

NORTHERN TERRITORY LICENSING COMMISSION

REASONS FOR DECISION

PREMISES: EVERLEY PARAP

LICENSEE: Fong Continental Foods Pty Ltd

LICENCE NUMBER: 80900486

NOMINEE: Mr Raymond Fong

PROCEEDING: Complaint Pursuant to Section 48 of the *Liquor Act*

COMPLAINANT: Inspector Paul Laverty

HEARD BEFORE: Ms Brenda Monaghan (Presiding)
Ms Jane Large
Mr Ian O'Reilly

DATE OF HEARING: 18 September 2006

APPEARANCES: Mr Raymond Fong
Mr Greg Lye for the Director of Racing Gaming
and Licensing

1. On May 2006 a complaint was lodged by Licensing Inspector Paul Laverty against Fong Continental Foods Pty Ltd, Licensee for the premises known as Everley Parap. The complaint alleges that the Nominee, Mr Raymond Fong, breached Section 102 of the *Liquor Act* on 11 May 2006 when he sold a cask of Barunga Ridge wine to a person who was intoxicated. The complaint was denied by Mr Fong who said he did not serve liquor to the intoxicated person in question.
2. At the hearing Mr Greg Lye appeared on behalf of the Director of Licensing and Mr Fong represented himself.
3. The Director of Licensing's case was that at approximately 11.05am on 11 May 2006, Mr Peter Gilson, a Regulatory Officer with the Darwin City Council was outside Barden's Pharmacy in Parap after making a purchase there. A Caucasian man with scruffy appearance and distinctive features knocked into Mr Gilson on the footpath. Mr Gilson gave clear evidence regarding this person's appearance, later identified as Glen Hutchins. Mr Gilson gave clear evidence to support a conclusion that Mr Hutchins was intoxicated at the time. He smelt of alcohol, his speech was unintelligible and he stumbled and fell on several occasions. Mr Gilson's observations regarding Mr Hutchins' intoxication was not disputed.

4. Mr Gilson saw Mr Hutchins enter Everley Parap and exit soon afterwards with a cask of Barunga Ridge in a green plastic bag. He could see the cask through the bag. He immediately phoned the Police and then Licensing and advised them. He also made notes in his notebook regarding what he had seen.
5. Mr Gilson's evidence that Mr Hutchins purchased the cask of wine at Everley Parap was disputed by Mr Fong. Mr Fong gave evidence of seeing Hutchins and another man walking past his premises in a drunken state but he was adamant that they did not enter his store.
6. Mr Fong gave evidence that at around 11.10am on the day in question, he served Chris from Rochelle's Fine Jewellery Store and he served a man named Ari. Chris purchased cigarettes and Ari purchased a cask of Barunga Ridge.
7. Mr Fong also stated that the financial return of about \$2.00 for a cask was not worth the trouble he could get into. Further, he tendered anecdotal evidence that he refused service of liquor to intoxicated persons. This evidence was included in information provided to investigating Licensing Inspectors, but not under oath, as the individuals refused the opportunity to do so.
8. Several pieces of evidence were placed before the Commission by the Director of Licensing. These included:
 - a) The till tape for Everley Parap, which showed a sale of Barunga Ridge was made at 11.10am. Mr Gilson stated that Hutchins bumped into him at approximately 11.05am before entering the Everley store.
 - b) A green plastic bag from Everley Parap, which was of a similar colour and size to the plastic bag used by Hutchins to carry the cask when he was taken into protective custody by Police.
 - c) The batch number on the wine cask seized by Police from Mr Hutchins was the same batch number as the next cask of wine in the fridge at Everley Parap.
9. Licensing Inspector Lavery advised in evidence that he received a call from Gilson at 11.15am advising him that an intoxicated person had just left Everley Parap with a cask of wine. The time sequence for this sale is consistent with Mr Gilson's evidence.
10. Licensing Inspector Lavery gave evidence that the Barunga Ridge Cask seized by Police from Mr Hutchins was "very, very cold". His conclusion was that the cask had not been out of a fridge long and he deduced that it had been purchased from somewhere close. The closest store which sells Barunga Ridge was Everley Parap.

11. Mr Hutchins, when interviewed at the scene of his apprehension by Police, advised that he had purchased the cask at “the new Woollies in town”. It is undisputed that neither Woolworths outlets in Darwin CBD sell Barunga Ridge cask wine – or in fact any casks larger than two (2) litres.
9. When Mr Hutchins later spoke to Licensing Inspectors, he changed his story and advised that he purchased the cask of wine at the Woolworths Liquor outlet at Stuart Park and then travelled by bus with it back to Parap Shopping Centre. Further enquiries found that this outlet does not use green plastic bags.
10. Mr Fong in evidence was adamant that he did not sell a cask of wine to Mr Hutchins. He saw him pass his shop in an intoxicated state in the company of another person known to Mr Fong as Mick, but stated in evidence that Mr Hutchins did not enter the shop. Mick has since moved interstate. Mr Fong argued that the doors to the shop were too heavy for an intoxicated person to handle without falling out of the door, downstairs and into the street. Mr Fong said he felt that he was being victimised and that Mr Gilson was either mistaken or was fabricating his evidence.
11. Section 102 of the *Liquor Act* states:

A licensee or a person employed by a licensee shall not sell or supply liquor to a person unless the person to whom it is sold or supplied is not intoxicated at the time (the onus of proof of which lies with the defendant).

12. The Commission stated in a previous decision (Scotty’s Place, February 2000) “once there is a case to answer in relation to a breach of Section 102, which is to say, once a sale or supply is demonstrated, together with any reasonable ground to suspect that the recipient may have been other than not intoxicated, an onus of proof shifts to the licensee, who must prove that (the patron) was not intoxicated, or alternatively must sufficiently undermine the evidence of the sale or supply having occurred”.
13. On the evidence before us, the Commission is satisfied that there is a case to answer in relation to a breach of Section 102 of the *Liquor Act*. We are satisfied that a sale is demonstrated and that there are reasonable grounds to suspect that Mr Hutchins was “other than not intoxicated” at the time of the sale by Mr Fong. This means that the onus of proof shifted to the Licensee, who must prove that Mr Hutchins was not intoxicated, or alternatively must sufficiently undermine the evidence that the sale or supply having occurred.
14. In evidence, Mr Fong admitted that he had seen Mr Hutchins at around the time of the alleged sale and that Mr Hutchins was clearly intoxicated. This admission is consistent with all of the other evidence before the Commission. The Licensee must therefore undermine the evidence of the sale to Hutchins having occurred if the complaint is to be dismissed.

15. As regards the evidence on this issue, the Commission is satisfied on the balance of probability that a sale of one (1) Barunga Ridge cask to Mr Hutchins by Mr Fong occurred.
16. Mr Gilson gave clear strong evidence of what he saw on that day. He appears to the Commission to be an independent witness who has nothing to gain from telling an untruth. His evidence is accepted. It is also noted that his evidence is corroborated in several ways. We are confident that the sale occurred.
17. Further, the Commission accepts Mr Gilson's evidence that Mr Hutchins smelt strongly of liquor and showed the other signs of considerable intoxication. It is noted that the Police placed Mr Hutchins in protective custody, thus we do not accept Mr Hutchins' evidence (provided in the hearing brief) that he was "feeling dizzy" at the time.
18. Reaching a decision on penalty, we take account of the following matters:
- a) The impact on residential neighbourhood of anti social behaviour and public drunkenness is a matter of ongoing concern to the Commission. Any Licensee who contributes to the problem in breach of the *Liquor Act* must accept the consequences of their actions.
 - b) On the evidence before us, Hutchins was visibly intoxicated. Mr Fong has had dealings with the Licensing Commission before in 2005 with respect to a similar complaint of serving an intoxicated person. Whilst the complaint was not upheld on that occasion, Mr Fong should know that the Commission takes a breach of Section 102 very seriously.
19. The Commission considered all of the evidence and submissions made by both Mr Fong and Mr Lye and ultimately upheld the complaint of a breach of Section 102 of the *Liquor Act*. The Commission considers that an appropriate penalty is a suspension of the liquor licence for the premises for ten (10) days commencing 25 September 2006 and concluding on 4 October 2006 inclusive.

Brenda Monaghan
Presiding Member
22 September 2006