

YACHTING NEW ZEALAND APPEAL 82

SWEET MAGIC v MYKONOS

*An appeal from a decision of the protest committee of
the Lake Taupo Yacht Club on 26 September 2021*

Introduction

The question in this appeal is whether the facts found by the protest committee support SWEET MAGIC's disqualification for breaking RRS 10.

The Protest Decision

MYKONOS protested SWEET MAGIC. MYKONOS claimed she needed to take avoiding action when SWEET MAGIC tacked in front of her. The diagram in the protest form suggests this happened in the zone of the windward mark.

The protest form states that MYKONOS informed SWEET MAGIC of her intention to protest by hailing "starboard" and by displaying a red flag.

The only facts found in the protest hearing were:

1. SWEET MAGIC admitted that with the tack onto starboard he may have been in trouble as he may have tacked in the water of MYKONOS.
2. SWEET MAGIC said that the following boat (MYKONOS) advanced to within 100 mm of his stern therefore causing (MYKONOS) to take evasive action.

The protest committee concluded that RRS 10 applied and disqualified SWEET MAGIC.

SWEET MAGIC appealed.

The Appeal

Yachting New Zealand required the protest committee to provide additional facts, pursuant to RRS Appendix R5. Yachting New Zealand provided a list of the facts needed to determine the protest. It also stipulated that Mr John Bullôt be included on the protest committee. Mr Bullôt is an international judge who would have known how to find those facts and how to put them in writing.

The protest committee replied in a memorandum emailed on 18 October 2021. They had not included Mr Bullôt in their deliberations. Yachting New Zealand's list of required facts and the protest committee's answers are as follows:

(a) Facts concerning the validity or invalidity of the protest;

We felt the protest was valid as a red flag had been flown and SWEET MAGIC was suitably hailed. The protest was launched in the correct time allowed.

(b) The wind and lake conditions;

These were clearly stated on the Protest form as "no current, calm water and 8-10 knots of wind".

(c) Facts clearly showing the boats' courses;

The Protest Committee could only go by the courses drawn on the Protest form.

(d) *The distances between the boats at the crucial times;*

Also explained during discussions with the 2 parties.

(e) *Facts showing the courses of the boats in relation to the mark they were approaching and the zone.*

Also shown on the Protest form and discussed with both parties

In a direction, dated 19 October 2021, Yachting New Zealand reiterated that the additional facts were needed and that the protest committee should include Mr Bullôt. The protest committee was asked to advise if they were unwilling to work with Mr Bullôt.

On 21 October 2021, the protest committee emailed saying (among other things) that they had no issue with working with Mr Bullôt.

On 11 November 2011, Yachting New Zealand inquired about progress. The protest committee replied that no progress had been made because the protest committee had already provided sufficient facts and MYKONOS had provided "a very good version of events" in their comments on appeal.

Decision

Protest committees are required to determine and articulate the facts of a protest.

"Facts" need to be distinguished from "evidence". Evidence is what the various parties and witnesses say happened. In the context of protest hearings, "facts" are what the protest committee determines has happened.

Protest committees hear evidence from the parties and witnesses. Evidence about an incident often varies because people's perceptions and recollections will differ – as in this case. The protest committee must then weigh the competing evidence and decide what actually occurred. The facts must be written in the protest decision – see RRS 63.6 and Appendix M3.3.

If a protest committee does not find the necessary facts, they will not be able to determine how the rules apply.

For instance, if a protest committee finds that boats converged on opposite tacks, rule 10 will apply. If they decide boats converged while overlapped on the same tack, rule 11 will apply. But if the protest committee does not determine whether the boats were on the same tack or on opposite tacks, no one will know what rules apply. A protest decision unsupported by factual findings is only a guess.

In this case, the protest committee's decision that SWEET MAGIC broke RRS 10 is not supported by facts. The protest committee only made general references to disputed evidence and statements made by the parties. For instance, instead of resolving disputed evidence, they wrote: "*The Protest Committee could only go by the courses drawn on the Protest form,*" when the protest form isn't clear.

There is uncertainty whether MYKONOS' protest is valid. The protest committee was asked to provide facts about that. They decided that "SWEET MAGIC was suitably hailed". That is not a fact but a judgment made without factual support. A hail of "starboard" does not satisfy the requirements for a valid protest.

The protest committee disqualified SWEET MAGIC for breaking rule 10. That rule provides: *“When boats are on opposite tacks, a port-tack boat shall keep clear of a starboard-tack boat”*.

The protest committee found no facts about the boats' courses or the distances separating them while they were on opposite tacks. There are no facts that show that SWEET MAGIC was not keeping clear when she was on port.

In their additional facts, the protest committee appears to endorse the diagram in the protest form. That diagram is inconsistent with the protest committee's decision because it shows SWEET MAGIC on starboard, half a boat-length clear ahead of MYKONOS, during the incident. The protest committee described MYKONOS' comments on appeal as a *“very good version of events”*. However, those comments contradict the protest committee's decision.

The protest committee refers to evidence that the boats were 100 mm apart at one stage. If that happened, was SWEET MAGIC then of port tack or starboard? Had she completed her tack, so she would have had right to way? Had she passed head to wind inside the zone of the mark, so that rule 18.3 applied? Did she pass head to wind outside the zone so that SWEET MAGIC was entitled to mark-room? None of these questions can be determined from the facts found.

Accordingly, the protest committee's decision is substantially wrong because the factual findings do not support it. The protest hearing was also procedurally wrong because the protest committee failed to make factual determinations as it was required to do.

Outcome

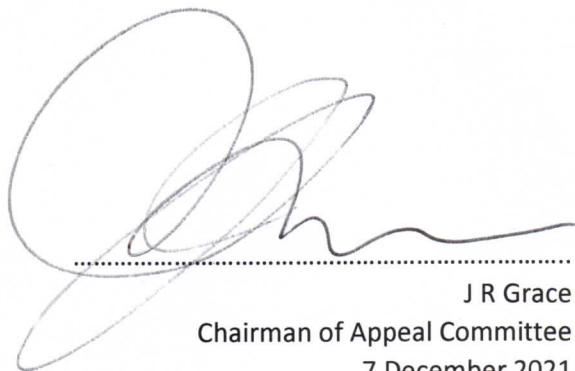
The appeal is upheld and the protest decision dated 26 September 2021 is set aside.

MYKONOS remains entitled to have her protest heard and determined. The Appeal Panel cannot resolve the factual issues because the facts provided are insufficient, and because it does not hold protest hearings. Efforts to obtain the missing facts from the original protest committee were unsuccessful.

A new hearing shall be held with a different protest committee under RRS 71.2. The new protest committee shall be John Bullôt, James Dunlop Storey, Graeme Robinson (who lives in Napier) and Vesna Wells, subject to their availability. The hearing may be held using Zoom.

Appeal Committee

John Grace (chair)
Mike Alison
Doug Elder
Michele Governale
Richard Matterson



J R Grace
Chairman of Appeal Committee
7 December 2021