



Neutral Citation Number: [2020] EWHC 1419 (Comm)

Case No: CL-2020-000062

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 04/06/2020

**Before :**

**MRS JUSTICE MOULDER**

**Between :**

**SPC AVIATION LIMITED**

**- and -**

**AIR LINK ONE LIMITED**

**Claimant**

**Defendant**

**Mr Simon Atkinson** (instructed by **Humphries Kerstetter LLP**) for the **Claimant**  
**Miss Hannah Laithwaite** (instructed by **Treon Law**) for the **Defendant**

Hearing dates: 22 May 2020

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**THE HONOURABLE MRS JUSTICE MOULDER**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 04 June 2020.**

**Mrs Justice Moulder :**

1. This is the claimant’s application for summary judgment made on 12 March 2020.
2. The application is supported by a witness statement of Mr Russell, the solicitor acting for the claimant, dated 12 March 2020. Mr Russell has also filed a second witness statement dated 13 May 2020.
3. In response the defendant has filed a witness statement of Mr Fetaimia on behalf of the defendant dated 20 May 2020.
4. The hearing was held remotely in light of the current pandemic but the court had the benefit of written and oral submissions from counsel on both sides.

Late evidence

5. The witness statement of Mr Fetaimia was served at 9am on 21 May 2020 after the deadline, set by order of this court on 15 May 2020, of 4.30 pm on 20 May 2020.
6. The defendant made an application that it be permitted to rely on the witness statement.
7. That application was not opposed by the claimant and for the reasons given at the start of the hearing the witness evidence was admitted.

Claim

8. The dispute relates to a Bombardier Challenger executive Jet. It is the claimant’s case that the defendant is currently and wrongly registered on the UK register of civil aircraft (the “Register”) maintained by the Civil Aviation Authority (“CAA”) as the charterer by demise of the aircraft. By these proceedings the claimant sought both a declaration and injunctive relief in order to enable it to procure that the Register is updated to reflect the position that the claimant asserts is the correct current ownership.
9. On this summary judgment application the claimant no longer pursues its application in respect of its claim for injunctive relief but seeks summary judgment on its claim for declaratory relief.
10. The claimant seeks a declaration that:

“any charter by demise of the aircraft by the claimant to the defendant has come to an end by reason of the sale and transfer of the aircraft from the claimant to the new third-party owner.”

Background

11. The claimant is a sole asset company owned and controlled by Mr Andre Serruys. Its purpose was to own a Bombardier Challenger executive Jet (the “Aircraft”) acquired in June 2007.

12. From January 2012 the Aircraft was maintained and managed on behalf of the claimant by a company, Hangar Eight Management Ltd which was subsequently acquired by Gama Aviation plc (“GAMA”).
13. Works were carried out by GAMA to the Aircraft between 2014 and 2016 and a dispute then arose between the claimant and GAMA in relation to GAMA’s charges. In 2016 GAMA exercised a lien over the Aircraft.
14. It is the claimant’s case that the claimant and the defendant were in discussions in the autumn and winter of 2016 in relation to a proposed lease of the Aircraft to the defendant in return for payment in instalments. At the end of the term, ownership and title would transfer to the defendant. Heads of terms (“Heads of Terms”) were prepared which are headed:

“Heads of Terms -Sale of G-OCFT (SPCA to ALO)

Agreement dated 28<sup>th</sup> December 2016”

15. The claimant says this document was signed by the defendant but not the claimant. The defendant’s evidence is (paragraph 18 of Mr Fetaimia’s witness statement) that he was informed by Mr Serruys that he had signed the Heads of Terms.
16. On 28 December 2016 Mr Serruys signed the form “Notice of Change of Details on a UK Registered Aircraft” and it would appear from an email dated 29 December 2016 that the relevant form was submitted by the claimant’s broker, Omnijet Europe, to the CAA. The form stated that there had been a change of ownership to the defendant and stated the date of sale as 28 December 2016. The defendant was stated to be a charterer by demise commencing on 28 December 2016 until 28 December 2018. The printed notes on the form record that the form should be used by the “current registered owner” to notify the CAA of any change in the information supplied to the CAA when applying for registration of the aircraft and refers to Article 28 of the Air Navigation Order 2016 requiring the registered owner to notify the CAA immediately of any changes.
17. The email of 29 December 2016 from the broker to Mr Fetaimia and copied to Mr Serruys stated:

“For good order I have written to the CAA with the request for the change of registered title details for G-OCFT.

We should have a reply within 24 hours...

As agreed this is not a transfer of ownership as that will occur when the loan is paid up in full.

Transfer of title is to assist ALO to collect the aircraft from GAMA”

18. It is the claimant’s case that:

“in contemplation of the proposed sale to the defendant the claimant was advised by the introducing broker...that the

defendant should be registered as the charterer by demise in place of GAMA.”

19. On 9 January 2017 Mr Serruys sent an email to GAMA referring to the defendant as “the new owners of the aircraft”. The email continued:

“The new owner now wishes to have free and unfettered access to its goods, would you be so good and accommodate this...

As it sits presently my understanding is that Air Link One will be in touch with you during today to arrange collection of the aircraft.”

20. The charter having been initially registered as a two-year term is alleged by the claimant to have been re-registered by the defendant without prior consultation with the claimant.
21. The claimant’s evidence is that the proposed lease and sale of the Aircraft to the defendant did not take place since the deadlock between the claimant and GAMA was not resolved until, following the commencement of legal proceedings by the claimant against GAMA and others, the matter was settled by a settlement agreement in December 2019 (the “Settlement Agreement”).
22. The claimant’s evidence is that the Settlement Agreement is confidential but that under the terms of the Settlement Agreement the claimant transferred all legal and beneficial interest in the Aircraft to a third-party connected with the former CEO of GAMA and executed a warranty bill of sale.
23. It is the evidence of the claimant that under the terms of the Settlement Agreement the claimant is obliged to procure the transfer of the registered title of the Aircraft with the CAA by 31 May 2020 and if the transfer is not effected by that date there are “potential financial consequences for the claimant”.
24. In his second witness statement Mr Russell stated that the “potential financial consequences” (referred to in his first witness statement) relate to an indemnity given to the new owner for losses suffered by the new owner in connection with the change of registration of the Aircraft backed by a retention from the sale price but does not give any further details. Mr Russell states that unless the Register is rectified the new owner’s ability to deal with the Aircraft is “compromised” but does not indicate whether any such dealing is contemplated or imminent.
25. The defendant has refused to consent to the change of ownership on the basis that it remains the demise charterer. On 29 November 2019 the claimant’s solicitors wrote to the defendant and stated:

“...

We write to confirm that any charter by demise in favour of Air Link One Limited is, for the avoidance of doubt, immediately terminated herewith.

We enclose for your signature a completed form CA71 notifying the Civil Aviation Authority that the charter is terminated. We request that you immediately sign and send to the Civil Aviation Authority in accordance with your obligations pursuant to the air navigation order...”

26. The relevant form requested was not sent by the defendant. The CAA has informed the claimant’s solicitors that it requires confirmation of the termination of the lease from the defendant before it would update its records. In the absence of such confirmation, in correspondence with the claimant’s solicitors, the CAA has indicated that it would be bound by a court order to register the Aircraft as directed by the court.

#### Procedural history

27. The claimant sent a letter of claim on 17 January 2020.
28. The claim form was issued on 4 February 2020.
29. An acknowledgement of service was filed and the defence was due on 5 March 2020.
30. The defendant made an application on 6 March 2020 requesting an extension for service of the defence to 27 March 2020 which was granted by order of 12 March 2020.
31. However on 12 March 2020 the claimant made an application for summary judgment. In correspondence with Mr Fetaimia the claimant’s solicitors pointed out the provision in CPR 24.4 that in light of the summary judgment application, no defence was therefore required to be filed.
32. On 12 May 2020 the defendant made an application to adjourn the summary judgment hearing (which had been fixed for 15 May 2020) on the grounds of the health of Mr Fetaimia, in particular that he had had mild symptoms “potentially of the coronavirus” from early April and had not been able to deal with the application.
33. At the (remote) hearing on 15 May 2020, the defendant was not represented and Mr Fetaimia did not attend, having emailed the court that he was ill and suffering from coronavirus and having provided a doctor’s note that he was not fit to attend court.
34. The hearing was adjourned to 22 May 2020 with a direction for the claimant to serve any further evidence in support of its application by 1pm on 19 May 2020 and the defendant to file any evidence by 4:30 pm on 20 May 2020.

#### Relevant legal principles on summary judgment

35. CPR 24.2 provides:

“The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

- (i) that claimant has no real prospect of succeeding on the claim or issue; or
  - (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”

36. The legal principles were not in dispute. The court was referred to the commentary in the White Book at p793-795. The court notes the principles applicable to applications for summary judgment formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098 at [24] (citations omitted):

“i) The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success..;”

ii) A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable...;

iii) In reaching its conclusion the court must not conduct a “mini-trial”...;

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents..;

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial...;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case...;

vii) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that

the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction....”

37. It was accepted for the claimant that the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. I note that if the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is however not high.

#### Charter by demise

38. The regulatory framework for the registration of the Aircraft is set out in the Air Navigation Order 2016 (the “Order”).
39. The CAA is responsible for registering aircraft in the UK and for maintaining the Register. The Register is open for public inspection.
40. By article 26(4) if an aircraft is chartered by demise to a person qualified under article 26(1) then the CAA may register the aircraft in the UK in the name of the charterer by demise.
41. The term charter by demise is not defined by the Order.
42. Counsel for the claimant referred the court to *Shawcross and Beaumont Air Law* at chapter 14 C that a dry lease or bare hull charter is one in which the charterer wishes to take possession of the aircraft and man it with its own crew and treat it effectively as part of its fleet against regular payments of advance rent.
43. Under European law (reg EC No 1008/2008) a “dry lease agreement” is defined as “an agreement between undertakings pursuant to which the aircraft is operated under the [air operator’s certificate] of the lessee”.
44. Counsel for the claimant submitted that the features of a charter by demise are a lease where the lessee has possession of the aircraft, operation of the aircraft and makes regular payments.

45. In his witness statement Mr Russell states (paragraph 12) that the term “charter by demise” is considered by the CAA to constitute an interest in an aircraft which arises pursuant to a loan, lease, hire or hire purchase agreement or similar (but not a mortgage).

#### Submissions

46. It was submitted for the claimant (in summary) that:
- i) it is clear from the documents that there was no binding agreement in 2016 between the claimant and the defendant and even if there was a binding agreement, the Heads of Terms were an agreement for lease not an actual lease;
  - ii) any charter by demise has come to an end: if there was any doubt, by letter of 29 November 2019 from the claimant’s solicitors any charter was terminated; and
  - iii) even if there were a binding agreement in 2016, that alleged agreement is irrelevant to the question as to whether the defendant can assert that it is now a charterer by demise: the defendant has never been in possession of the Aircraft and is not in possession now; once the Aircraft had been transferred to a new owner there could be no charter by demise as ownership and possession have passed to the third party.
47. Accordingly it was submitted for the claimant that it is not arguable by the defendant that there is any factual basis on which the defendant can say it is now a charterer by demise.
48. For the defendant it was submitted (*inter alia*) that the defendant has a real prospect of successfully defending the claim on the basis that:
- i) whilst it is usual for it to be a term of a charter by demise that the lessee will take possession of, and operate, the aircraft in question, a delay in taking possession of an aircraft for whatever reason (here, because of the actions of a third party in refusing to release the Aircraft to the defendant) or in operating the same, does not undermine a charter by demise which will subsist unless lawfully terminated, rescinded or otherwise avoided according to normal contractual principles;
  - ii) in light of the fact that the defendant’s interest under the charter by demise has not been terminated, the defendant is entitled to remain on the Register.

#### Discussion

49. Contrary to the submissions for the claimant, it seems to me that the issue in these proceedings is whether the defendant currently has an interest in the Aircraft which arises pursuant to a lease, hire or hire purchase agreement or similar such that it is entitled to be registered as a charterer by demise.
50. I do not accept the submission for the claimant that the existence of a binding agreement in 2016 is irrelevant to the question of whether the defendant currently has



an interest in the Aircraft which it is entitled to have registered as a charter by demise. It seems me that on the claimant's own evidence, a charter by demise arises out of an agreement. The passage in *Shawcross & Beaumont* relied upon by counsel for the claimant does not in my view provide authority for the proposition that the identification of a charter by demise is to be determined by reference to the factual features rather than the underlying agreement. Accordingly I do not accept the submission for the claimant that the question of whether the defendant is now entitled to be registered as a charterer by demise is to be judged not by reference to any agreement but by reference to whether the features of possession and operation of the aircraft are currently present.

51. Similarly I do not accept the submission that European law looks only to the entity which is currently operating the aircraft: the relevant regulation is referred to above and clearly refers to "an agreement pursuant to which the aircraft is operated under the [air operator's certificate] of the lessee" [emphasis added] and not the factual position irrespective of the agreement.
52. Accordingly in my view, if the defendant had a binding agreement under which it had an interest in the Aircraft which amounted to a charter by demise, the claimant would need to show that such an agreement had been validly terminated.
53. As to whether any agreement has been terminated, I do not accept the submission for the claimant that it is to be inferred or assumed that any previous charter by demise has been terminated by reason only that the Aircraft is not in the possession of the defendant or being operated by the defendant. That would seem to ignore the contractual relationship entirely and no satisfactory legal basis was advanced for this proposition.
54. This gives rise to the following issues on this summary judgment application: has the claimant discharged the burden on it of establishing that there is no real prospect that the defendant can show that:
  - i) there was a binding agreement in 2016 which gave rise to an interest in the Aircraft which entitled the defendant to be registered as a charterer by demise (a "Relevant Agreement");
  - ii) if there was such a legally binding Relevant Agreement, that Relevant Agreement has not been terminated.
55. As to whether there was a binding Relevant Agreement, the evidence before the court is that a document entitled "Heads of Terms-Sale of G-OCFT (SPCA to ALO)" was agreed but the claimant says it was not executed by the claimant or was not intended to be binding; further the claimant says that the Heads of Terms did not amount to a lease but merely an agreement for sale or in the alternative that the terms were not sufficiently detailed to amount to a lease.
56. It was submitted for the claimant that it was "obvious" from the Heads of Terms that they were not binding; that they were "too vague" to be legally enforceable and that the release of the Aircraft to the defendant was subject to the pre-condition of GAMA releasing the Aircraft. It was submitted that the statement in paragraph 4 of the Heads of Terms that the Aircraft "will be released to ALO upon signing this agreement" did

not transfer possession or a possessory interest to the defendant but rather any transfer of a possessory interest was subject to the condition precedent in paragraph 7 of the release by GAMA of the Aircraft.

57. As noted above the defendant's evidence is that Mr Fetaimia was informed by Mr Serruys that he had signed the Heads of Terms and he believes a signed copy was provided but cannot locate it.
58. In the previous proceedings against GAMA, the claimant sought to recover damages in respect of the sale of the Aircraft to the defendant which it was pleaded (at paragraph 73):

“was prevented by [GAMA's] refusal to release the [Aircraft] and fell through”.

59. The court notes the Defence filed in those proceedings in response to that pleaded case where, at paragraph 112, it stated:

“It is admitted that the Claimant has produced a written agreement dated 28 December 2016 for the sale by the claimant of the aircraft to Air Link One Limited as an “as seen” basis.

The claimant has held the agreement to sell out as genuine, as negotiated at arm's length between independent parties and as binding.

...

“Insofar as [paragraph 73 of the amended particulars of claim] is intended to suggest that the terms of the agreement to sell allow the buyer to withdraw from the purchase because of this dispute or the defendants' assertion of a lien, it is specifically denied. The agreement to sell appears to contain no such term. On the claimant's own case (in the claimant's letter of 15 May 2017), the effect of the defendants' assertion of a lien is to defer the commencement of the payment of instalments of the purchase price.” [emphasis added]

Whilst the proceedings were settled and thus the respective cases set out in the pleadings were never tested, it is relevant in my view to note the position of the claimant apparently adopted in those proceedings with regard to the binding nature of the Heads of Terms and their effect which appears to be inconsistent with the submissions on this application.

60. I also have regard to the contemporaneous email correspondence in January 2017 between the claimant and GAMA which support an inference that the claimant believed that it had entered into a legally binding contract and thus intended to create legal relations.
61. As to the construction of the Heads of Terms, counsel for the claimant accepted (as indeed he must) that the authorities on contractual construction indicate that the

exercise of construing a contract is not merely a literal interpretation of the language but also has regard to the context. The court in reaching its conclusion on a summary judgment application must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial and there is likely in my view to be evidence about the context of the Heads of Terms which is not now before the court.

62. The evidence leads to the conclusion that there is at least a triable issue as to whether a binding agreement was reached in 2016 and the terms of that agreement: the court has regard in particular to the contemporaneous and objective evidence that the relevant form was submitted to the Civil Aviation Authority to register the defendant as a charterer by demise in December 2016. It was submitted for the claimant that in hindsight the filing was “premature” and that it is to be inferred (as stated in the evidence of Mr Russell but not expressly in the relevant email) that this was done on the advice of the broker. In my view however the circumstances surrounding the registration of the defendant as the charterer by demise in December 2016 can only be resolved at trial.
63. As to the subsequent termination of any charter by demise, counsel for the claimant referred to the letter in which the claimant purported to terminate any charter by demise but failed to substantiate for the court on what basis, if a Relevant Agreement existed, the claimant was entitled unilaterally to terminate any such Relevant Agreement. I do not accept the submission that the claimant was entitled to terminate any charter merely because the original charter (if agreed) was contemplated for two years and the registration was extended by the defendant beyond that date. It seems to me that this is part of the investigation into the contractual agreement (if any) between the parties which can only take place at trial.
64. Although it was not the focus of oral submissions, I should deal with the point raised by the claimant of the failure of the defendant to provide any defence prior to its response in the last few days to this summary judgment application.
65. The court has regard to the following:
  - i) the defendant sought an extension of time for filing the defence and yet before that application had been considered, the claimant filed its application for summary judgment;
  - ii) whilst it was open to the claimant to make such an application, it then informed the defendant (which at that time was not represented) that it was not obliged to file a defence; whilst this was the position under the rules, in my view the claimant cannot then criticise the defendant for having failed to set out its defence;
  - iii) during April it would appear that Mr Fetaimia was unwell: the extent of his illness is unclear but at this present time the court cannot disregard his evidence that he was unwell over a period of weeks and he did obtain a doctor’s note that he was unfit to attend court last week.

66. In my view having regard to these matters, the failure to indicate its defence to the claim at an earlier stage does not give rise to any inference that the issues which the defendant now raises are fanciful having regard to the evidence.

#### Conclusion

67. On a summary judgment application the burden of proof is on the applicant. The court must consider whether the defendant has a realistic prospect of success and the criterion is not one of probability it is the absence of reality. The court cannot conduct a mini trial.
68. On the evidence before me the claimant has not shown that there is no real prospect of the defendant showing that it has a charter by demise which has not been terminated.

#### Declaratory relief

69. Even if I were wrong on the question of whether there is a real prospect of defending the claim, the application is for a declaration and the question arises whether the court should exercise its discretion to give summary judgment in the circumstances of this case.
70. Whilst the court has power to give a declaration even on a summary judgment application the court has to act with caution and I note the dicta of Scarman LJ in *Wallersteiner v Moir* [1974] 1WLR 991 at 1030 that:

“generally speaking the court should leave until after trial the decision whether or not to grant declaratory relief ”

Scarman LJ was there referring to allegations of fraud, misfeasance and breach of trust and it was said that different considerations apply when what is sought is a money or property judgment. However Scarman LJ went on to say that the power of the court to give declaratory relief upon a default pleading should be exercised only in cases in which to deny it would be to “impose injustice” upon the claimant.

71. I was also referred to the authority of *FSA v Rourke* 2001 WL 1171797. Although the court granted a declaration in that case on a summary judgment application, the circumstances were very different and the court made it clear that although the power to grant the declaration was unfettered:

“... , when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.”

72. Whilst I accept that the declaration would serve a useful purpose in that the CAA have indicated that it would accept an order of the court as sufficient to enable it to change the Register, the question in this case is the justice to each party.
73. In this case the claimant submits that there is urgency because it is under a contractual obligation to secure the change to the Register by 31 May 2020.

74. It was also submitted for the claimant that the Register currently gives a false impression to any third-party who consults the register and is likely to have an adverse impact on the new owner's ability to deal with the Aircraft; there could be confusion in the minds of the public if the defendant was to be shown as the owner of the Aircraft.
75. This latter point seems to me to be entirely without substance given that this dispute has now been running for many months and that on the claimant's case the defendant has erroneously been shown as the owner since the end of 2016. There is no evidence of any immediate or specific detriment to support the general statement of Mr Russell that there is likely be an adverse impact on the new owner's ability to deal with the Aircraft such that a declaration should be granted now prior to any trial.
76. As to the deadline of 31 May 2020, despite the court's observations in the course of the hearing last week and the opportunity for the claimant to file further evidence prior to the hearing, the claimant has chosen not to put any further evidence before the court as to the consequences for the claimant if it fails to meet the 31 May deadline.
77. As noted above, whilst the claimant states in its evidence that there are potentially adverse financial consequences if the Register is not updated, the claimant has not given any evidence which quantifies the likely adverse financial consequences or which substantiates any real prejudice to the claimant by reason of the deadline of 31 May 2020 being missed. There is no suggestion in the evidence that the CAA requires that the matter be dealt with as a matter of urgency.
78. Accordingly in my view having regard to the authorities and the circumstances of this case, even if the court were wrong to find that the defendant has no real prospect of defending the claim, the court would decline to exercise its discretion to give summary judgment in this case on the basis that no injustice to the claimant has been established and the court should therefore act with caution and leave until after trial, the decision whether or not to grant declaratory relief.
79. For all these reasons the application is therefore refused.