

Consequential responsibility is a concept that exists in several areas of law, but its impact on professionals, and lawyers in particular, needs developing. That was the lesson of a seminar on 'Lehman and the Lawyers' led by Centre Director Richard Moorhead and David Kershaw of the LSE. Consequential responsibility is founded on the basic moral commonplace that we should take responsibility for the effects of our actions. Transactional lawyering, through its complexity, places the issue in a challenging context.

The 'Repo 105' transactions conducted by Lehman Brothers present an interesting case study. Through classifying a Repo as a sale rather than a secured loan, Lehman was able to create the appearance of greater creditworthiness. The difficult question was whether this was compliant with US accounting regulation.

As far as we know, when asking for a legal opinion, Lehman Brothers did not ask their lawyers this difficult question. They asked Linklaters a narrow question: whether or not this transaction was a sale under English law. The advice, correctly given under English law, was that the transactions were indeed sales. Yet the advice needs to be seen in the context of what it was enabling. Lehman Brothers' bankruptcy examiner labelled it balance sheet manipulation. If he is right, this manipulation disguised Lehman's true creditworthiness.

While Repo 105 seems to have been consistent with the accounting *rules* applicable in the US, it appears inconsistent with the US Generally Accepted Accounting *Principles*. Under these substance trumps form – particularly with regard to representational faithfulness. There is a strong case for saying that Repo 105, as an attempt at technical compliance, fell short of the standard required under US Federal law.

Linklaters in this situation held a gatekeeper role. The Repo transaction could not proceed without Lehman obtaining a legal opinion disclosable to their auditors. Their legal opinion thus enabled Repo 105 and arguably became the foundation of unlawful accounting by Lehman. It also created a platform for further securities violations; an entry into a method that would inevitably require further violations in response to increasingly difficult questions.

The question faced now is considerably more difficult even than the question of legality initially faced by Lehman Brothers: how should the law respond to such situations? Consequential responsibility is a wholly unfamiliar concept in this professional context of transactional lawyering. Before attempting to answer questions of liability, we need a model to apply. We need a theory, or toolkit, with which we can assess consequential responsibility.

In developing this toolkit, we can draw upon other areas of law in which consequential responsibility has been developed. By way of example, liability for aiding and abetting in criminal law and dishonest assistance in equity can provide a useful indicator of when consequential responsibility is appropriate. Two principles

become apparent: first, a requirement of foreseeability, whether there is a foreseeable probability of unlawful activity; and second, a public interest in deterring the activity in question, a concern that goes beyond the parties directly involved in the case.

Applying such a model to Repo 105 transactions creates a strong argument for professional responsibility arising from the legal opinion provided. Kershaw and Moorhead emphasised that much remains unknown about the transactions, and we should treat the matter as a case study for the problem rather than proof of any concern about Linklaters. On the facts as known, it appeared reasonably foreseeable that the giving of an opinion would enable unlawful accounting. In such circumstances, a red flag was raised which required lawyers to investigate their client's intentions and get meaningful reassurance on their lawfulness, or decline to give the opinion. Such reassurance may have been sought and given, but if it was not then consequential liability might flow.

Moreover, a strong public interest argument can be made from lawyers' role as professionals and as gatekeepers. Lehman Brothers represented immensely powerful clients seeking assistance with a business transaction. This was a transaction that would affect the company and its shareholders, but also the market more generally. It affected a much wider set of interests. Zeal, alongside other legal principles and regulatory rules, seeks to protect the client, but zeal can go too far and is designed to protect vulnerable clients against a mighty State.

Despite this apparently strong public interest, the profession has not thought hard enough about how public interest obligations apply to transactional lawyers. The present rules are directed towards criminal law, work done by small firms, and litigation, and are not suited to the business context that many lawyers work within. The inadequacy of the rules is especially apparent when it is recognised that transactional lawyers are working in an environment where 'culture eats principles for lunch': where the economic and reputational risks associated with not providing advice that meets the commercial aims of clients significantly outweigh the risks stemming from the broad, woolly principles that point towards a generalised public interest.

A clearer, more explicit emphasis on the importance of the public interest issues that arise in business transactions is necessary. Equally important, if not more so, is a closer examination of the public interest problems created by transactional lawyering. This is the sort of enquiry that lawyers are trained for: one that addresses not just the letter of the law, but its spirit. What is the role of public interest, and how does this change the role of the lawyer?

At the same time, a further difficulty exists in the business context of ascertaining who the client is. Business organisations are complex clients, and when lawyers are faced with only one element of the corporation they must ask whether, for example, corporate managers are truly speaking for the client. It is not always easy to

ascertain who the true client is, and even more difficult to stand up for that client in the face of corporate counsel or management.

Regulators must respond to these questions, and in doing so take a proactive role, safeguarding the reputation, status and integrity of the legal profession. This requires understanding of both what is at stake and the market in which transactional lawyers are working.

It is crucial, though, to exercise a degree of caution in responding to these new challenges. There is, for example, a difficult question as to the standards of liability to be applied. Is the correct test one of actual foresight, or foreseeability? Some participants at the seminar, which took place under the Chatham House Rule, suggested we might go so far as to impose a strict liability test for professional responsibility in this context. Another suggested lawyers faced with giving opinions that facilitated unlawful acts should be under a duty to take steps to ensure those attempts were not successful. This would need to require more than simply turning down problematic instructions to overcome the risk of opinion shopping.

Beyond the particular tests applied, how far do we go in making lawyers liable? *Swain v the Law Society* [1983] 1 AC 598, [1982] 2 All ER 827 may provide a yet to be tested basis for civil liability. Is this a regulatory issue, or one that stretches into civil liability? It is possible to see civil liability and the associated monetary claims as a step too far, as a means through which firms could be vicariously liable to many parties, paying out catastrophically large sums. Equally, it was suggested that the SRA needed to make greater progress in understanding commercial legal work and firms before they could successfully regulate them. The risk of lawyers becoming excessively cautious is an issue that comes increasingly to the fore as the possibility, and extent, of liability increases. Overly stringent rules may alter, and arguably damage, the paradigm of the lawyer-client relationship.

There is only so much regulation can do. New issues will continue to emerge, and some degree of ambiguity and uncertainty is unavoidable. There will always be a degree of reliance upon the judgment of lawyers, one that needs lawyers and law firms to have the right training, good instincts and appropriate internal incentives. If such professional traits operate within an effective regulatory framework, then although we may not be able to eradicate unlawful corporate behaviour, we can at least solve one piece of the puzzle and reduce the prevalence of legal advice that enables unlawful acts.