When do lawyers come under enhanced/wider duties? *Giambrone* and all that

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1. It is routinely said that the scope of a solicitor's duties is determined primarily by the terms of its retainer. Thus – to quote what an American would probably call "hornbook' law – in *Midland Bank v Hett Stubbs & Kemp* [1979] 1 Ch 384 Oliver J said that
   "*The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do*."

2. But what are those terms? To the extent that this dictum is referring to the *express* terms, then the word "primarily" is unexceptionable if it means that this is the *first* place one looks. If it means that this is the *main* place one looks then the proposition is more doubtful.

3. This is because the express terms of a retainer letter do not typically set out at much length, or in much detail, what the solicitor will do and indeed attempts to be prescriptive of what the solicitor will do will usually be difficult and sometimes even dangerous.

4. Thus, in many cases the most important function of the express retainer will be to identify the nature of the instruction as well as anything specific which the client has asked the solicitor to do in connection with it.

5. From the nature of the instruction will flow, by practice and implication, what that would ordinarily involve; what a reasonably competent solicitor would do both on the facts as they seem at the time of the conclusion of the retainer and, of course, as they emerge

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thereafter.

6. Some reflection of this can be found in *Groom v Crocker* [1939] 1 KB 194 (at 222) where Scott LJ said that

> "*The retainer...puts into operation the normal terms of the contractual relationship, including in particular the duty of the solicitor to protect the client's interest and carry out his instructions in the matters to which the retainer relates, by all proper means. It is an incident of that duty that the solicitor should consult with his client in all questions of doubt which do not fall within the express or implied discretion left him and should keep the client informed to such an extent as may be reasonably necessary according to the same criteria.*"

7. If this all sounds rather vague then this is an inevitable consequence of generalizing about something which ultimately depends on the specific.

8. But even though the performance requirements of a particular retainer depend on the particular circumstances, the Courts have developed limiting presumptions (themselves rebuttable in particular circumstances such, in particular, as when the express terms of the retainer require a different result).

9. One is that the "default obligation is one limited to the taking and exercise of reasonable care"[1] and that the imposition of stricter obligations requires "special facts or clear language" (see the judgment of Rix LJ in *Platform Funding Ltd v Bank of Scotland plc* [2009] QB 426). In departing in this way from the default "strict duty"- position in most other kinds of contract, the Courts recognize that it will generally not be realistic for a professional to be held to have assumed an obligation to secure a particular result

[1] See also section 13 of the Supply of Goods and Services Act 1982.

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particularly where it may depend to a significant extent on the actions of a third party.

10. Another limiting principle is that a solicitor is not generally required to give advice about the commercial wisdom of a transaction see *eg Reeves v Thring & Long* [1996] PNLR 265, *Clarke Boyce v Mouat* [1994] 1 AC 428 and *Pickersgill v Riley* [2004] UKPC 14, [2004] PNLR 31.

11. This general position is subject to the qualification that the solicitor may agree otherwise but also that

    a. a solicitor has a duty to warn its client of problems or risks with a transaction which the solicitor discovers (or should have discovered) of which it is reasonable to assume that the client may not be aware: *Credit Lyonnais v Russell Jones & Walker* [2002] EWHC 1313; [2003] PNLR 17.

    b. This does not apply only to obvious risks:

> "...the professional man does not necessarily discharge his duty by spelling out what is obvious. The client is entitled to expect the exercise of a reasonable professional judgment. That is why the client seeks advice from the professional man in the first place. If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further."
>
> *County Personnel (Employment Agency) Ltd v Alan R Pulver & Co* [1987] 1 WLR 916 (per Bingham LJ)

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c. A solicitor is under a duty to draw the client's attention to material matters within the solicitor's knowledge that might adversely affect the client's position in a transaction: *Mortgage Express Ltd v Bowerman & Partners (a firm)* (No.2) [1996] PNLR 62.

d. A solicitor may be liable in negligence for ignoring a risk that should have been obvious or foreseeable to him: *Martin Boston & Co v Roberts* [1996] PNLR 45.

12. One of the themes underlying these qualifications is the more generally relevant one that the nature of the client will also affect the scope of the retainer and the advice which it is necessary to give to a particular kind of client.

13. Also potentially relevant is the reasonable expectation/understanding of the client in the light of the expertise and experience which the solicitor claims to have. But this brings us back at least to the vicinity of the express retainer and the sovereign need to take care not to agree or to imply that you will do things which you do not intend to do and may not even be capable of doing.

14. Sometimes this will be the result of mere carelessness but on other occasions it might be caused by enthusiasm to obtain the instruction in the first place.

15. With these not entirely random observations about some of the principles which inform the scope of a lawyer's duty under English law, I come to the case which I have primarily been invited to talk about.

16. *Various Claimants v Giambrone* [2015] EWHC 1946 (QB) ("Giambrone") relates – you will note the present tense – to a development of about 600 holiday properties on the Calabrian coast – Jewel of the Sea. It was meant to be complete by June 2009 but most of

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it is incomplete and indeed the last building work was done prior to 5 March 2013 when the site was seized by the Guardia di Finanza (the Italian financial police) on the grounds that the developer RDV – allegedly a creature of the local mafia the 'Ndrangheta – had collaborated with the Irish developer VFI to launder the proceeds of IRA drug trafficking through the Jewel of the Sea development.

17. Jewel of the Sea had been mired in planning and financial problems long before its seizure by the Italian authorities and as early 8 March 2009 the Mail on Sunday published an article which said this (amongst many other things):

> *"Ask Italians about the brief Anglo-Irish mania for Calabria and they shake their heads knowingly. In a part of the world renowned for its lawlessness – and nasty local mafia – the arrival of well-monied, naïve, monoglot holiday homebuyers, eager to snap up an off-plan bargain for the price of a garage in Tuscany, was bound to result in disappointment."*

18. Buyers at the development came mainly from the UK and Ireland and had succumbed to significant and sophisticated marketing which encouraged them to think that they could "live the Italian dream" at modest prices. They thus bought off plan, typically paying deposits of 50% of the purchase price in sums from about £40,000 upwards.

19. A few buyers have attempted to sue RDV in Italy but most have proceeded against Giambrone, the solicitors, who in various incarnations acted for the majority of the buyers. Until now all the (mainly Irish) claims have settled but about 100 UK cases (in 53 of which I act) have been managed together (there is no GLO) and were the subject of a trial of common issues in March of this year.

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20. Over 4 weeks, Foskett J heard 25 witnesses and 4 experts on various aspects of Italian law. His 153-page judgment was handed down in July and ranges widely over the many and various claims of negligence/breach of contract, breach of trust, and breach of fiduciary duty.

21. One could dilate almost endlessly on the highways and byways of this case. These included the challenge of applying SAAMCo to what Foskett J held to be the numerous failures by Giambrone to advise their clients about various aspects of the transaction: from the fact that guarantees given in respect of the clients' deposits did not comply with the requirements of the Italian Civil Code to the fact that commission amounting to 31% of the purchase price (62% of the deposit) was due to the promoter VFI and transmitted to it by Giambrone.

22. It is therefore something of a relief to be confined by both title and time slot to a relatively narrow aspect of the case: what standard applied to what duties?

23. Giambrone was the lawyer favoured, even designated, by the promoter and the developer. In 2007 when it first became involved, the firm was only 2 years old and the chance to act for some hundreds of buyers at Jewel of the Sea was a significant commercial opportunity. It was the desire to win this business which led to the production of client literature which verged on the promotional and which it must now have come to regret.

24. The first was a letter written "to whom it may concern" and which was entitled "Due Diligence Report — "Jewel of the Sea" Development (Brancaleone). Its text is reproduced in appendix 1 to this paper and contained this opening paragraph:

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> *We would like to confirm that Giambrone & Law, an independent firm of Italian lawyers in London, is in the process of carrying out the due diligence over the land and the development called "Jewel of the Sea".*

Mr Giambrone's oral evidence was that this document was not written for or intended to be seen by buyer clients rather as the Judge put it:

> *He said that the letter was produced "at the request of UK and Irish agents for their potential clients", its purpose being "to give some comfort that Giambrone & Law were independent Italian lawyers, and to confirm what initial due diligence checks had been made in relation to JoTS".*

25. Having said that, it was plain that it had come into the possession of numerous claimants in circumstances where, whatever the intention with which it had been written, Giambrone accepted that it had no control over its subsequent circulation. As Foskett J said:

> *The whole emphasis of the letter, whether seen directly by a potential purchaser or by virtue of its substantive content being mentioned by an agent to such a person, was the independence of Giambrone & Law from the developers and the professionalism they were bringing to the due diligence process. On any view, this message was intended to (and plainly did) operate as an incentive to potential purchasers to instruct Giambrone & Law.*

And indeed that was the tenor of some of the evidence given by claimant witnesses at the common issues trial. And, as we shall see, it also contributed to the context of reasonable expectation and understanding in which scope of duty was to be assessed.

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26. Mr Giambrone also accepted that there was a promotional aspect to the fact that Giambrone & Law had offices in Calabria and in London.

27. The single most important document was a letter sent to clients and which was described by Giambrone at trial as the "retainer letter" – see Appendix 2 for its key passages. By calling it that they no doubt hoped to confine the scope of the duties which they were held to have owed not least by stopping the clock in an attempt to exclude subsequent documents which might (otherwise) have been relevant.

28. Those included a document called "Report on Title" which, in any event, sometimes came with the so-called retainer letter and which contained these passages:

> "Giambrone & Law has independently carried out the due diligence in relation to [JoTS] promoted by VFI … and has also carried out a multiple object investigation aiming at determining the feasibility of the targeted purchase and at reviewing the clauses of the Preliminary Sale Agreement for Immovable Property) prior to the exchange between the client and the Vendor"

And later

> *"Payment Schedule: the proposed payment schedule seems acceptable, as there is no request by the Builders for further interim payments during the phases of construction: this somehow seems to imply that they have their own resources to bring the construction to a positive completion."*

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29. One of the very few issues which was not contested by Giambrone was that the retainer had been governed by English law, but the parties were not able to agree what the standard was. This involved a choice between the following formulations:

    a. what a firm based in the English jurisdiction, but with actual or professed expertise in the Italian off-plan market, would have done (as the claimants contended)

    or

    b. a duty to act as would the reasonably competent English conveyancing firm of solicitors, holding itself out as able to conduct conveyancing in Italy (as the defendants contended)

30. The Judge chose the former on the basis that the latter was just too narrow in the circumstances and it is perhaps little surprise, not least because the purchase transactions took place in another country and under a different system of law, that he did not consider that analogies with English conveyancing practice were of much assistance when it came to scope of duty.

31. That might suggest that the obvious alternative would be consider what an Italian lawyer instructed to act for a client in such a transaction would do, but it turned out that "conveyancing" is something of a misnomer when applied to the practice of Italian land transfer. Indeed it would be highly unusual for an Italian buyer to retain a lawyer to advise him or her in such a transaction and the usual practice is rather that the buyer and seller would rely on the independent role and scrutiny of the notary at the time of the execution of the transfer documents. This meant that significant parts of the evidence of the notary experts called by my clients and by Giambrone interesting, but not particularly helpful.

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32. This necessarily caused an even more intense focus on the express terms of the documents which Giambrone had put into circulation.

33. So what did the Judge hold that Giambrone had agreed to do or had done? This was in part to be answered by reference to the level of expertise which Giambrone had (repeatedly) claimed to have, as the Judge put it:

> *"if the professional person professes to have skills and expertise in a particular area, the client (or, in a medical context, the patient) is entitled to assume that he or she does indeed possess those skills and that expertise. Putting it in layman's language, if a professional person sets out his stall in a particular sphere as involving the ability to go an extra mile, his work is to be judged by reference to someone who can in fact go that extra mile."*

34. Neither the time available nor the patience of the audience permits any detailed description of the judge's findings or the reasoning therefor and/but summary is apt to mislead. Nonetheless, the key conclusions of Foskett J on scope of duty were as follows:

    a. Even allowing for an element of "puffery" about Giambrone's claim to be "one of the leading Italian Law firms in the United Kingdom and Ireland" the reference to having "a dedicated department specialising in Italian Real Estate law and off-plan property acquisitions."

        "would have operated as an inducement to everyone to think that everything that needed to be considered in "off-plan property acquisitions" would be considered."

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b. The phrase "[have] been requested to complete the necessary due diligence over the development, issue the Preliminary Contracts and to advise you in relation to the legal aspects of the aforementioned purchase" amounted to an agreement to do 3 things:

   i. the necessary due diligence over the development

   ii. issuing the preliminary contracts, and

   iii. advising on the legal aspects of the purchase.

c. There was also the later indication that Giambrone would undertake "due diligence over the Limited Company which is building the Complex".

d. As Foskett J put it:

> *"In my view, those features of the letter do convey in their own right the suggestion that what the firm was offering was something more than just ensuring that the legal formalities of the purchase would be complied with so that the purchaser would be secure in the binding nature of the acquisition. They conveyed a clear message that some degree of "due diligence" would be conducted in relation to "the development" as a whole and in relation to the building company undertaking the development. Indeed this message is reinforced by what Avvocato Giambrone said of his motivation in relation to the preliminary research namely, that he "wanted to investigate some more and see whether the project was feasible before becoming involved with it" (see paragraph 83 above). This, in my judgment, is what, according to English law, those aspects of the letter would reasonably have conveyed to the kind of person to whom the letter was addressed. (I should say that, in my view, that interpretation is reinforced by the terms of the Report on Title to which I will turn later, but I reach that conclusion at this stage of the analysis on the basis of the retainer letter as it stands.)*

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e. He agreed with Giambrone that the letter suggested that "the usual features of a conveyancing solicitor's duty within the domestic jurisdiction would be carried out in Italy" but that this was clearly – applying normal principles of construction – not the limit of what Giambrone was saying that it would do/had done.

f. In his recent decision in Kandola v Mirza Solicitors LLP [2015] EWHC 460 (Ch), HH Judge Cooke said this (at 51):

> *"It is not, in general, a solicitor's duty to check on the credit status of his client's counterparty in a transaction unless instructed to do so. There may be circumstances in which a solicitor should check specifically for the commencement of bankruptcy proceedings, since that may affect a party's ability to complete a transaction or give a good title. But that is not the same as a general duty to make checks about risk of future insolvency. Nor can such a duty arise merely because the client is incurring a risk of loss if the counterparty becomes insolvent, for that will be true in most if not all transactions. Nor in my view does such a duty arise merely because the transaction takes an unusual form which does involve a solvency risk (eg on release of a deposit) where the more normal form would not (deposit held as stakeholder). In such cases the duty of the solicitor is to advise of the unusual risk, but not to seek to evaluate it unless specifically instructed to do so."*

Or, it might be added (and Foskett J indeed found) the solicitor has specifically said that it will do so.

g. When it came to planning permission the retainer letter said that Giambrone would undertake

> *"enquiries to ensure … that valid planning permission is in place for the project to go ahead."*

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I was constrained to accept that this was not to be construed as an absolute commitment to ensure that valid planning permission for the development was in place *ie*. it could not be suggested that such a strict or absolute obligation existed but the Judge did accept the proposition that the letter did

> *"not obviously and clearly confine the obligation merely to checking that the proposed development was in accordance with a planning permission that had been granted."*

and that it had thus had the effect that a "degree of enquiry … higher than normal" was required and that this was of a piece with the enhanced level of due diligence which the retainer letter was otherwise offering.

35. All in all, it was the Judge's view that Giambrone had constructed a package aimed at proposed purchasers which, in effect, said

> *"we are experts in this field – we will check everything for you."*

This package had appealed to potential clients just as it was intended to do.

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Appendix 1

"Due Diligence Report — "Jewel of the Sea" Development (Brancaleone)

We would like to confirm that Giambrone & Law, an independent firm of Italian lawyers in London, is in the process of carrying out the due diligence over the land and the development called "Jewel of the Sea".

Upon inspection of the land registry searches, we have found that the Municipality of Brancaleone has granted two building licences on the 7th July 1994 … for the building of a residential complex located in Brancaleone, and hereby referred to as "Jewel of the Sea"….

We have carried out a number of land registry searches (visure catastali, visure ipotecarie, certificate di destinazione urbanistica) to verify that the Developers have a valid title to dispose of each property in the Development, and checked the legal title of the land to ensure that the property actually belongs to the Vendor and that no-one else has any claims on the land; we have also checked that the land is not being contested in an inheritance dispute in relation to an existing will (in accordance to the strict rules of Italian inheritance law, as regulated in the Civil Code).

We can confirm the absence of pre-emption rights in favour of third parties (such as the "prelazioni agrarie per coltivatori diretti" and/or the "prelazioni urbane"). We have carried out enquiries to ensure that there are no liens, encumbrances, and rights of way in favour of third parties and that the land is legally registered with the urban registry.

Finally, we also confirm that the Developer has provided us with a sample of a "Fidejussione Assicurativa" which is a bank loan guarantee valid under the current Italian legislation in accordance to decree 122 of 2005 and is a safeguard to any potential buyers for the event of default or bankruptcy of the building company."

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“Re: Purchase of your property in Calabria

We have been passed your details from VFI following your reservation of a new property in Jewel of the Sea (Calabria).

Giambrone & Law LLP is one of the leading Italian Law firms in the United Kingdom and Ireland and we have a dedicated department specialising in Italian Real Estate law and off-plan property acquisitions.

We have been requested to complete the necessary due diligence over the development, issue the Preliminary Contracts and to advise you in relation to the legal aspects of the aforementioned purchase. We have experience in advising a growing number of foreign investors in the Calabrian market, which is now fast becoming one of the “hot spots” in the Italian real estate market, with prices increasing rapidly.

Our lawyers from the London office have visited the area of Calabria and met with the representatives of VFI and of the Builders in order to discuss the legal aspects of these new developments in more detail.

Moreover, we will soon be opening a new office in Reggio Calabria: we hope to build a long relationship with you and be able to advise you on all different aspects of Italian law after you complete your purchase in Italy.

A brief overview of the purchasing process

Although we may been recommended to you by the Promoters, we wish to emphasise that our Italian Lawyers are completely impartial from any other party associated with this purchase and therefore we will act solely in your best interests and advise you on all aspects of Italian law which will be relevant to your purchase.

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The initial part of our remit is to carry out the customary due diligence over the Development and draft the Preliminary Contract in compliance with the provisions of the Italian Civil Code and local legislation. Our Italian Lawyers have already requested a number of documents to enable us to carry out the due diligence over the Limited Company which is building the Complex.

We have already carried out a number of land registry searches, called visure catastali, visure ipotecarie, and check the certificate di destinazione urbanistica, to verify that everything stated in the initial draft of the Preliminary Contact is correct.

We will also check the legal title of the land to ensure that it actually belongs to the Developers, that no-one else has any legal claims over it, and that this land is not being contested in an inheritance dispute. We will check for the absence of pre-emption rights in favour of third parties (such as the "prelazioni agrarie per coltivatori diretti" and/or the "prelazioni urbane"). If the Developers have obtained a mortgage to fund part of the project, we will need to inspect copies of any relevant bank documents to ensure that any legal charges in favour of the lenders will be removed prior to completion.

We would routinely carry out enquiries to ensure that there are no liens, encumbrances, and rights of way in favour of third parties and that the land is legally registered with the urban registry, and, furthermore, that valid planning permission is in place for the project to go ahead.

We will ensure that the Builders/developers or the Promoters will provide us with a copy of a "fidejussione banacaria", which is now mandatory in certain circumstances: this is a bank loan guarantee that has to be provided by them so that, in the event of bankruptcy, we can claw back any funds anticipated at this stage directly from the guaranteeing Bank.

We will draft a Report on Title which will give you a clear idea of the legal status of the apartment that you wish to purchase and of the land upon which it is being built. At the same time, the final version of the Preliminary Contract will have been prepared by our lawyers and it will be sent to you for your consideration. Our documents are always drafted in Italian and English so that you

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will know the exact content of what you are required to sign: however, it is important to note that only the Italian version of the Contract will be legally binding.

Our professional fees

…

All our lawyers in the London office are regulated by strict rules of conduct imposed by the Law Society (England and Wales) and we have professional indemnity insurance of £5,000,000 for your extra peace of mind. You can rest assured that we will constantly strive to provide you with the highest level of service possible.

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