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Case No: BL-2024-000079

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

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Before:

MASTER BRIGHTWELL

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Between:

MR TAHA EL BASYOUNI	**Claimant**
- and -	
ANTHONY GOLD SOLICITORS	**Defendant**

- -
- -

Mr Kwabena Owusu (instructed by Direct Access) appeared for the **Claimant**

Ms Pippa Manby (instructed by **Reynolds Porter Chamberlain LLP**) appeared for the **Defendant**

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APPROVED JUDGMENT

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MASTER BRIGHTWELL:

1. This is my ruling on an application dated 9 August 2024 by the second defendant, Anthony Gold Solicitors, for an order striking out or granting summary judgment on the claim brought by the claimant, Mr Taha El-Basyouni.

2. This application was first listed for hearing on 23 October 2024. On that occasion, shortly before the hearing I granted an adjournment to the claimant at his request in circumstances where he had recently parted company with the solicitors who had been acting for him in this claim.

3. Before the hearing on 19 February 2025, in which Mr Basyouni was acting as a litigant in person, he filed a number of documents, in particular a document commenting on the skeleton argument of Ms Manby, counsel for the second defendant. A similar document had been filed in advance of the November 2024 hearing. There was also, before the court, a response to a request for further information which had been filed shortly before the November hearing, and which had been prepared on the claimant's behalf by his then solicitors. Those documents have been taken into account.

4. At the hearing, the claimant was represented by Mr Owusu, counsel. Mr Owusu made an application for a further adjournment of the application which I declined to grant for reasons I gave at the hearing However, I granted Mr Owusu permission to file further submissions after the hearing, particularly on points of law which had arisen, not least as he had not filed a skeleton argument in advance of the hearing, and he availed himself of that opportunity. I have considered his submissions and also the further response of Ms Manby to that document.

5. The claim is a claim in professional negligence in which the claimant claims that in around February 2020 the second defendant was negligent and/or acted in breach of contract in relation to his attempts to purchase the property at 29 Havelock Road, Croydon.

6. The claim was initially issued naming as the first defendant Mr Spencer McGuire, the solicitor with conduct of the conveyancing in early 2020, who left the firm shortly afterwards. The claim against Mr McGuire personally was discontinued before this application was issued. From here on, I will refer to the second defendant, Anthony Gold solicitors, as "the defendant".

7. The particulars of claim explain the claim, first by reference to the retainer entered into by the claimant with the defendant. It is pleaded that the solicitors were instructed by the claimant first in 2019 in relation to the purchase of another property in Croydon, and that he went on to purchase this other property. He then pleads that he made an offer, which was accepted, to purchase the property at 29 Havelock Road ("the Property").

8. It is said at paragraph 15 that his mortgage broker, Mr Gerry Lombardi, contacted the claimant's lender, Clydesdale Bank, to arrange a valuation of the Property, and that the claimant received an offer from the lender of 75 per cent loan to value of the purchase price. The mortgage offer was in the sum of around £637,000 as against the purchase price of £850,000.

9. The claimant then pleads that the second defendant paid the retained deposit of 10% of the purchase price, namely £85,000, to the seller on 5 February 2020 and that completion was initially due to take place on or around 27 January 2020, but that a revised completion date was scheduled for 18 February 2020.

10. In paragraph 22 it is said that as a result of the claimant's wife's ill-health he could not travel to Egypt to acquire the additional funds from his savings account that he needed to complete. He says that he therefore called Mr McGuire to inform him that he could transfer £40,000 to complete on 19 February 2020 and that the stamp duty of £57,000 would be paid within 14 days thereafter as he was entitled to do.

11. Pausing there, there was discussion at the hearing whether that would have been an appropriate way to proceed. I was referred to guidance issued on behalf of mortgage lenders which makes clear that where a mortgage is involved, any stamp duty land tax must be paid at the point of completion and not within a period thereafter.

12. In paragraphs 23 to 25, it is then pleaded that:

    i) the claimant therefore borrowed money from a private lender to cover the stamp duty (land tax), the legal fees and any additional fees due to late completion. The sum of £70,000 from the private lender was by the way of a secured loan against the claimant's home until he had changed his residential mortgage to a let-to-buy mortgage.

    ii) this sum of £70,000 was transferred by the claimant directly to the second defendant's account, with further details, to allow completion to take place on the same day or the following day, namely 19 February 2020. From the point of transfer, the claimant became liable for £15,000 interest upon this sum.

iii) having received said funds, the first defendant advised the claimant that the firm could not accept the money and asked for the lender's details in order to refund the monies directly to their source.

13. The way in which the allegations are put thereafter has developed since the particulars of claim were filed.

14. On 18 February 2020, the claimant appears to have informed the defendant that he had borrowed the sum of £70,000 in order to complete the acquisition of the Property. At first, the defendant or Mr McGuire informed Clydesdale that this £70,000 was a gift. Subsequently, on 20 February 2020, Mr McGuire informed Clydesdale correctly that the £70,000 was not being provided by way of gift but was by way of separate loan arrangement.

15. Thereafter, the Clydesdale Bank rekeyed the mortgage application and subsequently informed the claimant that it was no longer willing to lend on security of the property, and the mortgage offer was withdrawn. The result of that was that the claimant was not able to complete the purchase as, having earlier served a notice to complete, the seller of the Property rescinded the contract by notice served on 26 February 2020.

16. Some further detail, not all of which is in dispute, is found in the witness statement served by the defendant in support of the application, being a witness statement of its solicitor, Ms Joanna Makin. She sets out the following in paragraphs 15 to 19 of her witness statement.

> "15. As C was not ready to exchange, the Seller's purchase of her own retirement property was delayed. Exchange of contracts on C's purchase of the Property and the Seller's

> purchase of her home took place on 3 January 2020 with completion set for 27 January 2020.
>
> 16. C encountered difficulties in raising the funds required to complete. Extensions to completion were sought and obtained. AG repeatedly warned of the risks of missing completion and chased C for funds. I have seen documentation in the file demonstrating significant pressure from [the seller] for C to complete.
>
> 17. On 5 February 2020 SPL served a Notice to Complete giving C until 19 February 2020 to complete the purchase.
>
> 18. Eventually C borrowed funds from the Tortos by way of secured loan. The loan agreement is dated 18 February 2020. Those funds were transferred without warning to AG and in breach of its terms and conditions and AML procedures. AG's compliance team determined that the funds could not be used for completion and would have to be returned. C was informed of this.
>
> 19. On C's case, on 18 February 2020, AG informed the Bank that funds were being provided by way of a gift deposit. AG states that any conversations were on 20 February 2020. I do not consider that anything is likely to turn on the date discrepancy."

17. Ms Makin then refers to emails that were sent to which I shall return shortly, and confirms that the contract was rescinded by the seller on 26 February 2020.

18. For completeness, there were some continuing negotiations between the seller and Mr Basyouni after that date, but they ended in what appear from the file to have been threats by the seller to report Mr Basyouni to the police for harassment and in the event the purchase did not complete.

19. Again by way of completeness, the bundle contains a copy of the loan agreement entered into between Mr Basyouni and Mr and Mrs Torto and dated 18 February 2020. It is now clear and not disputed that Anthony Gold made a suspicious activity report to the National Crime Agency upon receipt of the money from the Tortos. There was an initial indication by them that they would return the £70,000 they had received, but in the event there was a significant

delay in the receipt of those funds. They were not received, I believe, until May 2020, long after the contract for the purchase of the Property had fallen through.

20. Mr Owusu, in his submissions filed after the hearing has helpfully and succinctly summarised what he describes as at least three clear aspects of the claimant's claim that form the basis for liability on the defendant's part, i.e. in respect of which it is alleged that the defendant was negligent:

    i) Firstly, the characterisation of the funds by the defendant to the claimant's lender in the sum of £70,000 received on 18 February 2020 as a gift with, as he says, the additional force that Clydesdale was also the defendant's client.

    ii) Secondly, the delay between 18 and 20 February 2020 in correcting that error. He says this is an area of dispute between the parties that will need to be tested in evidence. There is no basis on which that issue should be determined against the claimant or the defendant at this stage.

    iii) Thirdly, the information provided to the claimant by the defendant that the sum of £70,000 was being returned to the claimant's private lender by the claimant's solicitor when the claimant, in terms of its anti-money laundering or proceeds of crime procedures, had no intention or no capacity to return those funds.

21. I turn now to the contemporaneous documents, being the emails which were passing between the relevant parties from 18 February 2020 onwards. The first material email is on 20 February 2020 at 10.46. This is from Mr McGuire to Dr Basyouni, copied to Mr Lombardi. He says:

> "I have spent 20 minutes on the phone to the lender. The final person I spoke to was Angelica. They require (1) gift deposit form from the owners (funds received are £60,000 from Joolee Torto and £10,000 from Victor Torto and (2) evidence of the funds. Please note they are still to clarify if they can accept the gift from a non family member (I do not know if these are relations or not)."

22. The claimant then replied shortly thereafter to say:

> "Please be advised I never said this money is a gift, to my understanding the gift is from a family members [*sic*]. This money is a second charge loan as per the loan agreement documents you have. Kindly advise the lender of the same immediately. Kind you again for all your support."

23. That has a time tag of 12:43 but that may be because a relevant computer was set to a different time zone. There is an email from Mr McGuire also dated 20 February at 12.26 to Angelica, being the contact at Clydesdale, saying:

> "As discussed, I attach (i) The mortgage offer in respect of the commercial property. This completed on 20 December 2019 and provided £173,669.15 towards the purchase of Havelock Road. (ii) I shall ask my client to provide proof as to who is paying the commercial loan. (iii) The loan agreement received from my client is attached. (iv) The repayment details are included I the loan agreement but it is to be repaid in full by 18 May 2020. (v) I confirm that the deadline to complete this transaction is next Tuesday, 25 February as the Sellers will then forfeit the 10% deposit paid."

24. Mr Lombardi then wrote to both gentlemen on 24 February at 14:56 to say:

> "Hi Spencer. Just to update you on this urgent matter. The lender had to rekey the application due to the change in circumstances. Today, they have advised me to upload various documentation which I received some 30 minutes ago from Taha. All documents have now been uploaded. My concerns are they may not be looked at until tomorrow/Wednesday."

25. There is then further email communication on the urgency of the situation given the fact that a notice to rescind could be served at any time, as indeed it was on

26 February 2020. Around that date, the parties were informed that the Clydesdale had withdrawn its mortgage offer to the claimant.

26. There is then an email from Mr Lombardi sent on Saturday 29 February 2020 at 12.04 on which both parties place reliance. It says:

> "Hi Spencer just picked up your email.
> The information given here is not correct?
> Since the original application was submitted it is true that our mutual client has had many credit checks done.
> The original mortgage offer was not withdrawn?
> The reason given by Clydesdale Bank was due to new information being provided at completion stage the mortgage had to be revisited.
> Therefore the lender had to rekey the application based on the additional information being provided , how the deposit was being funded as this was no longer the same as when the application was submitted.
> The mention of a gift was stated but there was never any gift involved with this mortgage.
> At this stage the lender requested many other documentation in order to reassess our mutual clients case.
> After 2 to 3 days of reviewing the information provided the reason given to the decline of the case was "The case no longer fits their criteria "
>
> The several credits checks that our mutual clients has had over the past months could/ may have been one of those reasons but there may have been others too but we will never know.
>
> I trust this clarifies matters."

27. For the avoidance of doubt, that was in response to an email from Mr McGuire asking for clarification as to the lender's reason for withdrawing the offer.

28. The application notice seeks summary judgment or strike out of the claim on four different bases. First, it is said that the claim has not been adequately particularised, even with the further details given in the Part 18 response; secondly, it is said that there is no arguable case on breach of duty; thirdly,

there is no arguable case on causation; fourthly, that the claim includes irrecoverable heads of loss.

29. Most of the submissions I received at the hearing were focused on the question of causation, and I consider that the application can be determined on that issue. I will say that when considering causation I proceed on the basis that the claimant has an arguable case that there was a breach of duty. It seems to me that when a solicitor instructed in a conveyancing transaction conveys incorrect information to a mortgage lender without a good explanation for doing so, it will generally be at least arguable that there has been a breach of duty. The defendant does not deny that it initially incorrectly informed Clydesdale that the additional funding was by way of gift when it has been informed otherwise. But, of course, a claimant needs to show more than a breach of duty in order to establish liability in a professional negligence claim.

30. Ms Manby, on behalf of the defendant, submits that I can be sure for the purposes of summary judgment that on no account did any breach committed by the defendant cause loss to the claimant. The evidence shows that the claimant was unable to complete the transaction on 18 February 2020, being the extended date for completion. Mr Owusu accepted at the hearing that any form of completion by the claimant would have to have involved the mortgage monies. The £70,000 additional loan was required because he needed that sum in addition to the Clydesdale advance in order to complete. As is clear from the evidence, any alternative sources of funding were not going to be available to him, at least until a time after the contract was in fact rescinded by the seller.

31. Ms Manby's submission is that the initial provision of incorrect information, corrected shortly thereafter, could not in practice have made any difference. She also submitted that a gift as opposed to a loan would have been of less concern to a lender. It is unsurprising that the Clydesdale would be concerned about a purchaser having entered into a secured loan in order to provide part of the purchase price, when the application had been approved without reference to such a loan. It was also submitted that there was no realistic prospect of disclosure and the exchange of witness evidence showing that, if Clydesdale had been informed of the Torto loan on around 18 February 2020 without any reference to a gift, the mortgage offer would not have been revoked.

32. As far as the return of the £70,000 to those who had provided it is concerned, Ms Manby submits that it is clear, from the evidence and also from paragraph 24 of the particulars of claim, that the obligation to pay £15,000 of interest had accrued immediately upon the loan being made. Accordingly, any delay in repayment to the claimant, even if there were a breach of duty in that regard, could not have caused further loss to the claimant.

33. In response, Mr Owusu submitted that the issues on causation are not suitable for summary determination. He suggested that there needs to be disclosure and exchange of evidence and the process of cross-examination at trial, and in particular that there is a prospect of relevant documentation being disclosed by Clydesdale Bank. He submitted that it would not be appropriate for the court to take any account of either its own experience or of any assumption that a gift would be of less concern to a lender than a further loan.

34. From my discussion with Mr Owusu at the hearing I consider that it is the claimant's case that, if the error in reporting a gift rather than a loan had not been made in the first place, the Clydesdale might never have rekeyed the application and the sale thus might have completed before the contract was rescinded. That submission is, of course, predicated on the assumption that the £70,000 loan monies could be used for that purpose as well.

35. It was therefore the claimant's submission that there would have to be a mini-trial in order for the court to determine at this stage whether or not the assumed breach of the defendant could have caused any loss to the claimant, and the court should not conduct a mini-trial on a summary judgment application.

36. The parties referred to the expression of the test for summary judgment in the decision of Lewison J (as he then was) in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWHC 339 Ch at [15]. It is well known and I will not read it out in full. The key points for present purposes are that the court must consider whether the claimant has a realistic as opposed to a fanciful prospect of success, meaning the claim must be more than merely arguable. I have already indicated that it would not be appropriate for there to be any sort of mini trial. In particular, the court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial.

37. In his further submissions, Mr Owusu raised a number of points on the question of causation. He submitted that there are different tests for causation, and 'but-for' causation is but one of those tests, and the court cannot be satisfied at this stage what the appropriate test of causation would be. In making that

submission, Mr Owusu referred to the decision of the House of Lords in *Kuwait Airways Corporation v Iraqi Airways Corporation (Nos 4 and 5)* [2002] 2 AC 883. Lord Nicholls of Birkenhead, in his judgment, commented on the 'but-for' test of causation at [71] onwards. He said:

> "71. In most cases, how far the responsibility of the defendant ought fairly to extend evokes an immediate intuitive response. This is informed common sense by another name. Usually, there is no difficulty in selecting, from the sequence of events leading to the plaintiff's loss, the happening which should be regarded as the cause of the loss for the purpose of allocating responsibility."

38. Then at [72] and [73]:

> "72. …This guideline principle [i.e. the 'but for' test] is concerned to identify and exclude losses lacking a causal connection with the wrongful conduct. Expressed in its simplest form, the principle poses the question whether the plaintiff would have suffered the loss without ('but for') the defendant's wrongdoing. If he would not, the wrongful conduct was a cause of the loss. If the loss would have arisen even without the defendant's wrongdoing, normally it does not give rise to legal liability….
>
> 73. … In very many cases this test operates satisfactorily, but it is not always a reliable guide. ... Torts cover a wide field and may be committed in an infinite variety of situations. Even the sophisticated variants of the 'but for' test cannot be expected to set out a formula whose mechanical application will provide infallible threshold guidance on causal connection for every tort in every circumstance. In particular, the 'but for' test can be over-exclusionary."

39. The example then given by Lord Nicholls at [74] is where more than one wrongdoer is involved. I would also refer to the comments of Lord Hoffmann at [128] to [130], discussing the need to look at the causal requirements following from the nature of the tort and from the nature of the loss claimed.

40. Ms Manby referred me, in response on this point, to commentary in *Jackson & Powell on Professional Negligence*. She referred to [11-252], which talks about "but-for" causation in the context of solicitors' negligence. This says:

> "Whether the claim is brought in contract or tort it is first necessary to determine whether the solicitor's breach of duty was a factual cause of the alleged damage. The burden of proof is on the claimant to prove causation."

41. After discussion of cases concerning allegations that a claimant has entered into a transaction on the basis of negligent advice, which is not this case, the editors say:

> "The breach of duty was not the cause if the damage would have occurred in any event."

42. Ms Manby also referred to *Professional Negligence and Liability* at [9.246], headed "Causation and Common Sense".

> "In *Galoo v Bright Graeme Murray* [[1995] 1 All ER 16], an accountants' negligence case, the Court of Appeal considered in general terms the question whether it is sufficient for a claimant seeking to prove causation merely to prove that the loss in question would not have occurred but for the matter complained of. The answer given to that question was in the negative. The court held that it was necessary to distinguish between a breach which causes a loss to the claimant and one which merely gives the opportunity for him to sustain the loss. That principle was applied to the facts of *Galoo* with the result that the accountant's negligence, which caused the purchase of a company, was held to have an insufficient causal connection with the trading losses thereafter made by that company to justify damages being awarded in respect of those losses."

43. What I take from this is the court must apply a common sense approach in asking the question whether the defendant's assumed negligence might have caused the loss which is claimed. Particularly from the last passage I read out, I consider it to be clear that, in a case like this, 'but-for' causation is a necessary but not a sufficient criteria to be satisfied in order for liability to be established.

44. Mr Owusu also relied, in his written submissions, on a point not raised at the hearing, which is a suggestion that the case law applicable to the loss of a chance or a loss of opportunity should apply. While the point may not be fully fleshed out, I understand the argument to be this: the claimant has lost the opportunity that the Clydesdale might have allowed the completion of the transaction to go through on the footing that the Torto loan was acceptable, which opportunity was lost by the incorrect information initially being supplied that the additional £70,000 of funding was a gift.

45. What is clear is that where a claimant relying for causation on a loss of a chance depends on the actions of a third party (i.e. in this case, Clydesdale Bank) the claimant must prove that there was a 'real and substantial chance' of the third party taking the relevant action: see *PCP Capital Partners LLP & Anor v Barclays Bank Plc* [2021] EWHC 307 (Comm) at [533], Waksman J. In this case, this means there must be a real and substantial chance that Clydesdale would have maintained its mortgage offer in the face of the Torto loan, if it had previously not briefly been told that the advance was a gift. In *PCP Capital Partners*, Waksman J, after reviewing the authorities, expressed the view in [561] that, for there to be a real and substantial chance, there must be at least a 10 per cent chance that the third party would have acted differently had it not been for the negligence.

46. The view that I have come to on the question of causation, on the assumption that the defendant was negligent, is that there is no realistic prospect of the claimant establishing at trial that such negligence caused loss to the claimant. It is clear, on the basis of the authorities I have considered, that the 'but-for'

causation test usually applies unless there is some sound policy reason for it not to apply, such as where there are joint tortfeasors. The claimant has not, in this case, put forward a reason why it is inappropriate to apply 'but-for' causation here. The authorities I referred to earlier make it clear that the burden is on the claimant to establish causation. So, if the claimant wants to rely on a different test for causation, the burden is on him to explain it. As I have indicated, 'but-for' causation is generally a necessary but not a sufficient element of liability. As explained by the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2022] AC 783 at [6], the court must also consider the scope of the professional's duty and questions of foreseeability and remoteness. One gets to those questions only if 'but-for' causation is established on an intuitive or common sense basis.

47. I consider that the evidence demonstrates that Clydesdale revoked the mortgage offer because of the use by the claimant of a second loan, which had not formed part of the mortgage application. Mr Lombardi's email dated 29 February 2020 says in terms that much other documentation was considered when the application was rekeyed. He explained seven days earlier that he had sent to the Clydesdale the further information which they had sought from the claimant. The claimant has not explained, in his response to the application, what the further evidence was that he was asked to provide on 24 February 2020.

48. Mr Lombardi also says in his email, relied on by both parties, that we will never know why the offer was withdrawn. The documents show that the reconsideration took place several days after the bank was corrected about the Torto loan being a loan, not a gift. It seems to me that whether or not the

Clydesdale was initially wrongly informed that there was a gift on 18 or 20 February is not material.

49. The claimant's case, not pleaded but as articulated on his behalf, is that if the Clydesdale had been told that the loan was a loan, and no gift had been mentioned, there might have been no need to rekey the application. I do not consider that there is any basis on the evidence before the court or which would likely be available at trial to suggest that the bank had inaccurate information before it when it made its final decision. If, for any reason, it had entered any inaccurate information when rekeying the application, that would not have been the fault of the defendant.

50. For the purposes of summary judgment, I do not consider that it is realistic to suppose that the court at trial would be in any different or better position than I am now to form an assessment.

51. It is improbable that the bank will have available to it, if disclosure be ordered against it under CPR r 31.17, any documents tending to show that its decision would have been different if a gift had not been mentioned. In other words, it is inherently improbable that it would have any document in its possession showing that it would happily have lent on the basis of a loan in circumstances where lending on the basis of a gift was problematic. At best, that is an inference that the court would be asked to draw at trial. As I have said, I am as well placed to form a view on that at this point as the court would be at trial. In doing so, I assume other material facts in the claimant's favour, including negligence on the part of the defendant and that Mr McGuire took two days to correct the mistake (i.e. from 18 to 20 February 2020).

52. In my view, common sense suggests that a gift, if acceptable to a lender, would be less problematic than a short-term loan. A gift with no expectation of repayment would not have so obvious a potential effect on a borrower's ability to meet their mortgage obligations as a loan would. This is particularly so in the case of a short-term loan which would have required repayment, with interest of a further £15,000, within three months.

53. The claimant has not put forward on this application full evidence of what funds were available to him to make that repayment within three months, but in any event the key question is what information was given to the Clydesdale on or around 24 February 2020 on that question - and the court has not been provided with that. It is information which I consider to be incumbent on a respondent to a summary judgment application in these circumstances to produce.

54. I do not consider that the view I have reached relies on inappropriate expressions of judicial experience or of assumptions, but on a common sense view of the reasons why these matters, i.e. the provision of finance from sources other than from the borrower himself, may be of concern to a lender.

55. Having formed the view that there is no realistic prospect of the claimant establishing at trial that any negligence on the part of the defendant caused loss, it seems to me that it must follow from that that there is no real or substantial prospect (or at least a 10% chance) that the bank might have come to a different view in the absence of that negligence. There is therefore no reasonable basis applying the loss of a chance analysis not to grant summary judgment either.

56. As far as the delay in repaying the £70,000 because of anti-money laundering concerns and because of the report which had been made to the National Crime

Agency is concerned, I agree with Ms Manby that the particulars of claim themselves show that there was no loss resulting from that delay (even if negligent) because of the requirement to pay interest accruing immediately. It was not suggested that the money was not paid until after three months, causing further interest to become payable.

57. I am therefore satisfied that there is no realistic prospect of the claimant establishing that any loss was caused by the negligence of the defendant. Any liability the claimant might establish at trial would accordingly be for nominal damages only and in those circumstances it would not be appropriate to allow the claim to continue. I will therefore grant summary judgment to the defendant.

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