing, and Human Rights' (2012) 39 *Journal of Law and Society* 269, 282–86.

[18] placesforpeople.co.uk/about-us/who-we-are/what-we-do.

[19] The assured tenancy is the standard form of tenancy in both the private and social housing sectors, and the principles of this case apply to all main forms of tenancy: see, eg, Insolvency Service, 'Insolvency Service Technical Manual, Part 4: Tenancies' (18 July 2012) para 30.70; Cowan, Hunter and Pawson (n 17) 283–88.

[20] Housing Act 1988, Sch 2, Ground 8.

[21] *Sharples* (n 1) [5].

bankruptcy's stay of any creditor's 'remedy in respect of a debt'[22] did not apply to a possession order claim. Etherton LJ stated that:

> An order for possession is not obtained with a view to payment of arrears of rent at all. Its object is to restore to the landlord the right to full possession and enjoyment of the landlord's property ….

Second, the Court held that this finding was not undermined by a legislative amendment introduced under the Housing Act 1998 which had removed an insolvent individual's tenancy from the bankruptcy estate.[23] Rejecting the idea that this amendment had been designed specifically to clarify that bankruptcy protection encompasses eviction, Etherton LJ held that the amendment simply ensured that a court could be confident that in ordering eviction it was not depriving an insolvent individual's creditors of an asset otherwise available to them. The Court found for Ms Sharples on the point that rent arrears constituted debts included in the bankruptcy, and so were discharged. The result is that while Bankruptcy cancelled Ms Sharples' rent arrears, it did not prevent a court from making an order evicting her based on those no-longer-existing arrears.[24]

Figure 1 Denbigh Place – image from Google Maps

[22] See Insolvency Act 1986, ss 285, 251G(2).

[23] Insolvency Act 1986 (1986 c. 45), s 283(3A), inserted by Housing Act 1988 (c.50), s 117(1).

[24] Mr Holland notes here that local authorities and housing associations also tend to treat a housing applicant's rent arrears from a former tenancy as an 'indelible black mark' against an application, even if the former arrears are now 'non-existent' due to an applicant's discharge through personal insolvency.

III. STRUCTURAL INJUSTICE OF CONSUMER LITIGATION AND THE LIMITS OF LEGAL CHANGE

The story of the *Sharples* case offers insight into the structural injustice of consumer litigation, which can tilt the law against the interests of the poor and reduce the odds of consumers achieving landmark change through the courts. Galanter's flagship piece on the why 'haves' tend to win over 'have nots' in battles of adjudication offers a useful frame for exploring the challenges for pursuing progressive change through law.[25] Legal advances for consumers must come at the expense of firms, and landmark cases usually involve a contest for favourable precedent between 'One Shotters' and 'Repeat Players'. 'Repeat Players' are well-resourced and organised parties who frequently use the court system. These actors can structure transactions in legally favourable ways, develop expertise and establish informal relations with institutional actors, and approach litigation strategically. Tactical approaches to litigation involve 'playing the odds' and maximising gains over a series of cases rather than focusing on just one case; as well as litigating to produce long-standing rules rather than solely concentrating on the outcome of a given case.[26] In contrast, 'One-Shotters' are individuals who may take part in litigation once in a lifetime, for whom the stakes in one particular dispute are too large and the financial value too low for such claims to be managed strategically (or to be managed at all – often the One-Shotters have no representation). When focusing on court decisions as legal landmarks, we must remember that fundamentally 'courts are passive' and the potential for legal progress only arises when proceedings are 'triggered by parties'.[27] Repeat Players hold 'superior opportunities … to trigger promising cases and prevent the triggering of unpromising ones', and so can shape precedent and legal development.

One way in which One-Shotters might tilt the litigation and legal development imbalance is through intermediaries – most notably lawyers but also other advisers and campaigners – who could 'bring well-planned and strategized test cases'.[28] In this way, a One-Shotter may be converted into something resembling a Repeat Player. This element of strategy may be unavailable, however, to groups advocating on behalf of the poor. In the context of debt, housing, and related issues in the UK, clients will generally be assisted by debt advice agencies.[29] These agencies 'must take cases as they come', depriving them of the ability to select the most promising cases, which is arguably a process 'central to the success of test cases'.[30] While a Repeat Player can approach all litigation from a strategical perspective, there is necessarily

[25] Galanter (n 5).
[26] ibid 98–101.
[27] ibid 103.
[28] C Menkel-Meadow, 'Do the Haves Come Out Ahead in Alternative Judicial Systems: Repeat Players in ADR' (1999) 15 *Ohio State Journal on Dispute Resolution* 19, 29.
[29] For informative discussions of the advice sector, see, eg, S Kirwan, *Advising in Austerity: Reflections on Challenging Times for Advice Agencies* (Bristol, Policy Press, 2016); D James and S Kirwan, '"Sorting out Income": Transnational Householding and Austerity Britain' (2020) 28 *Social Anthropology* 67.
[30] T Prosser, *Test Cases for the Poor: Legal Techniques in the Politics of Social Welfare* (Child Poverty Action Group 1983) 40.

a certain degree of randomness in litigation brought on behalf of the poor.[31] Much research in this tradition has focused on consumers and low income litigants as *claimants*, and explored how these groups can(not) transform a wrong or grievance into a legal claim.[32] A majority of people experiencing grievances will not progress them through the legal system, and mostly this is 'rational inaction'[33] – where, for example, a party decides that the costs of legal action outweigh the significance of a dispute. Advisors of clients such as a tenant or homeowner facing eviction, however, do not have the option of suggesting that a client 'lump it' and abandon a legal claim.[34] A One-Shotter *claimant* faces no worse consequences than the status quo when they decide not to pursue their claim, but a One-Shotter *defendant* may lose everything unless they can raise a defence.[35] A legal defence must sometimes be pursued even if it is not the perfect test case or part of a long-term strategy, and even against the odds of it producing a positive outcome or useful precedent. While an adviser might usually evaluate the merits of a grievance and dissuade a client from pursuing a weak *claim*,[36] an adviser may have little option but to try to mount a *defence* where the alternative outcomes for the client are severe. The litigation battle must then be fought on the terms of the Repeat Player who has chosen to pursue this matter. The defendant must accept the claimant's definition of the legal problem, while the claimant has the power 'to make crucial choices about parties, timing, posture, forum, relevance, and relief'.[37] Ideally a campaigning group might identify and compile evidence of harmful practices of certain firms or landlords, before strategising as to the optimum time, case, and theory of harm/cause of action for mounting a legal attack against such practices.[38] In reality, advisors of low income defendants cannot follow such an approach and must fight fires where they spark – 'the emphasis in advice provision tends to be geared towards disaster management'.[39]

This raises the further dichotomy in legal advice for the poor between 'service and impact',[40] or between offering advice to individual clients and pursuing campaigns

[31] M Feldman, 'Political Lessons: Legal Services for the Poor' (1994) 83 *Georgetown Law Journal* 1529, 1534–42.

[32] WLF Felstiner, RL Abel and A Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming …' (1980) 15 *Law & Society Review* 631; SE Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans*, 2nd edn (Chicago, University of Chicago Press, 1990); A Buck, P Pleasence and NJ Balmer, 'Do Citizens Know How to Deal with Legal Issues? Some Empirical Insights' (2008) 37 *Journal of Social Policy* 661.

[33] P Pleasence and N Balmer, 'How People Resolve 'Legal' Problems: A Report to the Legal Services Board' (Legal Services Board, 2014) 100.

[34] Galanter (n 5) 124–25.

[35] EST Poppe, 'Why Consumer Defendants Lump It' (2019) 14 *Northwestern Journal of Law and Social Policy* 149, 156.

[36] E Rose, 'Getting from the Story of a Dispute to the Law' in S Kirwan (ed), *Advising in Austerity: Reflections on Challenging Times for Advice Agencies* (Bristol, Policy Press, 2016) 142–43.

[37] Feldman (n 31) 1545.

[38] ibid 1546. For example, since the Court of Appeal seemed to place weight on Places for People's status as a social landlord, one wonders whether a case involving a private landlord might have removed at least one strand of pro-creditor policy argument from the court's decision.

[39] H Genn, *Paths to Justice: What People Do and Think about Going to Law*, UK edn (London, Bloomsbury Publishing, 1999) 255.

[40] Feldman (n 31) 1537–39.

for legal change on behalf of client groups.[41] In contemporary conditions of advice, the bulk of advice work will focus on the individual client. From the zenith of poverty lawyering in the 1960s and 1970s,[42] changes in philosophies of poverty activism may subsequently have moved away from litigation strategies and towards community-focused efforts.[43] Policy developments, such as the decimation of legal aid in the UK,[44] may have reduced the viability of such litigation strategies. Questions arise as to whether the removal of legal aid funding may have 'delegalised' problems of the poor, suggesting that policymakers prefer to cast these as non-legal problems, apparently not 'deserving' legal advice.[45] Among the money and debt advisers who now shoulder the burden of supporting clients, debate exists as to the extent to which their work involves *legal* advice. Advisers clearly hold legal knowledge, and some describe their work as involving legal diagnostics, communicating the law to clients, and 'framing the law in terms of possible courses of action'.[46] There appears to be considerable dispute, however, as to extent to which debt advisers can engage in legal strategising and 'get involved in the tactics'.[47] Certain debt advice agencies may also take organisational positions not to raise legal issues on behalf of debt clients, preferring to admit liability and work on negotiating repayment plans.[48]

While lawyers for 'Repeat Players' can play the 'long game' and trade off losses on some cases for gains on others, duties to individual clients mean that advisers of One-Shotters must strive for the best outcome in each individual case.[49] Where a client has multiple debt problems, bankruptcy is an option which offers relief against (almost) all debts. This is of course more advantageous to a client than raising legal

[41] See, eg, Prosser's discussion of internal debate on this point in the Child Poverty Action Group: Prosser (n 30) 19–22.

[42] M Galanter, 'Reflections on Why the 'Haves' Come Out Ahead' in A Hinshaw, AK Schneider and SR Cole (eds), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford, Oxford University Press 2021) 317.

[43] SL Cummings and IV Eagly, 'A Critical Reflection on Law and Organizing' (2000) 48 *UCLA Law Review* 443.

[44] J Robins and D Newman, *Justice in a Time of Austerity: Stories From a System in Crisis* (Bristol, Bristol University Press 2021) ch 9.

[45] Barrister and Conservative member of the House of Lords, Edward Faulks, stated that 'the question that arises out of social welfare law is whether it is always necessary for everybody who has quite real problems to have a lawyer at £200-odd an hour, or whether there are better and more effective ways of giving advice'. 'Legal Aid, Sentencing and Punishment of Offenders Act 2012: Question' publications.parliament.uk/pa/ld201516/ldhansrd/text/150610-0001.htm#15061054000331 (accessed 24 November 2022). This overstated the fees of legal aid lawyers almost fourfold: Robins and Newman (n 43) 16.

[46] Rose (n 36) 139.

[47] S Kirwan, '"Advice on the Law but Not Legal Advice so Much": Weaving Law and Life into Debt Advice', in *Advising in Austerity: Reflections on Challenging Times for Advice Agencies* (Bristol, Policy Press 2016) 150.

[48] As Mr Holland notes, in the context of the forced instalment of home energy prepayment meters during the energy crisis of 2022-23, similar dilemmas arise for organisations as to whether to build campaigns around legal (human rights) challenges or negotiations with industry. For an outline of relevant issues, see, eg, Department for Energy Security and Net Zero and G Shapps MP, 'Energy Companies Halt Forced Installation of Prepayment Meters' (*GOV.UK*) www.gov.uk/government/news/energy-companies-halt-forced-installation-of-prepayment-meters (accessed 4 April 2023).

[49] Galanter (n 5) 117.

defences in respect of all their debts,[50] but militates against clients pursuing points of importance in consumer law. In other situations, advisors may wish to settle a claim even where there is a valid legal point at issue, due to limitations on resources, or uncertainty about how a court might decide an unclear legal point.[51] Even where an advisor has the time and resources to identify a potentially strong legal defence, questions arise as to whether a client will wish to continue with a legal action which may involve considerable stress,[52] or even stigmatisation,[53] in a legal process which is often alienating and disempowering.[54] Surveys of public attitudes to legal problems have found that when 'faced with a justiciable event most people simply want to solve the problem'.[55] In this context, 'the One-Shotter has nothing to gain by trying to "make law" when what is needed is an immediate resolution of their problem'.[56] Some have lamented a reduced willingness of poverty lawyers to 'fight' for their clients by refusing settlements and taking cases to court.[57] Others see this as a natural rebalancing of the client-lawyer relationship – a move beyond criticisms of lawyers 'disempowering clients by controlling litigation strategies', towards ensuring the primacy of clients' ability to determine their own interests.[58] Indeed, some consider 'money advice to be the most complicated of advice areas given the extent to which the adviser must allow the client to make their own decisions'.[59] Tensions might arise between strategic litigation goals and client empowerment – one housing law strategy in 1970s New York considered that it had to expand from a focus on 'resolving individual problems in the narrowest possible manner' in order 'to develop a political strategy that could improve the legal position of all tenants'.[60] This occasionally involved risky tactics for individual tenants, such as encouraging them to withhold rent and force landlords to court.[61] The pressure to settle and the risks of litigation raise tension between producing best results for each client and fighting the tendency of repeat players to 'buy off' defendants in order to avoid unfavourable precedent and legal change.[62] In contrast, the *Sharples* case illustrates that in certain situations the fight for the best outcome for a client leaves no option but to mount a potentially landmark legal action.

[50] Whitford (n 10).

[51] Feldman (n 31) 1549.

[52] Rose (n 35) 143–34.

[53] Tensions might arise between individual and group interests, where an individual does not wish to see themselves as part of a stigmatised group such as 'the poor': K Summers, 'For the Greater Good? Ethical Reflections on Interviewing the 'Rich' and 'Poor' in Qualitative Research' (2020) 23 *International Journal of Social Research Methodology* 593.

[54] Genn (n 39) 254; Cummings and Eagly (n 43) 455.

[55] Genn (n 39) 254.

[56] C Alkon, 'Galanter's Analysis of the 'Limits of Legal Change' as Applied to Criminal Cases and Reform' in A Hinshaw, AK Schneider and SR Cole (eds), *Discussions in Dispute Resolution: The Foundational Articles* (Oxford, Oxford University Press, 2021) 313.

[57] Feldman (n 31) 1548–49.

[58] Cummings and Eagly (n 43) 458–60.

[59] Kirwan (n 47) 149.

[60] M Lazerson, 'In the Halls of Justice, the Only Justice Is in the Halls' in RL Abel (ed), *Politics of Informal Justice: The American Experience v.1* (First Printing edition, New York, Academic Press Inc, 1982) 129.

[61] ibid 130.

[62] Prosser (n 30) 84.

IV. THE SHARPLES STORY AND LITIGATION FOR THE 'HAVE NOTS'

The challenges to progressive legal change posed by the structural inequalities of the legal system are evident in the story of the *Sharples* case, and particularly the insight offered by my interview with Richard Holland. This case was not a consumer law test case in the usual sense – it did not arise from a deliberate strategic campaign,[63] or did not represent the culmination of a series of cases at lower court levels.[64] While the case certainly tested a new point of law, its origins were in a debt advisor's creative and determined efforts to assist an individual client in desperate need. Once Ms Sharples approached the debt advice office for assistance, her case was quickly chosen for casework due to factors such as the levels of her debt, the nature of her financial problems, and the high stakes involved in her situation (the imminent threat of eviction). From the beginning, the odds seemed stacked against Ms Sharples. It became clear that her financial position meant petitioning for Bankruptcy was the appropriate option for her, but the substantial costs of presenting a petition were an obstacle – in England and Wales, bankruptcy petitioners must now present up-front fees of almost £700.[65] After a period of delay, the debt advice office managed to obtain a grant from charitable funds to cover the costs of the Bankruptcy petition. Ms Sharples was declared Bankrupt and so was protected from creditor collection efforts, but the possession order hearing was still due to take place in the days following her Bankruptcy. Requests were then made to Places for People to abandon the possession claim due to Ms Sharples' Bankruptcy. Often housing associations will work with debt advisors and agree to abandon claims for rent arrears and possession due to the insolvent tenant's confirmed inability to pay, allowing cases to be settled. In this instance Places for People, which did not have the kind of working relationship with local debt advice services which might have facilitated settlement, continued to pursue its claim.

At the possession order hearing, Mr Holland first raised the argument which was to be central to the Court of Appeal case – that since Bankruptcy provides that creditors shall not have any remedies against the insolvent individual in respect of their debts, it should prevent a possession order from being pursued and made against the tenant availing of Bankruptcy protection. Mr Holland's argument was born of necessity and creativity. He knew that something had to be done to assist this client in keeping her home if possible. He also remembered reading a piece in the Money Advice Association journal, *Quarterly Account*, which had suggested that the stay of enforcement in Bankruptcy could operate to protect insolvent tenants from eviction.[66] Mr Holland considered that the argument could work on the facts of the case, and decided that 'we're going to have a go at this'.

For the debt advisor, this was an unusual step into the unknown. Often resourcing issues, individual client needs, and the demands of following set procedures and timelines under Money and Pensions Service (MAPS) funding contracts, mean

[63] *R v Lord Chancellor, ex parte Lightfoot* [2000] QB 597 (Court of Appeal (England and Wales)).
[64] *McGuffick v Royal Bank of Scotland plc* [2009] EWHC (Comm) 2386, [2010] 1 All ER 634.
[65] On the costs of accessing Bankruptcy, see Spooner (n 2) ch 4.
[66] J Kruse, 'The Impact of Bankruptcy on Rent Arrears' (2003) 70 *Quarterly Account* 9.

that often legal challenges on behalf of clients are not fully explored. Mr Holland noted that cases still arise in which legal issues can be pursued, often in consultation with second-tier specialist advice agencies, but that legal challenges were more common in the past than under current conditions. Mr Holland sees it as part of a debt adviser's remit to raise a challenge in cases where a client's legal liability to pay a debt is in doubt. Where a client owes multiple debts, however, the 'broader picture' must be considered and a liability challenge 'might not be worth it'. The wiser solution might be to ignore this legal issue and instead opt for insolvency. Negotiated arrangements regarding debt repayment, or entry into an insolvency remedy, offer a means of tackling a client's multiple debts as far as possible, while a legal challenge may address one problem while leaving other debts unresolved. So, while a few 'pioneering' debt advisors remain open to bringing legal challenges, the abovementioned factors mean that they now resemble a 'dying breed' – something has been lost in this side of debt advice. Where legal defences are still pursued, for example in mortgage possession proceedings, often a debt advisor will follow well-trodden paths relying on widely used precedent, rather than seeking to construct a new landmark.[67] In Mr Holland's words, the *Sharples* case was 'unproven ground', and it is a rare experience for a debt advisor to raise a defence based on a previously untested point of law. As he explains

> So, it was a kind of a novel thing … it was like well, we've got to try this, because if I don't defend it, she's out. And the whole purpose of this is that we would try to make a difference to her situation. It would be unfortunate if she ended up losing her debts but also losing her home. So, we had to do it, simple as that.

Despite her extremely difficult situation, Ms Sharples was in a comparatively fortunate position among possession order defendants, in that she had the representation of Mr Holland at her hearing before District Judge Hovington. This allowed her to avoid attending in person to present her own defence, unlike the many tenants who are 'often scared witless' as they are forced into possession order hearings with no greater representation than 'last-minute emergency advice' from a court duty solicitor.[68] Often the only resolution for which a tenant might reasonably hope in eviction proceedings is a postponement due to paperwork errors or the striking of a deal between the duty solicitor and relevant housing officer over an arrears repayment schedule.[69] This contrasts with the hour-long hearing in which Mr Holland presented the previously untested legal point, which would have prevented eviction outright for Ms Sharples and potentially many more insolvent tenants in the future. After the hearing, the District Judge decided that while Bankruptcy discharged the rent arrears owed by Ms Sharples, it did not prevent the court from issuing a possession order, which the judge duly made. It became clear to Mr Holland at this point that Ms Sharples would require legal representation to appeal this order, and he

[67] The conditions under which a court will exercise its discretion to suspend a mortgage possession order are established in *Cheltenham & Gloucester Building Society v Norgan* [1995] EWCA Civ 11, [1996] 1 WLR 343 (EWCA (Civ)).

[68] Robins and Newman (n 44) 9–11.

[69] ibid 11.

subsequently referred the case to Glaisyers solicitors and ultimately barristers Jan Luba QC and Ben McCormack. Legal aid was required to fund further stages of the litigation and the ultimate Court of Appeal challenge. Again raising this funding was an uphill struggle, as the Legal Aid Board initially refused aid and Ms Sharples' representatives were forced to bring a successful judicial review of the Board's decision in order to obtain funding.[70] Even where an important and novel legal point regarding the scope of bankruptcy protection had been raised, not to mention the pressing need to challenge the imminent loss of the defendant's home, significant obstacles remained in getting the case to court.

V. JUDICIAL REASONING AND THE EXCEPTIONALITY OF LOW-INCOME LITIGATION

The above discussion might support a 'user theory of law', which understands law 'as being made and changed by the cumulative efforts of its users', and 'moved in a particularly evolutionary direction by the dominant users'.[71] In this 'market-based development of law', 'lawyers and court personnel are devoted disproportionately to identifying, articulating, analysing, defining, understanding, and sometimes expanding the law serving those with economic power'.[72] This means that those lacking power are 'systematically excluded from this law-making process, resulting in doctrinal voids'. The under-representation of lower-income groups in litigation may mean that judges do not see poor people's problems as the kinds of issues appropriate for legal resolution.[73] As a stark example, the Court of Appeal once held that the 'benign administrative process' of bankruptcy raises no issues for judicial determination, such that no right of access to justice arises for those seeking to enter bankruptcy.[74] A life-changing matter for an individual may be seen by court officials as one of many 'garbage' cases of little legal significance.[75] Claims to enforce contracts or evict tenants can come to be viewed less as legitimate disputes calling for scrutiny and adjudication, and more as a 'nuisance',[76] items for 'routine processing' to be cleared from dockets,[77] under 'conveyer belt justice',[78] or 'assembly-line' litigation.[79] As factors such as the reduction of legal aid provision lead to fewer cases of low-income litigants

[70] Indeed, Mr Holland has explained that the *Sharples* case did not proceed beyond the Court of Appeal because funding was unavailable to allow Ms Sharples and Mr Godfrey to appeal further Etherton LJ's decision.

[71] L Nader, 'A User Theory of Law' (1984) 38 *SMU Law Review* 951, 952.

[72] KA Sabbeth, 'Market-Based Law Development' (*LPE Project*, 21 July 2021) lpeproject.org/blog/market-based-law-development/ (accessed 27 July 2021).

[73] Prosser (n 30) 84.

[74] *Lightfoot* (n 63) 609; For the US counterpart, in which the US Supreme Court rejected a constitutional right of access to court to petition for bankruptcy, see H Rose, 'Denying the Poor Access to Court: United States v Kras (1973)' in MA Failinger and E Rosser (eds), *The Poverty Law Canon: Exploring the Major Cases* (Michigan, University of Michigan Press, 2016).

[75] Merry (n 32) 43.

[76] Lazerson (n 60) 151.

[77] Galanter (n 5) 121.

[78] Robins and Newman (n 44) 10.

[79] D Wilf-Townsend, 'Assembly-Line Plaintiffs' (2022) 135 *Harvard Law Review* 1704.

appearing before judges, there is a risk 'that whole categories of legal claims will quickly disappear from the docket', heightening the danger of judges becoming unfamiliar with specialist legal areas impacting the lives of low-income groups.[80] A risk develops of a spiral of judicial indifference, as judges become increasingly 'unversed in and desensitised to the underlying factual issues that affect lower-income groups'.[81]

One way this might manifest is through a judicial 'commitment to formalism', which allows courts to avoid both the 'human stories' behind the law,[82] and the political questions involved in disputes between groups such as consumers and firms, and landlords and tenants.[83] The decision of Lord Justice Etherton relies heavily on formalistic technical distinctions: first, between a particular court procedure (an application for a possession order), and the statutory concept of a 'remedy in respect of a debt'; and second between a legal process for enforcing property rights, and a process for the collection of rents representing the fruits of such property rights. This approach is indicative of how formalistic approaches to adjudication can hinder legal activism on behalf of the poor.[84] Based on 'intellectual orderliness, with identified categories, fixed boundaries, and clear resolutions', formalistic approaches miss 'complexity and a discussion of other social processes', including the complex intersecting legal problems of low-income groups.

A further formalistic aspect of Etherton LJ's reasoning is a textualist approach to legislative interpretation, in which he rejects consideration of relevant policy concerns. Etherton LJ had no regard to apparent legislative intent that insolvent tenants should be protected from losing their homes.[85] The Court similarly considered that 'no assistance' could be offered from the 'policy underlying' the Pre-action Protocol for Possession Claims by Social Landlords. It thought that the DRO procedure's acknowledged aim of providing 'relief from debt [to] those with limited means and limited debts' could not be used to give an 'artificial meaning' to the legislative text.[86] This adjudicative method excludes the policy context in which the law exists, as well as creating a disconnect between abstract legal principle and contemporary lived realities.[87] The 'human stories' are missed as formalist accounts of case law reduce clients to 'mere caricatures, fashioned from the highly truncated facts of heavily edited appellate opinions'.[88] This commitment to formalism also stifles the extent to which such context might drive progressive legal outcomes. Under this perspective

[80] Prosser (n 30) 28, 37.

[81] M Gilles, 'Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket The 2015 Pound Symposium: The War on the U.S. Civil Justice System: Articles & Essays' (2015) 65 *Emory Law Journal* 1531, 1561.

[82] C Gearty, 'In the Shallow End' (2022) 44 *London Review of Books* www.lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end (accessed 20 February 2022).

[83] Griffith argued that 'when faced with the realities of a genuine political conflict', judges have often 'retreated hastily behind the barricades of legal … formalism' JAG Griffith, *Politics of the Judiciary*, 5th edn ((Reissue), Fontana Press, 2010) 303.

[84] Feldman (n 31) 1586–91.

[85] HL Deb 11 October 1988 vol 500, 725, per Lord Malcolm Sinclair, Earl of Caithness.

[86] *Sharples* (n 1) [77].

[87] Prosser notes that in a series of social welfare test cases in the 1970s/80s, English courts tended to ignore arguments about the social consequences for claimants of their decisions: Prosser (n 30) 32.

[88] Feldman (n 31) 1588; Etherton LJ reduces Ms Sharples' eight years of home life at Denbeigh Place to a single sentence: 'She fell behind with her rent.' *Sharples* (n 1) [6].

'change is orderly and incremental … the vantage point is retrospective; the conclusion inevitable'. Therefore, legal change, 'like law more generally, is impersonal and disembodied … how and why clients and lawyers went about seeking change remains unaddressed'.[89]

Etherton LJ's rejection of 'artificial meanings' reverts to the 'plain meaning' method of statutory interpretation, which sees the court's role as giving legislation the meaning its words would 'ordinarily mean for reasonable people'.[90] While this approach continues to operate as a starting point for interpretation in English law, its limitations are well-recognised. In an appellate case, in which both sides present convincing arguments for conflicting interpretations of a statute, it becomes artificial for a judge to rely only on a single 'plain meaning'. Recognising this potential lack of clarity, textualism usually relies on 'canons of construction', which offer rules for interpreting text.[91] A problem long recognised, however, is that these various 'canons' can be deployed in support of opposing conclusions, meaning that a party's argument must 'be sold, essentially, by means other than the use of the canon'.[92] Indeed, it appears that Etherton LJ was required to look beyond legislative wording and ultimately invoked policy arguments to justify his decision. First, Etherton LJ held that the objective behind bankruptcy's freezing of debt collection activities was not to protect debtors from enforcement, but rather to preserve assets for distribution among the pool of creditors.[93] From this perspective, the court could allow a landlord to obtain a possession order since this would not impact other creditors, without need to consider whether this outcome is compatible with the 'fresh start' policy. Second, Etherton LJ appealed to the potential negative consequences for landlords if Ms Sharples was allowed to win her case. While not considering the policy benefits of debt relief, the judge endorsed a past court decision which explains how a possession order 'affords relief to the landlord from being saddled with a defaulting tenant'.[94] Similarly silent regarding the catastrophe of eviction and housing insecurity,[95] Etherton LJ warned that it

> could be financially catastrophic for [social] landlords to be unable to recover possession from persistent non-payers and could threaten the availability of social housing to meet the great demand from the large number of people who are economically disadvantaged and seek suitable and affordable permanent accommodation.[96]

Thus, we reach the position under which Etherton LJ swore that loyalty to literalism requires rejection of pro-debtor policy objectives as expressed in legislative history

[89] Feldman (n 31) 1587.
[90] N Duxbury, *Elements of Legislation* (Cambridge, Cambridge University Press, 2012) 140.
[91] A Marmor, 'The Immorality of Textualism Symposium: Theories of Statutory Interpretation' (2004) 38 *Loyola of Los Angeles Law Review* 2063, 2063; see also R Doerfler, 'Late-Stage Textualism' (2022) 2022 *Supreme Court Review* 267.
[92] KN Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed Symposium on Statutory Construction' (1949) 3 *Vanderbilt Law Review* 395, 401.
[93] *Sharples* (n 1) [30], [70].
[94] *Razzaq v Pala* [1997] 1 WLR 1336.
[95] M Desmond, *Evicted: Poverty and Profit in the American City* (New York, Allen Lane, 2016).
[96] ibid [71].

and official documents such as Pre-Action Protocols, only then to justify his decision through pro-creditor and pro-landlord policy considerations. This approach chimes with the argument that there is often a 'hidden story' behind textualist approaches to legislative interpretation, which may betray a conservative preference that 'unresolved interpretative issues ought to remain unresolved by judges', so that 'unregulated disputes … remain unregulated'.[97] In other words, formalism and textualism often work hand-in-hand with protecting extant market incumbents such as landlords, while rejecting regulation of market activity. When speaking of the financial impact on landlords and invoking the classic conservative argument that pro-consumer policies may hurt consumers,[98] Etherton LJ's 'opinion doesn't read much differently than a congressional committee report recommending legislation to a chamber divided on partisan lines'.[99]

Of course, judicial political ideas may align with prevailing political moods – general pro-market and pro-property sentiments may dominate politics outside of the courtroom also (even a local paper styled the *Sharples* test case as a threat to landlords countrywide[100]). Nonetheless the asymmetrical invocation of policy arguments evident in Etherton LJ's judgment seems of a piece with judicial tendency to refuse expansive interpretations of consumer protection measures. While enforcing property rights and contracts represents business as usual for courts, the rarity of low-income litigation may contribute to a judicial view of its exceptionality. Consumer protections and progressive bankruptcy laws, which threaten the traditional dominance of property rights and market allocations, may fall within a certain judicial 'abhorrence for 'redistributive' "class legislation"',[101] persistently viewed as distorting interventions in the 'neutral and rational principles of the common law [of property and contracts]'.[102] One review of the attempts of 1970s welfare rights advocacy commented that campaigns must overcome 'ideology of the judges, the legal profession more generally and legal education'.[103] One wonders whether these challenges have become any less daunting four decades later.

VI. CONCLUSION

The *Sharples* story exemplifies challenges of achieving landmarks of legal change in the interests of consumers and low-income groups. Structural inequalities mean that the legal process is tilted against One-Shotters such as Ms Sharples, who must

[97] Marmor (n 91) 2066.

[98] AO Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Cambridge, MA, Harvard University Press, 1991) 11; D Kennedy, *A Critique of Adjudication [Fin de Siecle]* (Cambridge, MA, Harvard University Press, 1998) 149.

[99] Kennedy (n 98) 149.

[100] 'Landmark rental case', *Salford Advertiser*, 8 April 2010, 4.

[101] RW Gordon, 'Afterword' in M Galanter (ed), *Why the Haves Come Out Ahead: The Classic Essay and New Observations* (New Orleans, Quid Pro, LLC, 2014) 113–14.

[102] I Ramsay, 'Consumer Credit Law, Distributive Justice and the Welfare State' (1995) 15 *Oxford Journal of Legal Studies* 177, 196.

[103] Prosser (n 30) 84.

compete against well-resourced institutions who can afford to pick the battles they are confident they will win. Once deciding that a case raises an opportunity to create favourable precedent, 'Repeat Players' can draw on tools of formalism and textualism, as well as classical understandings of the sanctity of property and contract, to fight off progressive legal development which might be demanded by contemporary socio-economic conditions and pressing public policy concerns. The case shows that litigation in the law of the poor – consumer law, bankruptcy, housing law – is seldom a fair fight.

Various conclusions could be drawn from this story. One approach would be to adopt 'scepticism toward law as a vehicle for social change', and to focus progressive reform efforts on community organising and political campaigning.[104] Money advice work in organisations such as Citizens Advice has long combined client service with policy campaigns built on evidence of problems collected in local offices.[105] Even this campaigning function is under 'threat', now that government grant agreements specify that funds cannot be used to influence politics.[106] On the other hand, emerging grass-roots independent campaigning organisations are making their presence felt.[107] A further approach might be to rest hopes on regulatory enforcement of consumer law and Alternative Dispute Resolution mechanisms.[108] Regulatory redress mechanisms have recently produced great victories for consumers,[109] most spectacularly in the £50 billion Payment Protection Insurance (PPI) compensation scheme.[110]

These alternative strategies offer little immediate assistance, however, to a consumer defendant faced with the sharp end of the law's enforcement machine. Therefore, other perspectives keep faith in law and see the necessity of trying, even sometimes in vain, to invoke the legal system as a means of achieving social change. 'Repeat players' will continue to use the legal system against low-income groups, and defences must be mounted by those who refuse to accept that 'our society is necessarily better off if judges merely passively support the powerful'.[111] Invocation of law's procedural fairness and creative use of its technicalities may remain 'the best defences of the subordinate classes, even if these rules were the instruments by which the dominant classes came to power'.[112]

This chapter has shown that taking a client's problems from a debt advice office to the Court of Appeal can alone be seen as a remarkable achievement. A debt advisor's

[104] Cummings and Eagly (n 43) 451, 460.
[105] M McDermont, 'Citizens Advice in Austere Times' in S Kirwan (ed), *Advising in Austerity: Reflections on Challenging Times for Advice Agencies* (Bristol, Policy Press, 2016) 32.
[106] ibid 40.
[107] wearedebtadvisers.uk/news/a-huge-relief-but-now-maps-must-now-be-changed-for-good (accessed 14 September 2022).
[108] WC Whitford, 'Structuring Consumer Protection Legislation to Maximize Effectiveness' (1981) 1981 *Wisconsin Law Review* 1018.
[109] S Williams, 'The Rise and Rise of Affordability Complaints' in M Gray, J Gardner and K Moser (eds), *Debt and Austerity* (Cheltenham, Elgar, 2020).
[110] 'Monthly PPI Refunds and Compensation' (*FCA*, 29 April 2021) www.fca.org.uk/data/monthly-ppi-refunds-and-compensation (accessed 14 September 2022).
[111] S Macaulay, 'Private Legislation and the Duty to Read--Business Run by IBM Machine, the Law of Contracts and Credit Cards' (1965) 19 *Vanderbilt Law Review* 1051, 1121.
[112] Lazerson (n 60) 159.

commitment to clients may nonetheless leave an abiding sense of disappointment and unfairness at the ultimate result in this case. Mr Holland pointed out the injustice of a situation in which possession proceedings could be reintroduced on what was effectively a non-existent, discharged, debt. As he put it, a tenant can 'make one mistake [in falling into arrears] and [end up] paying for that for a long time'.[113] This risk, that a tenant who is paying current rent could be evicted based on historic arrears, achieved judicial recognition in a subsequent case.[114] For the debt advisor, there was a sense of disappointment at not achieving a true 'fresh start' for the client:

> … why I don't talk about it too much … is that it didn't work … we had a go but it didn't work and unfortunately that's what can happen. But it's important to underline that there was no alternative for her … we had to push that otherwise she would have been out a lot sooner … and she did get to stay there for another two years.

The outcome of the case highlighted the vulnerability of tenants even when they avail of bankruptcy protection,[115] and gave landlords immunity to evict tenants on becoming aware of their bankruptcy.[116] Campaigners for social and economic change through law have accepted, however, 'that there would be as many unsuccessful cases as there would be successes'.[117] The losing cases can themselves raise the profile of important issues, highlighting injustice, exposing inconsistency, and supporting campaigns for reform. Test cases can 'politicise issues by forcing them into the arena of political debate'.[118] The *Sharples* struggle was surely a more valuable approach than an alternative of passively accepting the silent and routine enforcement of possession orders against insolvent tenants. It is difficult to measure 'success' in campaigns for social change – 'what looks like failure at one point, turns into success at another', and 'struggle is an unending process in which wins must be defended and extended over time'.[119] In this way, highlighting the obstacles to achieving change through law may help develop strategies and paths to future reform. Some landmarks may take time to reveal themselves along a march towards change.

[113] Here Mr Holland reminds us that past rent arrears can be held against an individual in an application for public or social housing.

[114] *Irwell Valley Housing Association Limited v Docherty* [2012] Court of Appeal, England and Wales [2012] EWCA Civ 704 CA The judge nonetheless allowed a possession order to proceed.

[115] It is now accepted in debt advice that bankruptcy offers little assistance to tenants facing eviction for rent arrears, and that bankruptcy may actually damage a tenant's credit history such as to limit their future ability to rent in the private sector, if evicted: '25.02.22' (*The Debt Advice Diaries*) debtadvicediaries.blogspot.com/2022/02/250222.html (accessed 28 February 2022).

[116] Citizens Advice Bureau (CAB), *Cutting Our Losses: The Need for Good Debt Collection Practice for People with Debt Relief Orders (2015)* 17.

[117] Prosser (n 30) 22.

[118] ibid 85.

[119] S Cummings, *An Equal Place: Lawyers in the Struggle for Los Angeles* (Oxford, Oxford University Press, 2021) 489–90.