dissatisfaction in *Riddell* should have been directed at the law's unnecessary distinction between conditions of functionally similar defences, rather than the prosecution's charging decisions. *Riddell* illustrates the attraction of Clarkson's suggested "necessary action" defence to remove this distinction. The justification/excuse dichotomy no longer has any practical utility – quite the opposite.

ELAINE FREER

Address for Correspondence: Robinson College, Cambridge, CB3 9AN, UK. Email: ef269@cam.ac.uk

DEFERRED PROSECUTION AGREEMENTS: COOPERATION AND CONFESSION

SIR Brian Leveson's approval of the third deferred prosecution agreement (DPA) in *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep. F.C. 249 is the most significant addition to the growing canon of case law on DPAs. This new enforcement tool was added to the UK prosecutors' armoury by the Crime and Courts Act 2013. Following the successful use of deferrals to tackle corporate crime in the US, the Act allows an organisation to avoid prosecution for certain corporate crimes by entering into an agreement with a designated prosecutor, under court supervision, whereby prosecution is deferred pending successful compliance with certain conditions, which may include payment of a substantial fine.

Rolls-Royce, the UK engineering giant, made corrupt payments to local agents to secure contracts across seven countries, over three decades and in three of its business streams. In Indonesia and Thailand, it paid cash bribes and gave a luxury Rolls-Royce car to intermediaries, to secure contracts for the provision of aircraft engines to Garuda Indonesia and Thai Airways. To facilitate its defence business in India, Rolls-Royce used sham contracts and falsely recorded the bribes to local agents as legitimate consultancy fees. In order to secure aircraft engine orders from China Eastern Airlines, Rolls-Royce offered cash credit to the airlines' employees, who used the funds to pay for a Master of Business Administration course at Columbia University, four-star accommodation and lavish activities.

The conduct of Rolls-Royce was described by Sir Brian Leveson P. as the "most serious" breach of criminal law in bribery and corruption (at [4]); it covered 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. It was unlike the conduct that gave rise to the first DPA in *Serious Fraud Office v Standard Bank plc* [2016] Lloyd's Rep. F.C. 102, which concerned a single failure to prevent bribery by a sister company, where the Bank was not complicit in the corruption. It was also unlike the conduct that gave rise to the second DPA in *Serious Fraud Office v XYZ* [2016] Lloyd's Rep. F.C. 509, which involved a

six-year course of systematic bribery to secure contracts in foreign jurisdictions, when on the evidence the bribing mechanism was not particularly sophisticated. Rolls-Royce's bribery scheme involved, by contrast, egregious criminality over decades. The case was by far the largest foreign bribery case in UK history, and the investigation was the largest ever carried out by the Serious Fraud Office.

The facts of the case were exceptional. Rolls-Royce, unlike other DPA recipients, did not self-report. Rather, the prosecution uncovered the crime by examining public Internet postings. Nevertheless, Sir Brian Leveson was convinced that a DPA was in the "interests of justice", and that its terms were "fair, reasonable and proportionate" in accordance with the Crime and Courts Act 2013, Sch. 17, para. 8(1).

Dealing first with the interests of justice requirement, Sir Brian Leveson adopted a robust and pragmatic approach. The core of the interests of justice test, identified by His Lordship himself in *Standard Bank* and *XYZ*, lies in the "promptness of the self-report" (*Standard Bank*, at [14]; *XYZ*, at [16]). In *Rolls-Royce*, the judge, however, valiantly attempted to create an exception. Rolls-Royce did not self-report, but its cooperation was recognised as "extraordinary" (at [22], [121], [123]). More radically, His Lordship was willing to accept that cooperation and self-reporting could be equated. He was impressed with Rolls-Royce's waiver of legal professional privilege over internal investigation memoranda, its cooperation with independent counsel to resolve privilege claims, and its continued cooperation with the prosecution's request to conduct an internal investigation. Therefore, he concluded that Rolls-Royce "could not have done more" to expose its misconduct (at [38]).

The equivalence of cooperation to self-reporting is not wholly convincing. The distinction between the two is critical. Self-reporting is a voluntary disclosure of wrongdoing. While the concept of cooperation remains clouded in England and Wales, the Serious Fraud Office views it as comprising genuine cooperation and openness, leading to the uncovering of financial crimes (see speech, Alun Milford, 5 September 2017, 35th Cambridge International Symposium on Economic Crime, Cambridge, available at https://www.sfo.gov.uk/2017/09/05/alun-milford-on-deferred-prosecution-agreements/ (accessed 22 January 2018)). The DPA Code makes clear that cooperation embraces self-reporting (DPA Code of Practice, para. 2.8.2(i)) – a point on which *Rolls-Royce* signifies a departure. Yet at bottom both serve to achieve the objectives of DPAs, namely, to drive self-policing, self-reporting, and compliance (*Consultation on a New Enforcement Tool* (Cm. 8348, 2012), para. 30). The core purpose of DPAs, as His Lordship repeatedly emphasised, is to incentivise the exposure and self-reporting of criminality. This is an important reminder.

At the heart of the case was a difficult question – what constitutes extraordinary cooperation? Earlier cases had stressed that a self-report was a

precondition. *Rolls-Royce*, however, suggested otherwise. Rather, Sir Brian Leveson said that the question was "to identify the tipping point" (at [38]), so that here the judge broke new ground in his approval of the third and the most significant DPA by far, on the basis of a company's extraordinary cooperation but where investigation was not triggered by a self-report. At first sight, his approval is difficult to reconcile with *Serious Fraud Office v Sweett Group plc* (Crown Ct. (Southwark), 19 February 2016), where Sweett was convicted of failing to prevent bribery when its Cypriot subsidiary paid bribes to win a hotel construction contract in Dubai, notwithstanding that a self-report was made. On a closer inspection, however, *Rolls-Royce* differs from *Sweett* in one significant aspect, in that Sweett had failed to demonstrate genuine cooperation by its deliberate attempt to mislead the prosecutors.

On legal professional privilege, the DPA Code expressly preserves existing law (DPA Code of Practice, para. 3.3). However, the Serious Fraud Office has made clear that, although a waiver of privilege cannot be compelled, it would be an obvious sign of cooperation. Both Standard Bank and XYZ received credit for cooperation without waiving privilege. Indeed in *XYZ*, Sir Brian Leveson viewed the company's assertion of privilege as being consistent with its full and genuine cooperation. It had once been thought that a privilege waiver was not an absolute requirement for a finding of cooperation. *Rolls-Royce*, however, demonstrated that this may not be the case – for the company's waiver of privilege was seen as part of its extensive cooperation. What is not so clear is whether a company's robust assertion of privilege would be regarded as a failure to demonstrate extraordinary cooperation. The logic of the judgment leads in that direction.

A further question was whether the DPA terms were fair, reasonable and proportionate. The DPA fine must be "broadly comparable" to the criminal fine on a guilty plea – that is, a one-third discount (Crime and Courts Act 2013, Sch. 17, para. 5(4)). As a result of Rolls-Royce's extraordinary cooperation, the judge was notably more generous than in his earlier decisions, and awarded Rolls-Royce a one-half discount. More significant is His Lordship's willingness to "step back" towards the end of penalty calculation, so as to ensure that the end result was proportionate, and was in the interests of justice.

The flexible approach taken may usefully explain what appear to be inconsistencies between *Standard Bank* and *XYZ*. Standard Bank received a one-third discount, whereas XYZ received a financial penalty of £352,000 – a sum which it could just afford to pay "without going into insolvency", and which the court considered was in the interests of justice. Indeed, the most adventurous steps were taken in *XYZ*, where the court abandoned the one-third discount formula, and adopted a more generous approach to an organisation in financial difficulty. This is consistent with the historical

and valuable role of DPAs in the US and in England and Wales – namely, to mitigate collateral consequences of a corporate conviction.

The indulgence granted by the court to Rolls-Royce in the case, that a company could secure a DPA in the absence of a self-report so long as it can demonstrate extraordinary cooperation, may give rise to some disquiet. The modest financial sanction imposed on Rolls-Royce has been criticised for undermining the incentives to self-report (*Implementing the OECD Anti-Bribery Convention Phase 4 Report: UK*, A.1, para. 22). However, the reasoning of Sir Brian Leveson certainly resonates with the approach taken by the Serious Fraud Office which makes cooperation a prerequisite for a DPA. *Rolls-Royce* is an exceptionally important case which demonstrates that a failure to self-report may not preclude a DPA, but the company must demonstrate extraordinary cooperation including a privilege waiver – this may justify a DPA, and also a generously discounted financial penalty.

RITA CHEUNG

Address for Correspondence: MCAL Solicitors LLP, Hong Kong. Email: rita.cheung@mcalai.com

ORGANISATIONAL TORTS: VICARIOUS LIABILITY VERSUS NON-DELEGABLE DUTY

ON 18 October 2017, the UK Supreme Court decided *Armes v Nottinghamshire County Council* [2017] UKSC 60. The Court ruled that a local authority could be vicariously liable for intentional torts committed by foster parents against a child whom the authority had placed in their care. The outcome was not entirely unexpected. Less than two decades ago it would have been inconceivable. After all, isn't it the case that the common law does not recognise a general principle of liability in tort for the acts of third parties? And that in so far as it does, it holds an *employer* vicariously liable for a tort committed by an *employee* in the *course of their employment?* This is a very long way from the facts of *Armes*.

Armes was made possible by a line of cases which have transformed the law of vicarious liability since *Lister v Hesley Hall* [2001] UKHL 22, [2002] 1 A.C. 215 was decided by the House of Lords in May 2001. In *Lister* the century-old "Salmond test" for determining when a wrong arose in the course of employment was abandoned. In place of the distinction between "authorised acts" and "unauthorised modes" came the more modern-sounding "sufficient connection" test.

Now an employer could be vicariously liable if the tort had a sufficient connection to the job or role which the employee was undertaking. Around the same time the Canadian Supreme Court was using, in *Bazley v Curry* (1999) 17 D.L.R. (4th.) 45, the slightly more functional language of the "enterprise risk" test: "the question in each case is whether there is a