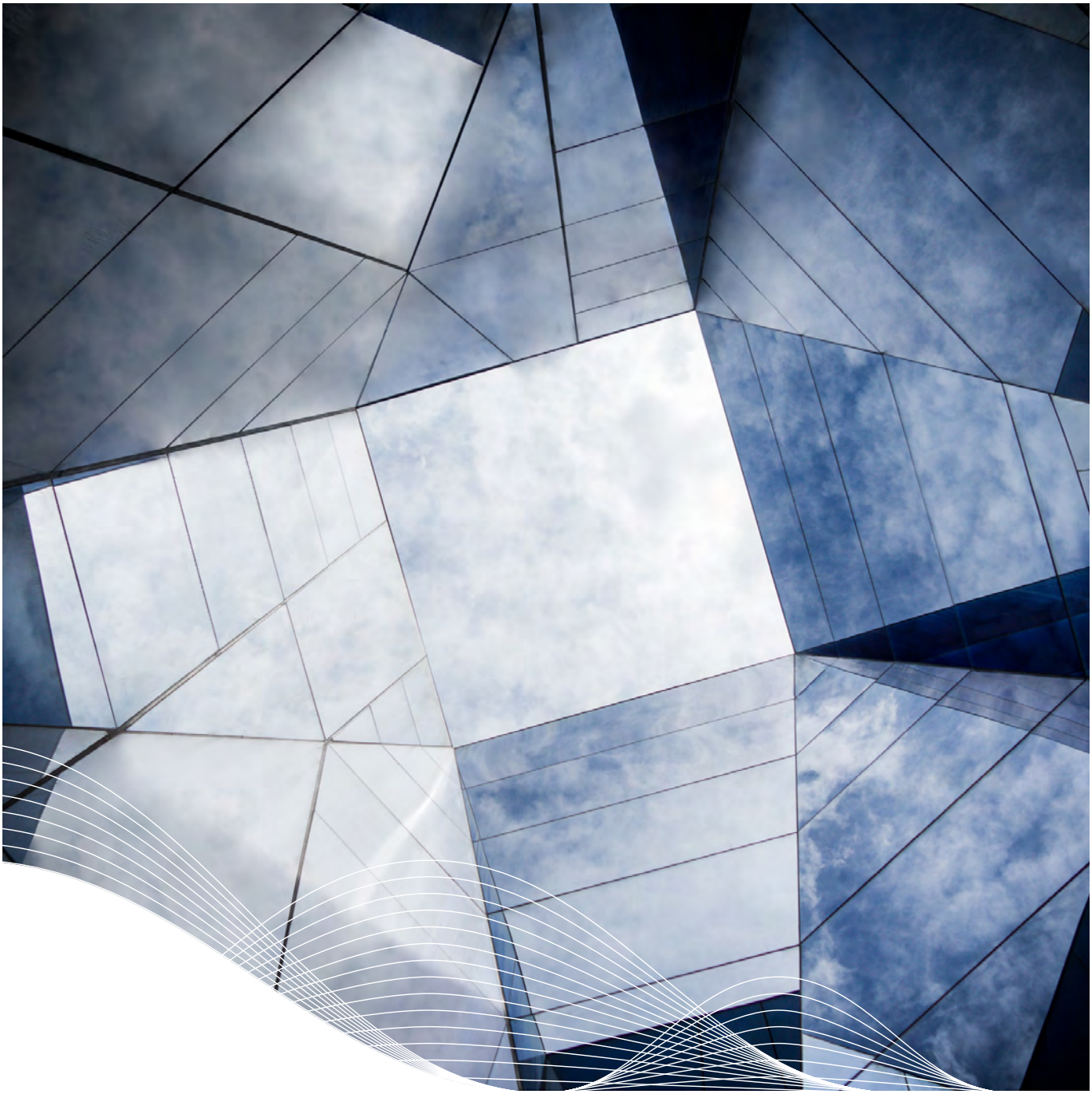

Pensions Ombudsman Round-Up

SEPTEMBER 2021

DLA PIPER

Introduction

Welcome to DLA Piper's Pensions Ombudsman Round-Up publication in which we report on recent determinations made by the Pensions Ombudsman and Deputy Pensions Ombudsman.

In this edition we look at determinations covering issues including:

- death benefits;
- transfers;
- overpayments; and
- misinformation.

In the statistics section we provide a breakdown of the overall outcome of the determinations for May, June and July 2021 and the range of awards made for distress and inconvenience. We also look briefly at a case where the Pensions Ombudsman made an unusually high award for distress and inconvenience.

In this newsletter references to:

"**TPO**" mean the organisation The Pensions Ombudsman;

"**the PO**" mean the Pensions Ombudsman; and

"**the DPO**" mean the Deputy Pensions Ombudsman.

If you would like to know more about any of the items featured in this edition of Pensions Ombudsman Round-Up, please get in touch with your usual DLA Piper pensions contact or contact Megan Sumpster. Contact details can be found at the end of this newsletter.

Death benefits

In PO-13671, Ms R complained that: the Scheme trustees (the **Trustees**) and the Scheme employer (the **Employer**) wrongly refused to reconsider her claim for a dependant's pension following the *Brewster [2017]* judgment of the Supreme Court; and the Employer decided improperly not to make a discretionary payment into the Scheme, as requested by the Trustees.

In Brewster, the Supreme Court ruled that a requirement in the rules of the Local Government Pension Scheme for cohabiting partners to be nominated by members in order to qualify for a survivor's pension should be disapplied as it constituted discrimination contrary to the European Convention on Human Rights (**ECHR**).

Ms R had been the cohabiting partner of Mr N, a member of the Scheme, for 15 years when he died in 2003. The Employer was a privatised water company. The Scheme's rules (the **Rules**) permitted the payment of a dependant's pension to a long-term "Dependent Partner". The definition of Dependent Partner was: *"... any person nominated to the Trustees by the Member and who was, in the opinion of the Trustees, involved in a long-term permanent relationship which included cohabitation with the Member ... ."* Further, under the Rules, the Employer had the power to direct the Trustees to grant additional benefits in respect of a member. When Mr N died in 2003, Ms R applied for a dependant's pension from the Scheme but the Trustees did not grant Ms R a pension because there was no evidence that Mr N had ever made a nomination in her favour.

Ms R alleged that the Trustees did not provide her with details of how to appeal the decision in 2003 and that they first drew the Scheme's internal dispute resolution procedure to her attention in 2012. The Trustees rejected Ms R's complaint on the grounds that: (i) there was no nomination; (ii) it was not within their power to make a discretionary payment to a Dependent Partner without the Employer's agreement; and (iii) the Employer was not willing to make a discretionary payment in this case. Following the *Brewster* decision, Ms R asked the Trustees to reconsider. The Trustees maintained their position and argued that *Brewster* did not apply to her case as the Human Rights Act 1998 (**HRA 98**) did not apply the provisions of the ECHR directly to private pension schemes in the way it did for statutory public sector schemes, such as the one in the *Brewster* case.

Ms R complained to TPO. She argued that the Employer was carrying out a public function and as such, it was bound by the HRA 98. She cited several Upper Tribunal cases where water companies in England were found to be public authorities and argued that the Employer was a "quasi-public authority". Ms S submitted that her claim was virtually identical to the *Brewster* case and, by insisting on the need for a completed nomination form, she was not being treated as her married counterparts would have been and, as such, she had been discriminated against under the HRA 98.

PO's conclusions

The PO did not uphold Ms R's complaint. Ms R suggested that the decision in *Brewster* overrode the nomination criteria in the Rules but it was the PO's view that *Brewster* could be distinguished on its facts from Ms R's case. The deceased partner in *Brewster* was a public sector employee and a member of a public sector scheme. The Supreme Court in *Brewster* disapplied the nomination requirement within the context of a public sector pension scheme but the Court did not go on to rule more generally that nomination requirements in all pension schemes are discriminatory. The provisions of the ECHR are directly enforceable against public sector institutions only. The PO made no finding on whether the Employer was or was not a public authority, but he considered that, in order for Ms R to rely on the HRA 98, she would have to show that the Trustees were also a public authority. The PO considered that the nature of the Trustees' functions were of a private nature and Ms R could not rely on the HRA 98 in her complaint against the Trustees. The PO also rejected Ms R's complaint that the Trustees had discriminated against her more generally. Although the Trustees were bound by the provisions of the Equality Act 2010 (**EqA 10**), the status of being a cohabiting partner was not a protected characteristic under the EqA 10. Finally, the PO noted that, under the Rules, the Trustees could not award discretionary benefits to a Scheme member without a direction from the Employer, which it was not prepared to make.

Transfers

In a case relating to transfers (CAS-29595-J8R4), Mr R complained that Sun Life Financial of Canada (**SLOC**) failed to carry out sufficient due diligence before transferring his benefits from the Plan to the Henley Scheme (**Scheme**). Mr R claims that he cannot trace his assets and is concerned that all his pension funds have been lost.

Mr Y was a member of the Plan. In January 2013, an unregulated financial adviser submitted a Letter of Authority, signed by Mr Y, to the Plan with a request for a transfer pack. The Plan issued the transfer pack in early February and sent a copy to Mr Y. The Plan then received the completed documents to proceed with the transfer. The covering letter was dated 3 March and was sent by T12 Administration, administrators of the Scheme. In addition to the formal request to transfer, the returned documents included: a copy of the HMRC Registration Certificate showing the Scheme as having been registered in September 2012; an authority form appointing Omni Trustees Limited to collate Mr Y's membership information; and a Pension Scheme CV giving details of the Scheme. Where appropriate, documents had been signed by Mr Y and dated 13 February 2013. On 8 March, the transfer value of £31,822 was paid to the Scheme. The financial adviser was dissolved in 2014 T12 Administration was dissolved in 2015 and Omni Trustees was wound up in 2020.

In 2018, Mr Y sent a formal complaint to SLOC through his legal adviser, which alleged that: (i) Mr Y had received an unsolicited call from a financial adviser for a free pension review and he had not realised that the adviser was unregulated; (ii) it was incumbent upon SLOC to conduct the necessary due diligence to protect its members' interests; (iii) the Pensions Regulator had issued its Scorpion guidance in February 2013 and SLOC should have been complying with the spirit of the warning even before it was issued; (iv) SLOC had allowed Mr Y to transfer out without undertaking the due diligence advised by the Regulator; and (v) Mr Y had suffered a serious loss through SLOC's negligence.

PO's conclusions

The PO dismissed Mr Y's complaint, agreeing with the Adjudicator's opinion. The PO considered whether SLOC ought to have done more to alert Mr Y to the risks of the transfer. The transfer took place shortly after the Scorpion guidance was issued and he considered it reasonable to allow SLOC the necessary time to implement any changes arising from this. He considered that a one-month period, from 14 February 2013, was a reasonable timeframe to do so. However, given that SLOC received the completed transfer documents only a little more than three weeks after the Scorpion guidance was issued, the PO considered that it was not reasonable to expect SLOC to have both implemented the guidance and revisited Mr Y's transfer application during its late stages within that timeframe. Accordingly, the PO did not consider that SLOC had erred in not making further enquiries about Mr Y's reasons for requesting the transfer. The PO noted the High Court judgment in *Hughes*, which indicated that there is very little providers can do to stop a transfer, where a statutory (or other) right exists, even if they have serious concerns about the destination of the money or the nature of the receiving scheme. SLOC had a statutory and contractual duty to transfer Mr Y's funds, which it was required to act upon when it received his transfer paperwork, unless there were any indications of why the transfer should not go ahead. The PO concluded that, at the time of Mr Y's transfer request, the checks undertaken by SLOC were reasonable. The transfer paperwork was in order, the Scheme was registered with HMRC and it had confirmed that it was willing to accept the transfer and provide benefits to Mr Y. There was no maladministration by SLOC in allowing the transfer to proceed in accordance with Mr Y's statutory rights and his clear instruction.

While the PO has, in the past, allowed a three-month period for schemes to implement the Regulator's Scorpion guidance, in this case, he considered a one month period to be sufficient. This is in line with the PO's March 2021 decision in PO-24554.

Overpayments

In this case, CAS-30002-K6Z8, Mrs E was a deferred member of the Teachers' Pension Scheme (the **Scheme**) with two periods of service: the first from 1975 to 1980; and the second from 1983 to 2008. After Mrs E's first period of employment, she received a refund of pension contributions from the Scheme. However, Teachers' Pensions (**TP**) failed to update Mrs E's records and, as a result, they continued to indicate that she had a period of pensionable service from 1975 to 1980. In 2004, TP began to issue estimates of retirement benefit (**EORBs**) to Scheme members, which would show members' total pensionable service. In 2014, TP undertook a review of its records and noted that Mrs E's pensionable service was incorrect; however, no action was taken to update the records. Later that year, Mrs E reached normal retirement age and received a statement confirming her benefits (the **2014 Statement**), which showed her pensionable service as 13 years. Shortly after receiving the 2014 Statement, Mrs E received her lump sum payment and her regular pension came into payment. In late 2018, Mrs E's income from the Scheme suddenly reduced. TP wrote to Mrs E confirming that: (i) it had made an error when calculating her pension benefits in 2014 as it had incorrectly continued to record her employment from 1975 to 1980 as pensionable service; (ii) it had, therefore, reduced Mrs E's pension to the correct level; (iii) and there had been an overpayment of approximately GBP13,500, which Mrs E must repay. Soon after, TP chased the repayment.

Mrs E complained to TPO. She contended that she was not aware of being overpaid benefits from the Scheme. She did recall receiving a refund of contributions for the period from 1975 to 1980; however, she was not aware that this period was used to calculate her benefits at retirement. Mrs E also stated that she used the lump sum payment to pay off the remainder of her mortgage and that she spent her income on buying wedding presents, installing a new bathroom, holidays and a business venture. Mrs E also felt that TP's approach to recovering the overpayment was inappropriate: she was asked to repay the entire GBP13,500 in one go and was chased for the payment only a little over one week later.

PO's conclusions

The PO partly upheld Mrs E's complaint, agreeing with the Adjudicator. The PO noted, first, that members were only entitled to their correct benefits and any overpayments could, in general, be recovered, even if the error was careless; however, he also noted possible legal defences. The PO dismissed the possibility that a contract had arisen between Mrs E and TP such that she would be entitled to the overpayment. He also dismissed the possibility that it would be unconscionable for TP to recover the overpayment from Mrs E on the grounds of hardship as Mrs E had not provided evidence to support hardship. The PO then considered whether Mrs E might have a change of position defence and outlined the criteria for this to apply, stating that Mrs E must be able to show that: (i) her circumstances had changed detrimentally; (ii) the change of circumstances was caused by receipt of the overpayment; and (iii) she was not disqualified from relying on the defence. The PO did not find that Mrs E's circumstances had changed detrimentally in relation to the lump sum overpayment, as Mrs E had used this money to pay off her mortgage, improve her home and invest in her business. However, the PO was satisfied that Mrs E had spent the pension income overpayment irreversibly on expenditure she would not otherwise have had; notably, the wedding gifts and holidays. The PO was not of the view that Mrs E ought to be disqualified from relying on the change of position defence, as the evidence indicated Mrs E had spent the income overpayment in good faith. The test of good faith is a subjective one and the PO believed that Mrs E had not spotted the error on her EORBs and so she was not aware of the overpayment. The PO also said that the documents contained a lot of technical information and that Mrs E had demonstrated that her knowledge of pensions was very basic. The PO appreciated Mrs E's honesty in admitting to remembering the refund of contributions and believed this added to her credibility. Finally, the PO considered whether the defence of estoppel would apply. He noted that it was a harder defence to establish and that Mrs E had not met the relevant criteria. The PO ordered that, within 21 days of his determination, TP should reduce the amount of the overpayment it was seeking to recover to GBP5,667 and contact Mrs E to discuss an affordable repayment plan. He was also of the view that TP chasing Mrs E for the overpayment just over a week after it was first brought to her attention was unreasonable, causing Mrs E serious distress and inconvenience, as a result of which he ordered TP to pay Mrs E GBP1,000 in compensation.

Misinformation

In this case, PO-22137, Mr N claimed that, when he took voluntary redundancy in 1993, he had been offered a redundancy package from his employer, which provided that his deferred pension from his scheme (the **Scheme**) would increase by a fixed rate of 5% per year. This was reiterated in a conversation with his employer.
At the time, Mr N was sent confirmation in writing of his Scheme entitlement (the **Leaver's Certificate**), which stated that he was entitled to a pension from age 65 of GBP19,745 a year, payable in accordance with the terms and conditions relating to the Scheme. There was no reference to increases or revaluation. Mr N was also provided with a copy of the Scheme booklet (the **Booklet**), which stated that his preserved pension in excess of GMP would be *"increased by 5% for every year …"*.

In 2014, Capita provided Mr N with a statement of his benefits. The statement confirmed his expected pension at NRD was GBP19,742. It also said, *"Please note that these figures are estimates only and are not guaranteed…"* Shortly after, Mr N emailed Capita with a series of questions relating to the benefit statement. In particular, he queried whether the figures took into account inflation. Capita responded by saying, *"In calculating your pension at age 60 and 65 your pension has been revalued by fixed percentages… These were the terms for when you left the Scheme."*

In early 2017, Capita moved the administration of the Scheme to another office and, around the same time, Mr N contacted it for information about potentially transferring his benefits out of the Scheme. At this point, he was informed that his benefits were not revalued at a fixed rate, but instead were revalued in line with the retail prices index up to a maximum of 5% a year (the **RPI Cap**). Later that year, Capita confirmed to Mr N that the Trustee was conducting a full investigation into the information deferred members had been provided with regarding revaluation rates. In January 2018, Capita issued Mr N with a benefit statement, which confirmed that Mr N's projected benefits at NRD were GBP14,481 p.a.. This was based on Mr N's benefits above GMP increasing at a rate of 1% p.a. In February, Mr N issued a formal complaint against Capita and the Trustee.

PO's conclusions

The PO partly upheld Mr N's complaint, agreeing with the Adjudicator that Mr had suffered a loss of expectation but not a financial loss. Based on the Leaver's Certificate and the Booklet, Mr N would reasonably have expected to receive a pension of GBP19,745 at NRD. While it seems there may have been other documents in circulation at the time to cast doubt on this, the PO was of the view that neither the Trustee nor Capita had provided compelling evidence that these were widely distributed or that Mr N had seen them.
In addition, the PO found that Mr N would primarily have referred to his Leaver's Certificate for information about his benefits and so this is the document that ought to have included key information such as the fact that his pension increases and his projected benefits were not guaranteed. However, the PO confirmed that the starting position should be that Mr N is only entitled to benefits in accordance with the Scheme rules and these state that the RPI Cap will apply. In addition, while Mr N may have been provided with inaccurate and incomplete information, the PO did not find that be had relied on it to his detriment or that a contract overriding the Scheme rules had arisen. The PO noted that Mr N claimed he planned to accrue a pension of GBP40,000 so that he would be a basic rate taxpayer at retirement. However, without plausible evidence of this, the PO could not conclude that Mr N would have acted differently had he known that his Scheme pension might be lower. The PO also noted that Mr N had not taken any appreciable steps to increase his retirement provision since becoming aware in 2018 that his Scheme pension would be lower than anticipated.

In short, the PO held that Mr N is due to receive the benefits he is entitled to under the Scheme, which is the correct position. He has also not been put in a position whereby he has irreversibly relied on misleading information about his benefits. Therefore, the PO could not find that Mr N would suffer a financial loss. However, the PO was of the view that Mr N had suffered serious non-financial loss. He was not entitled to a guaranteed Scheme pension of GBP19,745 but it was reasonable for him to have expected to receive it and the PO believed that this loss of expectation would have caused Mr N significant disappointment and serious distress and inconvenience, having to reconsider his future finances and priorities. The PO ordered the Trustee to pay Mr N GBP1,000 in recognition of this fact.

Statistics

May 2021

NUMBER OF DETERMINATIONS		17
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		15
Scheme type	Public service scheme	3
	Private sector scheme	14
Outcome	Upheld	5
	Partly upheld	1
	Not upheld	11
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP1000

June 2021

NUMBER OF DETERMINATIONS		8
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		7
Scheme type	Public service scheme	2
	Private sector scheme	6
Outcome	Upheld	2
	Partly upheld	4
	Not upheld	2
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP1000

Statistics

July 2021

NUMBER OF DETERMINATIONS		14
Number of these determinations which are Ombudsman decisions following an Adjudicator's opinion		11
Scheme type	Public service scheme	3
	Private sector scheme	11
Outcome	Upheld	2
	Partly upheld	3
	Not upheld	9
Awards for distress and inconvenience*	Lowest award	GBP500
	Highest award	GBP6000**

*For these purposes, awards are considered by looking at what is payable by a single respondent to a single applicant. There may be some awards that are, in aggregate, higher than the awards listed here because more than one respondent is directed to make a payment to the applicant or one respondent is directed to make payments to more than one person in the same case.

**An unusually high award for distress was given by TPO in PO-15521, PO-20938 and PO-21459. In this case, Ms T and additional applicants complained that the Scheme trustee invested the Scheme's funds inappropriately, which resulted in members' benefits and rights in the Scheme being lost. The PO found that the trustee had committed multiple breaches of trust, and had committed acts of maladministration. These included breaches of trustee duties, both under statute and trust law, including in relation to trustee knowledge and understanding, conflicts of interest, investment powers and duties, and the duty to act honestly and in good faith. The PO ordered the trustee to pay into the Scheme the total amount of funds initially transferred into the Scheme, plus interest at the rate of 8% p.a.. Additionally, the PO directed the trustee to pay Ms T and the additional applicants GBP6,000 each for the exceptional distress and inconvenience caused by the maladministration of the Scheme.

Contact details

Cathryn Everest
Senior Professional Support Lawyer, London
+44 (0)20 7153 7116
cathryn.everest@dlapiper.com

Megan Sumpster
Professional Support Lawyer
London
+44 (0)20 7153 7973
megan.sumpster@dlapiper.com

Ben Miller
Partner, Head of Pensions
+44 (0)151 237 4749
ben.miller@dlapiper.com

Tamara Calvert
Partner, London
+44 (0)20 7796 6702
tamara.calvert@dlapiper.com

Andrew McIlhinney
Partner, Leeds
+44 (0)113 369 2141
andrew.mcilhinney@dlapiper.com

Matthew Swynnerton
Partner, London
+44 (0)20 7796 6143
matthew.swynnerton@dlapiper.com

Joel Eytle
Partner, London
+44 (0)20 7796 6673
joel.eytle@dlapiper.com

Amrit Mclean
Head of Pensions De-risking
London
+44 (0)20 7796 6613
amrit.mclean@dlapiper.com