

AUSTRALIAN SAILING

Australian Sailing Appeal Decision

2023-10 BYS - Madness vs Swish

Appeal by Madness (AUS1307). Lodged on 06 December 2023 after receiving the written decision on 29 November 2023

Arising from the decision of protest hearing involving 2 protests (Swish vs Juno) (Juno vs Madness) heard together on 17 November 2023 relating to an incident in the racing area involving Swish (AUS82), Juno (AUS1635) and Madness (AUS1307), during race 3 of J70 Victorian Championships, conducted 17 November 2023. The hearing was reopened on 18 November 2023 to consider new evidence in the form of photographs at the request of Madness.

The following people have been appointed to the Appeal Panel for this appeal by Australian Sailing:

Steven Hatch (IJ, IU, NRO) Chair Damien Boldyrew (IJ, IU) Phil Mostyn (NJ),
John Whitfield (NJ) Greg Kemp (RJ)

The Protest:

The protest committee found the following facts:

1. Downwind finish
2. All three boats were overlapped on Starboard tack, approaching the finish line at the pin end with Madness to windward of Juno who was to windward of Swish
3. All three boats were being carried towards to pin end by a tidal flow
4. As a result, Swish gybed onto Port to lay the mark and almost immediately made contact with Juno who was unable to respond due to proximity of Madness to Port of her
5. Juno hailed Madness for room but Madness did not respond and there was contact between the Port bow of Juno and the Starboard quarter of Madness as Madness crossed the finish line

The protest committee concluded:

1. Juno did not keep clear of Swish as required by RRS11 but is exonerated as Madness did not give her room to do so
2. Madness did not keep clear of Juno as required by RRS11
3. Neither Juno nor Swish were given the mark room by Madness, to which they were entitled. For the same reason as above, Juno is exonerated and Madness broke RRS18.2

The protest committee Rules that Applied:

RRS11, RRS14, RRS18.2

The protest committee decided the following:

Madness is Disqualified in Race 3

The protest committee decided in the reopened hearing the following:

The Photos 'head on' angle, made it impossible to see the gaps/overlaps accurately and, having reviewed the photos, no changes were made to the decision

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The Appeal summary:

The appeal panel reviewed the submission by Madness (AUS1307) which included photographs, and discerned the grounds of her appeal to be:

1. That the Protests Committees Facts Found had inconsistencies following the viewing of photos of the incident
2. That the Protests Committees Conclusions had inconsistencies following the viewing of photos of the incident
3. That Madness was not given the opportunity to prepare for the hearing
4. That the Protest Committee Chair asked the boats whether they had received any damage, to which the answer from all parties was none, yet Madness has since received a repair invoice from Swish.

Comments and Clarifications:

In addition to the appeal submission by Madness (AUS1307), the appeal panel received written submissions from the Protest Committee and Swish (AUS82). The submissions in part include evidence that was purported to have been presented during the hearings. This evidence may only have been part of the evidence the protest committee obtained during the hearings.

RRS 70.1(a) states that a party to the hearing can not appeal the facts found by the protest committee. The appeal panel is therefore required to only rely on the facts that are found by the protest committee, unless the appeal panel believes these facts are inadequate.

Appeal Panel discussion and conclusions:

Validity of Appeal

The appeal was lodged with Australian Sailing 6 days after Madness received a written copy of the protest decision from the protest committee. This application therefore complies with the requirements of RRS R2.1(a). RRS R2.2 was also satisfied and therefore the submission is a valid appeal request.

Appeal ground 1:

The protest committee took the evidence of the parties present at the hearing and it's reopening as required by RRS 63.3(a). Having taken the evidence of the parties including the photos provided at the reopening, RRS 63.6(d) requires the protest committee to give the weight it considers appropriate to the evidence presented, find the facts and base its decision on them, which the protest committee did.

RRS 70.1(a) states that a party to the hearing can not appeal the facts found by the protest committee.

On this ground the appeal is denied.

Appeal ground 2:

Throughout the appeal submission, alternative facts and reasoning are presented. Under RRS 70.1(a) a party may appeal a protest committee's decision or its procedures but not the facts found. The protest committee took the evidence of the parties present at the hearing and it's reopening as

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required by RRS 63.3(a). Having taken the evidence of the parties, the protest committee gave the weight it considered appropriate to the evidence presented and found facts as required by RRS 63.6(d) and made its decision based on a balance of probabilities as per RRS 64.1(a) and its Conclusions are consistent with the Facts Found.

On this ground the appeal is denied.

Appeal ground 3:

Appeal ground 3 is that Madness was not given the opportunity to prepare for the hearing. Under RRS 63.2 a party "shall be allowed reasonable time to prepare for a hearing".

At no time before the start of the hearing or during it did Madness ask for additional time to prepare for the hearing. It is the duty of a party to protect themselves by acting reasonably which includes if they have done all things possible to prepare for the hearing (such as checking the protest hearing schedule posted on the Notice Board, seeking out the protest form, and using any available time to prepare for the hearing) and if they are still not ready, to inform the Protest Committee at the start of the hearing that they needed additional time to prepare. They did not do this and cannot rely on RRS 63.2 in the appeal.

On this ground the appeal is denied.

Appeal ground 4:

Madness claimed that the Protest Committee Chair asked the boats whether they had received any damage, to which the answer from all parties was none, yet Madness has since received a repair invoice from Swish.

The Protest Committee in their rejoinder indicated that they asked the parties whether there was any damage that would prevent them from competing, to which all parties indicated there was none. Protests Committees regularly ask this question to inform themselves in relation to the requirements of RRS 61.1(4), RRS 62.1(b), RRS 63.5

In RRS 67 Australian Sailing prescribes that the question of damages is for the appropriate court of law.

On this ground the appeal is denied.

Appeal Panel Decision

The Appeal by Madness (ASU1307) is denied.