

Australian Sailing Appeal Decision

2022-07 SYC Esprit vs Black Diamond

Appeal by Esprit. Lodged on 09 July 2022

Arising from decision of protest hearing held 04 July 2022 relating to an alleged breach of RRS 16.1 during an incident in the racing area involving Esprit and Black Diamond during race 2 of SYC Offshore Division 2022/23 Winter Passage Series.

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

Damien Boldyrew (IJ, IU) Chair

Ben Fels (IJ, IU)

Peter Hannah (NJ),

Jonathon Rees (NJ, NU)

Tim Went (NJ, NRO)

The Protest:

By check box, the protest committee found the following:

No objection by interested party

Written protest or request identifies the incident

'Protest' hailed at the first reasonable opportunity

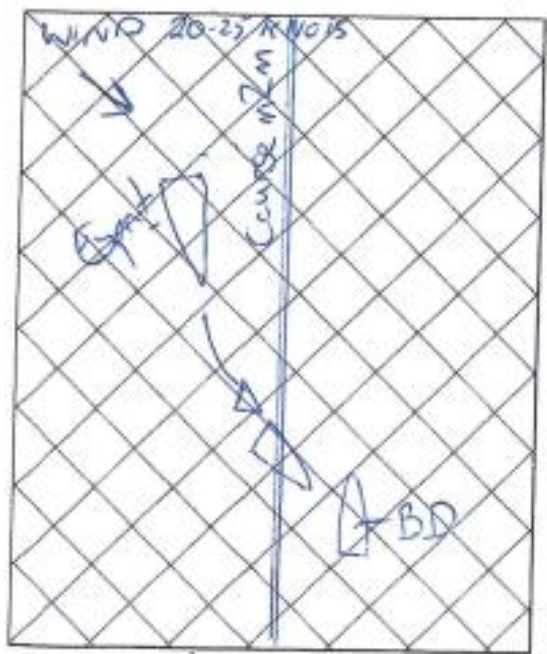
Red flag conspicuously displayed at the first reasonable opportunity, and remarked "Within 2 minutes"

Protest of request valid; hearing will continue

The protest committee found the following facts:

1. Esprit STBD downwind run with main + gennaker up.
2. Black Diamond on port tack, close hauled.
3. BD alter course to avoid contact by bearing away.
4. E continued to alter course by bearing away towards B.D. (RRS 16.1).
5. B.D. as a result of above, had to abruptly alter course to avoid a collision. Boats came within 1 boat length.

The protest committee endorsed the diagram of BD



The protest committee went on to conclude:

1. RRS 16.1 breached by Esprit.

The protest committee decided the following

Esprit is disqualified from race 2

The Appeal summary

The grounds of appeal submitted by Esprit are:

1. An invalid Protest was accepted by the [Protest] Committee.
2. The Committee was unduly influenced by a number of photographs submitted by [Black Diamond], did not ask questions listed in RRS Appendix M7, and that this amounted to a breach of procedural fairness.
3. The incorrect interpretation of Rule 16.1 and an over-reliance on 'Conclusion' rather than 'Facts'.

Comments and Clarifications

In addition to the appeal submission by Esprit, the appeal panel received a written submission from Black Diamond including photographs.

The written submissions received each include evidence that was purported to have been presented during the hearing. This evidence may only have been part of the evidence the protest committee obtained during the hearing.

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. In that case per RRS Appendix R5, it shall require the committee to provide additional facts or other information, or to reopen the hearing and report any new finding of facts.

Appeal Panel discussion and conclusions:

Ground 1:

An invalid Protest was accepted by the [Protest] Committee

The appellant Esprit contends she was not properly informed of the protest; that there was no hail of 'Protest', a red flag was not displayed at the first reasonable opportunity, and the protesting boat did not comply with SI 17.1

In respect of the hail of protest, Esprit asserts that no hail of protest was made by the protesting boat, Black Diamond.

Black Diamond's written protest indicates that she informed Esprit in some other way, and elaborated, "By VHF (unacknowledged)", and this is affirmed in her written submission to the appeal panel.

The appeal panel required the protest committee to provide additional facts in respect of how and when the protesting boat informed the other boat. The protest committee reply included evidence it took regarding validity from which the appeal panel could discern the fact:

"BD had provided hail/intent to protest to ES, both using the race channel on VHF and displaying the red flag."

As the protest concerned an incident in the racing area, RRS 61.1(a) requires the protesting boat to hail 'Protest' and conspicuously display a red flag at the first reasonable opportunity for each.

Noting the fact found that “Boats came within 1 boat length” the appeal panel does not consider Esprit was beyond hailing distance. As such, the exception provided by RRS 61.1(a)(1) does not apply and the attempt to inform Esprit by VHF does not meet the requirement of a hail provided for in RRS 61.1(a).

In respect of the display of a red flag, the protest committee remarked with a fact, "Within 2 minutes"

The protest committee did not identify any additional facts which justify a delay of up to two minutes in displaying the flag, therefore 'within 2 minutes' is not considered by the appeal panel to be the first reasonable opportunity.

By not hailing 'Protest' and conspicuously displaying a red flag at the first reasonable opportunity for each as required by RRS 61.1(a), the protest committee should have found that not all the requirements for the protest have been met, declared the protest invalid and closed the hearing as required by RRS 63.5.

The contention that SI 17.1 was not complied with becomes an irrelevant point and is not discussed further.

Ground 1 is upheld.

Ground 2:

The Committee was unduly influenced by a number of photographs submitted by [Black Diamond], did not ask questions listed in RRS Appendix M7, and that this amounted to a breach of procedural fairness.

Black Diamond provided select digital photographs as evidence during the hearing. Esprit had the opportunity to address that evidence and requested the protest committee not consider that evidence. The appellant asserts the protest committee refused that request.

Accepting photographic evidence is in compliance with RRS 63.6 which requires the protest committee to take the evidence, including hearsay evidence, of the parties present at the hearing and of their witnesses and other evidence it considers necessary.

RRS 63.6(d) requires the protest committee to give the weight it considers appropriate to the evidence presented.

RRS Appendix M7 is part of an advisory appendix within the RRS. A protest committee is not required to ask the questions listed exactly as they are presented and may not need to ask questions at all if the information is forthcoming as parties speak to the evidence.

Ground 2 is rejected.

Ground 3:

The incorrect interpretation of Rule 16.1 and an over-reliance on 'Conclusion' rather than 'Facts'.

The facts establish that throughout this incident, Black Diamond, a port tack boat was required to *keep clear* of Esprit, a starboard tack boat.

When Esprit altered course, as right-of-way boat over Black Diamond she was obligated by RRS 16.1 to give Black Diamond *room* to keep clear.

There are no facts to suggest Black Diamond did not *keep clear*, nor that she did not have the space needed in the existing conditions to be able to do so while manoeuvring promptly in a seamanlike way.

Therefore, the protest committee erred in concluding RRS 16.1 breached by Esprit.

Ground 3 is upheld.

Appeal Panel decision

For the reasons stated above the appeal is upheld. The decision of the protest committee is reversed, and Esprit is to be scored in her finishing place.