

Auditor of the Court of Session

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AB & JW

 POOR SISTERS OF NAZARETH: CI/01/900832999
V. POOR SISTERS OF NAZARETH: CI/01/900832499

EDINBURGH. 15 June 2009. At a diet of taxation on 21 April 2009 the Auditor heard representations by Susan O'Brien, Q.C. and the Scottish Legal Aid Board. The Auditor, having considered the papers submitted to him, now taxes at THIRTY NINE THOUSAND EIGHT HUNDRED AND SIXTEEN POUNDS (£39,816.00) the fees due to Susan O'Brien, Q.C. To the said sum there falls to be added VAT at 15%, £5972.40, and the Auditor's fee, inclusive of VAT, £1831.72.



AUDITOR OF THE COURT OF SESSION

NOTE/

The Auditor
Kenneth M. Cumming, W.S.

Principal Clerk
Mrs. Cynthia Cameron

NOTE

1. A dispute has arisen between the Legal Aid Board and Ms O'Brien as to the amount of fees allowable to her in respect of two House of Lords Appeals in which she appeared on behalf of legally-aided Appellants. The matter has been referred to the Auditor for taxation in terms of Regulation 12 of the Civil Legal Aid (Scotland) Regulations 1989.
2. Regulation 10(2) provides that Counsel's fees for any work in relation to proceedings in *inter alia* the House of Lords "shall be 90 per cent of the amount of fees which would be allowed for that work on a taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid".
3. In the case of Dingley (AP) v The Chief Constable of Strathclyde Police 9 October 2002 (Unreported), Lord Eassie stated firstly, at paragraph 26, that it appeared to him that "*given the propriety and reasonableness of the particular instruction to counsel in question, the amount found on taxation on a party and party basis to be recoverable should equiperate with what someone who is not in control of the amount of the fee would consider to be reasonable remuneration to counsel for the work encompassed by the instruction*", and secondly, at paragraph 27, that "*for similar work performed pursuant to the same instruction, the amount of the fee to counsel recoverable under a party and party award ought not to diverge markedly from that recoverable on an agent and client, third party paying basis*".
4. At the diet of taxation on 21 April 2009, Ms O'Brien accepted the submission made by [REDACTED] on behalf of the Legal Aid Board that, in taxing her fees in terms of Regulation 12 and Regulation 10(2) of the Civil Legal Aid (Scotland) Regulations 1989, it was appropriate for the Auditor to have regard to the Practice

Directions Applicable to Judicial Taxations in the House of Lords (as commended by Lord Eassie in the Dingley case).

5. [REDACTED] in turn, however, accepted the submission made by Ms O'Brien that the Practice Directions are not "the end of it" and that there is scope for the exercise of discretion on the part of the Auditor. In this connection, the Auditor has noted in particular the terms of paragraphs 16.1, 16.2, 26.6 and 26.12 of the Practice Directions.
6. The Auditor understands that the two appeals to the House of Lords were conjoined at an early stage and were thereafter conducted as a single cause with one set of Counsel and one case only on each side, one Appendix of documents, and one hearing. The Auditor accordingly considers that, while it is reasonable on a solicitor and client, third party paying basis to allow Ms O'Brien a fee for reading in to both cases when she was first instructed (see paragraph 8(a) below), the fees allowable to her for all work thereafter should be fees in respect of a single appeal only.
7. Applying the approach described in the preceding paragraphs, the Auditor has, in the first instance, identified that the following categories of work set out in paragraph 26.7 of the Practice Directions have been carried out by Ms O'Brien:-
 - Statement of facts and issues
 - Authorities
 - Conferences (x5)
 - Advice
 - Brief (based on a 2 day hearing)

The guideline fees suggested for those categories in paragraph 26.7 in a single appeal amount in total to £25,800.

8. The Auditor also considers it reasonable, on a solicitor and client, third party paying basis, to allow the following:-

- (a) A fee for reading in to both cases. Senior Counsel who had been involved from the outset was on the point of retiring and Ms O'Brien was first instructed, in his place, after the appeals to the House of Lords had been commenced. Paragraph 26.7 of the Practice Directions does not specify such a fee, but it appears to the Auditor that it anticipates that the work on the appeal will be carried out by the same Counsel who has dealt with the rest of the action and does not cater for the unavoidable introduction of new Counsel after an appeal to the House of Lords has been commenced.
- (b) An uplift to reflect that Ms O'Brien's work involved travelling from Scotland.
- (c) An uplift to reflect the complexity and novelty of some of the questions raised and the importance of the proceedings to the Appellants and to others who were pursuing similar claims.

9. The Auditor has accordingly taxed Ms O'Brien's fees as follows:-

Fee for initial reading in	£5,800.00	
Fees per paragraph 26.7	<u>£25,800.00</u>	
	£31,600.00	
Uplift for travel (10%)	£3,160.00	
Uplift to reflect complexity, etc (30%)	<u>£9,480.00</u>	
	£44,240.00	
Of which 90% =	<u>£39,816.00</u>	÷ 2 = £19,908