

Australian Sailing Appeal Decision

2021-08 MHYC Kaizen vs Shibumi

Appeal By: Kaizen represented by Brad Newton

Arising from: Incident at the Manly West mark of the MHYC Thursday Twilight Series Race 6 - 11 November 2021

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

- Jonathon Rees (NJ) Chair
- Damien Boldyrew (IJ)
- Nev Willis (IJ)
- Rob Ware (NJ)
- Luke Tupper (NJ)

The Protest / Request for Redress

Following an incident between Kaizen and Shibumi on 11 November 2021 a protest hearing was held on 16 November 2021.

The protest committee found the following facts:

1. Wind SE 10-12 Knots
2. S & K reaching to mark on STB
3. At 3B zone K clear astern of S
4. K established outside overlap @ approximately – 2 boat lengths from mark
5. A contact occurred approximately 1 boat length from mark. K STB forequarter & S port after quarter
6. Boats separated after 1st contact
7. At mark rounding S port quarter made contact with K STBD bow

And went on to conclude

1ST COLLISION

Rule 18.2A applies: When boats overlapped outside boat shall give inside boat mark room

Rule 14 applies: Avoid contact

Rule 17 applies: When boat clear astern established overlap from within 2 boat lengths to leeward. Shall not sail above proper course*.

Conclusion: Kaizen broke rules 17 & 18.2a & 14.

2nd COLLISION

Rules

Rule 14 applies

Rule 17 applies`

Rule 18.2 applies

Conclusion: Kaizen broke rules 14, 17 & 18.2.

And decided the following

Kaizen disqualified

The Appeal summary

The appellant's grounds for appeal are:

1. 1st Collision Kaizen broke rule 17 - There were no facts found to support this conclusion.
2. 1st Collision Kaizen broke rule 18.2(a) - There were no facts found to support this conclusion.
3. 1st Collision Kaizen broke rule 14 - There were no facts found to support this conclusion.
4. 2nd Collision Kaizen broke rule 14 - There were no facts found to support this conclusion.
5. 2nd Collision Kaizen broke rule 17 - There were no facts found to support this conclusion.
6. 2nd Collision Kaizen broke rule 18.2(a) - There were no facts found to support this conclusion.
7. Procedural 1 - Prior to the hearing, the Protestee observed the Protestor in conversation with the PC Chair regarding the incident. This was raised by the Protestee during the preliminary part of the hearing as a potential conflict of interest. When this was raised the Chair denied there was a conflict.
8. Procedural 2 - During the preliminaries, a member of the Protest Committee directed that the Protestee should "ignore the content of the protest form".

Appeal Panel conclusions

The panel reviewed the protest committee's decision in this appeal and decided that the finding of facts was inadequate.

In accordance with Appendix R5 of the rules the panel required the committee to provide additional facts as follows:

1. Details of the dimensions and type of design of Shibumi and Kaizen.
2. The courses of Kaizen and Shibumi relative to the mark and each other and the distance between them when the overlap was established.
3. Any change in course after the overlap was established by either boat.
4. The distance between Shibumi and the mark when she was at the mark.

The committee responded with the following additional facts:

Q1 Shibumi - Northshore 369, length 11.07m, beam 3.721m, Kaizen - Sydney 38, length 11.74m, beam 3.75m

Q2 Both Shibumi and Kaizen were on a Starboard broad reach towards the mark. Before entering the Zone Kaizen was directly astern of Shibumi and gaining ground. Kaizen was the overtaking boat. Kaizen bore away to the outside of Shibumi. After Shibumi entered the Zone, Kaizen established an outside overlap. At that stage the boats were approximately 1 metre apart with Kaizen's bow approximately halfway between Shibumi's stern and beam. kaizen then changed course and made first contact with Shibumi's port quarter.

Q3 Shibumi continued in a straight line to the mark. (Please see the attached picture of Shibumi's track, as recorded on the night.) The turn around Manly West is indicated in the upper left hand track. The turn around Manly East is the upper right hand turn in the picture.

After the first contact the boats separated, but then Kaizen again altered course to again press close (less than 1m) to Shibumi on her Port Stern quarter as Shibumi reached the mark, giving no room to turn - despite being warned to keep clear and give buoy room. As Shibumi rounded the mark to starboard at Manly West to sail to Manly East, the boats made contact again. This time Shibumi port stern quarter with Kaizen's starboard bow.

Q4 Shibumi's bow and then beam was approximately 1 metre from the mark when she reached the Manly West Mark.

Grounds 1 and 5 – 1st Collision Kaizen broke rule 17 and 2nd Collision Kaizen broke rule 17

The protest committee is correct in concluding that rule 17 applied as Kaizen established an overlap from clear astern and within two boat lengths of Shibumi.

For a protest committee to conclude that a boat broke rule 17 it must find facts that support a conclusion that the boat sailed above her *proper course*. A boat's proper course is any course a boat would sail to finish as soon as possible in the absence of other boats. For a boat to be sailing above her proper course in this situation, her course would need to pass to windward of the mark.

The protest committee did not find any facts relating to Kaizen's course relative to the mark at the time of the first or second contact.

In accordance with Appendix R5 of the rules the panel required the protest committee provide additional facts. The committee provided the following relevant facts:

- i. Both Shibumi and Kaizen were on a Starboard broad reach towards the mark. Before entering the Zone Kaizen was directly astern of Shibumi and gaining ground. Kaizen was the overtaking boat. Kaizen bore away to the outside of Shibumi.
- ii. After Shibumi entered the Zone, Kaizen established an outside overlap. At that stage the boats were approximately 1 metre apart with Kaizen's bow approximately halfway between Shibumi's stern and beam. Kaizen then changed course and made first contact with Shibumi's port quarter.

Taking into account the additional facts the panel concluded that Kaizen did not sail above her proper course at any time and hence complied with rule 17. The protest committee's conclusion is changed to reflect this.

Grounds 2 and 6 – 1st Collision Kaizen broke rule 18.2(a) and 2nd Collision Kaizen broke rule 18.2(a)

As the boats approached the mark Kaizen, as the leeward overlapped boat, was the right of way boat under rule 11 and Shibumi was entitled to mark room under rule 18.2(b).

In this situation the definition of mark Mark-Room states that the inside boat is entitled to room for three manoeuvres (Case 21):

- Room to leave the mark on the required side.
- Room to sail to the mark.
- Room to round the mark as necessary to sail the course

Kaizen must give Shibumi the space she needs in the existing conditions to carry out these manoeuvres in a seamanlike way.

No facts were found by the protest committee which enable a conclusion to be drawn that Shibumi sailed within the mark room she was entitled to.

In accordance with Appendix R5 of the rules, the panel required the protest committee provide additional facts regarding:

- Shibumi's course, relative to the mark, her relationship to Kaizen leading up to the first contact, and how close she came to the mark on rounding.
- The class and size of both Kaizen and Shibumi to allow conclusions as to space required by Shibumi in the existing conditions to sail to the mark and round the mark without touching it.

The protest committee provided the following additional relevant facts.

- i. Shibumi continued in a straight line to the mark.
- ii. Shibumi's bow and then beam was approximately 1 metre from the mark when she reached the Manly West Mark.

Based on the additional facts found, the panel concluded that Shibumi sailed within the mark-room to which she was entitled and that Kaizen, clear astern at the time Shibumi reached the zone, failed to give Shibumi mark-room and broke RRS 18.2(b).

Ground 3 and Ground 4- 1st Collision Kaizen broke rule 14 and 2nd Collision Kaizen broke rule 14

From the facts found by the protest committee, the panel observed that when contact occurred rule 14 applied to both boats and that each contact was a separate incident.

From the additional facts provided by the protest committee the panel concluded that the first contact occurred due to the alteration of course by Kaizen and that Kaizen, being on the same tack and to leeward of Shibumi, had right of way over Shibumi. (Preamble to Part 2, Section A of the rules)

The panel went onto conclude that

- Kaizen the right of way boat did not act to avoid contact with Shibumi when it was reasonably possible to do so and broke rule 14.
- Since Kaizen was right of way boat and the contact did not cause damage or injury, she should be exonerated for this breach under rule 43.1(c).
- It was not reasonably possible for Shibumi, the boat sailing within the mark-room to which she was entitled to avoid contact with Kaizen when it was clear that Kaizen was not giving mark-room. Shibumi did not break RRS 14.

The second contact occurred when Shibumi's changed course to round the mark and her stern contacted Kaizen's bow. When Shibumi changed course, it was not reasonable possible for Kaizen to avoid contact with her.

For the second contact the panel concluded that:

- Kaizen the right of way boat did not act to avoid contact with Shibumi when it was reasonably possible. Kaizen broke rule 14.
- Since Kaizen was right of way boat and the contact did not cause damage or injury, she is exonerated under rule 43.1(c).
- It was not reasonably possible for Shibumi, the boat sailing within the mark-room to which she was entitled to avoid contact with Kaizen when it was clear that Kaizen was not giving mark-room. Shibumi did not break RRS 14.

The panel concluded that these conclusions by the protest committee were incorrect.

Ground 7 – potential conflict of interest.

Kaizen's representative observed the protestor and protest committee chair discussing the incident before the hearing.

Kaizen's representative believed that this implied that the protest committee chair had a conflict of interest and raised this at the start of the hearing. The chair offered to recuse himself from the hearing. The appellant consented to the hearing proceeding with the chair as a member of the committee.

The panel noted that a discussion between a protestor and protest committee member prior to a hearing does not meet the definition of conflict of interest under the rules.

The panel concluded that the procedures followed by the protest committee complied with rule 63.4 and the recommendations in appendix M2.3 of the rules.

Ground 8 – protest form

The appellant stated that during the preliminaries for the hearing, a member of the Protest Committee directed that the Protestee should “ignore the content of the protest form”. This was not contested by the protest committee in their response to the appeal.

The panel notes that the protest form contains the allegation by Shibumi that Kaizen had broken a rule together with Shibumi’s description of the incident, including a diagram. Kaizen was provided with a copy of the form and allowed reasonable time to prepare for the hearing. At the hearing, Shibumi, the protestor, was given the opportunity to present evidence supporting the allegation and description of the evidence.

The content of the form is relevant to the hearing, and as such Kaizen, a party to the hearing, is entitled to question, Shibumi, the other party regarding the content of the form and any perceived difference between that content and the evidence taken at the hearing.

The panel concluded that it was an improper action for a member of the protest committee to direct Kaizen to ignore the content of the form. However, the panel is satisfied that Kaizen was able to question Shibumi’s representative on her evidence presented at the hearing and that although improper, the direction did not affect the outcome of the hearing.

Appeal Panel decision

The panel decided that the protest committee’s conclusions be changed to:

1. Kaizen, clear astern at the time Shibumi, reached the zone failed to give Shibumi mark-room and broke RRS 18.2(b).

For both the first and second contacts:

2. Kaizen, the right-of-way boat, did not act to avoid contact with Shibumi when it was reasonably possible. Kaizen broke RRS 14
3. Since Kaizen was right-of way boat and the contact did not cause damage or injury, she is exonerated under RRS 43.1(c) for breaking RRS 14.
4. It was not reasonably possible for Shibumi, the boat sailing within the room to which she was entitled, to avoid contact with Kaizen, when it was clear that Kaizen was not giving mark-room. Shibumi did not break RRS 14.

The decision by the protest committee to disqualify Kaizen is upheld.
