speak not of the settlor's intention but of the settlor's manifestation of intention", saying ([44]) that "[n]o express term [of the CST] provides for any residue to revert to the husband, nor does any express term allude to any such outcome".

CHILDREN

Family violence allegations should not be ignored at interim hearing because they are contested – Discharge of earlier supervision order set aside

In *Salah* [2016] FamCAFC 100 (17 June 2016) the Full Court (May, Ainslie-Wallace & Cronin JJ) allowed the mother's appeal against Judge Dunkley's interim order that a consent order made a month earlier that due to family violence she alleged against him the father's time with the children be supervised be discharged. The Full Court cited authority as to a court's approach to contested allegations at an interim hearing, including ([39]) *SS & AH* [2010] FamCAFC 13 in which Boland and Thackray JJ said that "[a]part from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims" and that "it is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue." The Court continued ([41]-[45]):

> "The difficulty … is that his Honour … having determined that he could not make any findings, ignored the allegations and found the presumption of equal shared parental responsibility applied. His Honour's comment 'given no other evidence' suggests that his Honour required corroboration or objective support for the mother's allegations in proof of them. To so suggest is an error. Family violence often takes place in private in circumstances where no corroboration is available. (…) His Honour was in error in … failing to pay any heed to allegations which he had earlier regarded as 'significant' and in failing to consider those allegations in the context of an interim hearing."

The Court added ([61]):

> "The … circumstances of the making of the recent consent orders, while not determinative of the issue were, in our view important factual background to the issues before his Honour and were worthy of consideration by him. That his Honour did not consider them is, in our view an error."

Andrew Yuile's High Court Judgements

CRIMINAL LAW

Jury directions – attempted murder – self defence – consent

In *Graham v The Queen* [2016] HCA 27 (20 July 2016), the High Court held to be correct the trial judge's directions to the jury as to an alleged "consensual confrontation" and possible honest and reasonable but mistaken belief as to fact. The appellant had been convicted of attempted murder and unlawful wounding with intent to maim. The offence arose out of a confrontation in a shopping centre between the appellant and another man (Mr Teamo). Both men were members of rival motorcycle clubs. Teamo drew a knife and the appellant drew a gun, shooting Teamo and an innocent bystander. At trial, the appellant alleged self defence. A necessary element of self defence is that the accused responded to an assault, defined as an attempt or threat of force without consent. In his closing, the prosecutor suggested that the confrontation was "consensual" and thus self defence could not be made out, as any threat of force from Teamo was made with consent and thus not an assault. Counsel for the appellant did not directly address the consent point in closing. The trial

judge made only passing reference to the prosecutor's submission in the charge, and the appellant's counsel did not seek a redirection. On appeal, the appellant argued that the judge's direction failed to deal properly with the consent point and as to mistake of fact: the appellant had argued that even if Teamo did not have an intention to assault the appellant, the appellant was honestly and reasonably mistaken about that fact. The High Court held that it was unclear how the confrontation could have been treated as consensual by any reasonable jury. Consent was not a real issue in the case. The judge's direction on the point (and on other aspects of self defence) was adequate. There was also no need for a direction on honest and reasonable mistake: based on the case at trial, there was no material which engaged the possibility of the defence. French CJ, Kiefel and Bell JJ jointly; Gordon J concurring; Nettle J dissenting. Appeal from the Court of Appeal (Qld) dismissed.

CONTRACT LAW

Collateral contracts – estoppel – statements in negotiations

In *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26 (20 July 2016), the respondent had entered into a five year lease with Crown. The lease provided that, prior to the end of the lease term, Crown was to state to the respondent whether (a) the lease would be renewed, and on what terms; (b) the respondents could continue in the property on a monthly tenancy; or (c) the respondents were required to vacate. Crown gave notice to vacate. The Victorian Civil and Administrative Tribunal (VCAT) found that Crown had stated, pre-contract, that the respondent would be "looked after" when the time came to consider renewal of leases (the Statement). VCAT found that the Statement created a collateral contract, by which Crown would give a notice to renew the lease, on terms that would be decided later. In the alternative, VCAT found that the Statement founded an estoppel. A single judge of the Supreme Court overturned both findings; the Court of Appeal agreed but remitted the matter for further argument on the estoppel point. The High Court held that the Statement was too vague to amount to a collateral contract – the reasonable person would see it as no more than "vaguely encouraging". Further, there could be no enforceable agreement unless at least the essential terms of the lease had been agreed. There was no basis for findings about what Crown might have done and what might have been accepted by the respondent: the terms of any agreement were unresolvable speculation. The estoppel argument also failed for lack of clarity and because there was insufficient material to show that the statement had been relied upon to the respondent's detriment. The Court discussed, but did not decide a question that arose as to whether the argued estoppel was promissory or proprietary, whether the thresholds for each are different, and whether there is a unified doctrine of estoppel. There was also some reference to whether VCAT's findings in relation to the collateral contract and its terms were questions of law or fact; however, an application for Special Leave to argue that the appeal from VCAT was incompetent for lack of a question of law was refused. French CJ, Kiefel and Bell JJ jointly; Keane J and Nettle J separately concurring; Gageler J and Gordon J separately dissenting. Appeal from the Court of Appeal (Vic) allowed.

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