The presumption of due delivery of a letter which has been posted was considered in *Australian Trade Commission v Solarex Pty Ltd* (1987) 78 ALR 439. In order to establish entitlement to a grant under the Export Grants Act, the claimant had to establish that its claim for a grant had been received by the Grants Board on or before 30 November, 1985. The evidence was that the claimant had posted the claim on 30 October, 1985 in a prepaid envelope addressed to the Board at its post office box and that the envelope was not returned undelivered.

The Federal Court held that proof that a letter has been posted, and that it was prepaid, properly addressed, and not returned undelivered, is evidence of its delivery in the ordinary course of post unless it can be shown that the letter went astray in the post. Clause 7 of the Standards Association's contracts would not displace the presumption of due delivery by post. As yet there is no legal presumption that a notice sent by electronic mail has been received. Actual receipt has to be shown.

The *Kennedy* case is also interesting in that Giles J held that even if the letter of termination was ineffective as a determination under Clause 13 of BC3, it was open to the proprietor to exercise both the contractual power and the common law entitlement to accept the builder's repudiation and the letter could be effective at common law to terminate the builder's engagement.

In *Architectural Installation Services Ltd v James Gibbons Windows Ltd* 1989 46 BLR 96 the Official Referee in England came to a similar conclusion. The contract in question had a termination clause covering certain defaults. It was argued that the termination clause was a comprehensive code which excluded any right to terminate at common law. It did not include the words 'without prejudice to other rights and remedies' (which are found in AS2124-1986, NPWC3, E5b and JCC). Nevertheless, the Official Referee said that since there was no express provision in the contract to the effect that it can only be determined by exercise of the express contractual right, he would not imply such a term and therefore the contract could be terminated by exercise of common law rights.

- Philip Davenport

Employment - Restraint of Trade

Gasweld Pty Ltd v Wright (1989) ATPR 40/957

Gasweld & Wright is a decision of Hodgson J in the NSW Supreme Court on an application by an employer to restrain a former employee from using certain 'trade secrets' and from dealing with the employer's suppliers and customers.

Against the advice of his solicitor, the employee signed a contract with several blank spaces in it and gave it to the employer who subsequently filled in the blank spaces. The employer's business was the importing of tools and machinery from Taiwan and the wholesale and retail of those goods in Australia.

The contract provided in clause 6 that the employee would not disclose or use:

a) information concerning the identities of suppliers and customers; and
b) confidential information and trade secrets generally.

The contract provided in clause 8 that for the period set out in the schedule, the employee should not perform services for customers of the employer. When the employee signed the contract no period was stated in the schedule. The employer later inserted the period of '36 months from termination of employment'.

Some three years later the employee resigned and after six months set up a competing business. The Court held that the identity of reliable agents and manufacturers in Taiwan was a 'trade secret' which the employer was entitled to have protected. The contract did not state any period for the clause 6 constraints so the Court fixed a period of 4 years during which the employee would be restrained by the Court from using or disclosing the identity of the employer's agents and manufacturers or dealing with them.

The Court considered that information other than the identity of suppliers, in particular, the identity of customers and the employer's pricing and discounting practices, costs and profit margins was less confidential and would not justify any restriction after 9 months after termination of the employee's employment.

The Court held that the NSW Restraints of Trade Act, 1976 empowered it to read down clause 6(a) so that it applied for 3 to 5 years and clause 6(b) so that it applied for 9 months.

The Court held that clause 8 was ineffective. The Court found that the employer had authority to complete on behalf of both parties some of the blanks in the contract document, in particular the employee's name and details of employment, but not the period of 36 months.

The Court was unable to make a finding that there was any discussion between the parties on the period during which the restrictions in clause 8 were to apply. Hodgson J said:

> "This is not a document like a cheque, or a transfer given to a mortgage, where the handing over of a document with a blank is widely understood as conveying authority to fill in blanks. It could not be suggested that (the employer) had authority to fill in any period at all, and I do not think that it is plausible to suggest that he had authority to fill in any reasonable period."

The ineffectiveness of clause 8 did not affect the validity of the remainder of the contract.

Where a contract includes a restraint of trade that is unreasonably wide in its effect, the NSW Restraints of Trade Act, 1976 empowers the Court to read down the restraint thereby validating what otherwise would be a provision that at common law is contrary to public policy and void.

- Philip Davenport.