

CAS 2008/A/1630 Mathieu Montcourt v/ ATP

ARBITRAL AWARD

Rendered by

THE COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Professor Jan Paulsson, Juffair, Bahrain

Arbitrators: Mr Olivier Carrard, Attorney-at-Law in Geneva, Switzerland
Professor Richard H. McLaren, London, Ontario, Canada

in the arbitration between

Mr Mathieu **Montcourt**, Boulogne, France

Represented by Mrs Laure Heinich-Luijter, Attorney-at-law in Paris, France

Mrs Clotilde Lepetit, Attorney-at-law in Paris, France

- Appellant -

and

Association of Tennis Professionals (ATP), Florida, USA

Represented by Mr John F. McLennan, Attorney-at-law, in Jacksonville, USA

- Respondent -

I. FACTUAL BACKGROUND

1. Parties

1. Mr Mathieu Montcourt (hereinafter the “Appellant”), a French professional tennis player, was born on 4 March 1985. The Appellant has a career high of 176 in the ATP Singles Rankings; professional tennis is his main source of income.
2. The Respondent, ATP Tour, Inc. (hereinafter the “ATP”), is the official international circuit of men’s professional tennis tournaments. It is a non-profit membership organization under the laws of the State of Delaware (USA), the members of which are individual male tennis players and tennis tournaments. The ATP certifies tennis tournaments and provides league governance and support to its member tournaments and players.

2. Facts

3. On 21 February 2003 and on 5 February 2005, the Appellant signed a document entitled “*Player’s Consent and Agreement to ATP Official Rules Book*”, according to which he consented and agreed to be bound and to comply with the 2003, respectively 2005, ATP Official Rulebook (2003, respectively 2005, ATP Rules).
4. He became a member of the ATP on 29 June 2005. As a player who entered or participated in any competition or activity organized, sanctioned or recognized by the ATP, the Appellant was covered by the 2005 program.
5. Between 2 June and 17 September 2005, the Appellant wagered on several tennis events through an account he had opened with an on-line betting organisation.
6. It was ultimately determined that the Appellant wagered a total amount of USD 192 on 36 tennis events between 6 June 2005 and 12 September 2005.
7. The overall result of these bets was a net loss of USD 36.60 for the Appellant. It is common ground that he never wagered on any of his own matches.
8. On 28 April 2008, the Appellant was informed by way of a notice from the Executive Vice-President – Rules and Competition of the ATP (hereafter “EVP-Rules & Competition”) that the Respondent was commencing a procedure against him for a possible violation of the Tennis Anti-Corruption Program, to wit wagering.
9. By letter dated 22 May 2008, the Appellant admitted the opening of an account with an on-line betting organisation and having gambled a few times between 6 June 2005 and 12 September 2005. He explained that he (1) had not been aware that the 2005 Rules prohibiting gambling, like many players and coaches at that time, (2) was not aware of the consequences of his actions; for him it was just a "game" (3) had immediately

stopped wagering on line as soon as he had read the relevant rules. He expressed his regrets and underlined that he had gambled only very small amounts of money for a very short period of time, neither on any of his own matches nor on any matches of a tournament he was participating in.

10. By order dated 28 May 2008, the Anti-Corruption Hearing Officer (hereafter the "AHO") noted that the Appellant had not requested a hearing, and, referring to the ATP 2008 Official Rulebook, that "*as stated in the Notice from EVP-Rules & Competition, dated 28 April 2008, and according to the ATP Rules Chapter 7.05, Section F.1.b, the Player has: i) waived his entitlement to a Hearing; ii) admitted that he has committed the Corruption Offense(s) specified in the Notice; and iii) acceded to the Consequences specified in the Notice*" and announced that the AHO would issue a final decision after receipt of a proposal for a sanction from the EVP - Rules & Competition.
11. By letter dated 2 June 2008, the ATP stated that the Appellant had admitted having placed around 48 bets between 6 June 2005 and 12 September 2005 in violation of the Tennis Anti-Corruption Program, and recommended a sanction of a three month period of ineligibility and a fine of USD 20,000.
12. The parties then exchanged some e-mails in order to try to agree on a joint application for a sanction; they did not reach an agreement.
13. Determining that the Appellant had actually placed only 37 wagers (later corrected to 36), the ATP finally recommended a suspension of 10 weeks and a fine of USD 15,000, whereas the Appellant suggested a suspension of one month (to be served from 1 December 2008 until 1 January 2009) and a fine of USD 8,000.
14. On 7 August 2008, the AHO issued the challenged decision. He considered that (1) the 2005 ATP Rules were applicable to the wagers charged against the Appellant; (2) as the relevant provisions of the ATP Rules 2005 and 2008 were substantially the same, the erroneous reference to the 2008 ATP Rules was irrelevant; (3) the Appellant was subject to the 2005 ATP Rules during the relevant period; (4) the Appellant had not undertaken to learn about the rules of his profession; (5) the ATP might have undertaken more to inform the Appellant; (6) all tennis matches and other competitions are covered by the prohibition of wagering irrespective of the entity organizing them; (7) the Appellant wagered "for fun" small amounts of money but never wagered on a match in which he was involved; (8) the Appellant expressed his regrets, stated that he understood that he deserved disciplinary consequences, had never been accused of a breach of the ATP Code before, admitted the offenses against him and cooperated during the proceedings; and (9) in the course of his professional tennis career, he had accrued a total prize money of USD 260,019.00.

In view of these considerations and of the sanctions imposed in similar cases, the AHO pronounced an ineligibility for any ATP event for a period of 8 weeks (starting on 11 August 2008 and ending at midnight on 5 October 2008) and a fine of USD 12,000 to be paid to the ATP before the end of the period of ineligibility.

15. The Appellant was suspended from 11 August 2008 until 15 August 2008, when CAS granted a provisional stay of the suspension. He could therefore not take part in the Challenger ATP in Vigo, Spain, which took place between 11 and 17 August 2008.
16. According to the Appellant, in August 2008, the French Tennis Federation, which had initially intended to grant a wild card to the Appellant for the US Open 2008, ultimately changed its mind and decided to withdraw it.

3. Proceedings before the Court of Arbitration for Sport and the parties' main submissions

17. On 8 August 2008, the Appellant filed a statement of appeal, written in French, against the AHO decision dated 7 August 2008, requesting mainly that the CAS set aside the challenged decision and state that no sanction should be imposed on him.
18. In his statement of appeal, the Appellant also requested a stay of the execution of the AHO decision dated 7 August 2008.
19. With respect to the merits of his case, the Appellant essentially argues that the principle of proportionality is incompatible with (i) a suspension of eight weeks and a fine 62 times superior to the amounts wagered; (ii) a sanction pronounced three years after the alleged facts; (iii) a sanction in the absence of any fraudulent intention; (iv) a sanction without any consideration of the player's age, in this case of his minority under US law, and of the experience of a player; and by (v) a sanction that does not take into consideration the absence of any offence to sporting image and integrity.
20. The Appellant then puts forward the context in which the sanction was imposed on him, i.e. the then-current suspicions against a prominent tennis player. He contends that the charges against him do not bring the sport's integrity into dispute; as the purpose of the Tennis Anti-Corruption Program is "*to maintain the integrity of tennis and to protect against any efforts to impact improperly the results of any match*", the imposed sanction does not correspond to the spirit of the texts but only to the political will of the Respondent.
21. The Appellant finally stresses that the challenged decision concerns facts which occurred three years ago and which equity demands to be barred.
22. With respect to applicable law, the Appellant alleged that he cannot be charged for any offense sanctioned by the ATP Anti-Corruption Program before he became a member of ATP. This would mean that only 9 of his bets could be taken into consideration.

Furthermore, he argued that the ATP wrongfully purported to sanction conduct related to tournaments not under its control, and that non-consideration of his bets on matches of other tournaments would lead to only three remaining instances of wagering.

23. The Appellant also emphasizes that, in 2005, he was not aware that his wagers were prohibited by the ATP and that the "*Player's Consent and Agreement to ATP Official Rules Book*" he signed in February 2005 did not provide him with complete knowledge of the anti-corruption program. According to the Appellant, it is for this reason that in 2008 the ATP amended the "*Player's Consent and Agreement to ATP Official Rules Book*", in order to make clear the existence of this program.
24. At the end of his statement of appeal, the Appellant mentions that, according to French and European law, a French citizen cannot be sanctioned for betting and that "*if the authorities of ATP have the natural right to sanction the bets that it forbids, nevertheless, the inflicted sanctions should take in consideration the permissive legislation of the common law*". Such a possible sanction should also take into consideration his good faith, the amounts he had bet, his financial situation and the damage to Rule of law in sports.
25. By letter dated 8 August 2008, the Respondent informed the CAS that it did not agree to conduct this arbitration procedure in French.
26. On 13 August 2008, the ATP filed objections to the request for a stay.
27. After having received the observations requested from the parties concerning the language of the proceedings, the Deputy President of the CAS Appeals Arbitration Division, decided, in an Order dated 15 August 2008, that the language of this arbitration would be English.
28. In another Order, issued on the same day, the Deputy President of the CAS Appeals Arbitration Division allowed the Appellant's application to stay the challenged decision.
29. By letters dated 7 and 8 October 2008, the Appellant requested that the CAS consider the statement of appeal as a combined statement of appeal and appeal brief, whereas, on 10 October 2008, the Respondent objected to such request. The Appellant's letter of 8 October 2008 was filed together with a draft translation of his original "*déclaration d'appel*".
30. On 14 October 2008, the Panel admitted the "*déclaration d'appel*" of 8 August 2008 as an appeal brief, invited the Appellant to submit within 10 days an English translation, and specified that the Respondent would be granted a twenty day deadline from receipt of this translation to file its answer.
31. The Appellant filed a translation of his "*declaration d'appel*" on 20 October 2008 and, pursuant to an order of the Panel, the translated exhibits on 23 October 2008.
32. The Respondent filed its answer together with its exhibits on 20 November 2008.

33. In its answer the ATP mainly argues that (1) the Appellant is a professional tennis player since 2002; (2) on 21 February 2003 and on 5 February 2005 he agreed to comply with and to be bound by the 2003, respectively 2005, ATP Official Rule Books, which, have prohibited wagering since 2003; (3) the ATP had taken several measures since 2003 to inform players of its anti-wagering rules; (4) the applicable time-bar is eight years pursuant to Rule 7.05.I.1 stipulated by the Program; (5) the Appellant need not be an ATP member to be bound by the ATP Rules; as he played in ATP events and had an ATP ranking in 2005, pursuant to the Rule 7.05.B, he was bound by the Anti-Corruption Program in 2005, (6) Grand Slam events are covered by the term “events” as defined by the ATP and the Appellant's wagers on Grand Slams therefore did violate the Rules; (7) the fact that under state law the Appellant cannot be penalized is not relevant as he is bound by the ATP rules and as “CAS has long recognized that professional athletes may be, and often are, held to standard considerably higher than that applicable to other citizen”; (8) the sanction imposed by the AHO is consistent with the penalties imposed by the AHO in previous anti-corruption cases; (9) the counter-claim contained in the “déclaration d’appel” joined to the Appellant’s letter of 8 October 2008 is untimely and should be disregarded by CAS.
34. The Respondent concluded that “[t]he AHO’s imposition of a fine of USD 12’000 and a period of ineligibility of eight weeks is a proportionate sanction and should not be set aside”.
35. By letter dated 7 April 2009, the Panel informed the parties that a purported counter-claim contained in the draft translation of the “déclaration d’appel”, attached to the Appellant’s letter of 8 October 2008, was inadmissible.
36. On 2 February 2009, both parties signed the Order of Procedure.
37. Further to the Appellant’s request, a hearing was held in Lausanne on 20 April 2009. The Appellant attended the hearing and was represented by Mrs Laure Heinrich-Luijter and Mrs Clotilde Lepetit, attorneys-at-law in Paris, France, whereas the ATP was represented by Mr John McLennan, attorney-at-law in Jacksonville, USA. Mr Gayle Bradshaw, ATP Administrator Rules and Competition (ARC), and, as an observer, Mr Jeff Rees, new Director of the ATP Tennis Integrity Unit, also attended the hearing on behalf of the ATP, whereas Mr Sid Ruis served as an interpreter for the Appellant.

II. IN LAW

4. CAS Jurisdiction and admissibility

38. The jurisdiction of CAS is not disputed and all parties signed the Order of Procedure in which a specific reference is made to the competence of the CAS, based on Chapter 07.05., Section H, of the ATP Rules.
39. Under art. R57 of the CAS Code, the Panel has full power to review the facts and the law.

40. Filed within the deadline set by Rule 7.05.H.3 of the 2008 ATP Rules, the appeal is admissible.

5. Applicable law

41. Art. R58 of the Code provides the following:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such choice, according to the law of the country in which the federation, association or sports body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

42. As the Appellant's wagers were made in 2005, the 2005 Tennis Anti-Corruption Program of the ATP (from the 2005 ATP Official Rulebook) is applicable.
43. With respect to wagering and its sanction, Rule 7.05.C.1(a) reads, *inter alia*, that no Player “shall, directly or indirectly, wager or attempt to wager money or anything else of value or enter into any form of financial speculation (collectively, “Wager”) on the outcome or any other aspect of any Event”, whereas, Rule 7.05.G.1(a), lays down the framework for sanctioning such a violation. For the Player, the provided penalty is “(i) a fine up to \$ 100,000 plus an amount equal to the value of any winnings or amount received” and “(ii) ineligibility for participation in any competition or match at any ATP tournament, competition or other event or activity authorized or organized by the ATP (“ATP Events”) for a period of up to three (3) years”.
44. This Program furthermore specified, under Rule 7.05.B.1 and 2, that “[a]ny Player who enters or participates in any competition, event or activity, organized, sanctioned or recognized by the ATP or who is an ATP member or who has an ATP ranking (a “Player”) shall be bound by and shall comply with all the provisions of this Program” and that the term ““Events” means all tennis matches and other tennis competitions, whether men’s or women’s, amateur or professional, including, without limitation, all ATP tournaments, Challenger Series tournaments, and Futures and Satellite Series Circuit tournament”.
45. The Panel therefore deems that, in view of Rule 7.05.B.1 and 2 and of the fact that the Appellant expressed his agreement to comply with and to be bound by all of the provisions of the 2005 ATP Official Rulebook on 5 February 2005, the ATP Official Rulebook is applicable to him at least since that date and that the wagers he placed on tournaments which are not under the ATP control are also submitted to the prohibition provided for by Rule 7.05.C.1
46. Finally, pursuant to its Rule 7.05.I.3, the 2005 Tennis Anti-Corruption Program “shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the laws of the State of Delaware without reference to Delaware conflict of laws principles.”

6. The Panel's analysis on the merits

47. There is no doubt that the Appellant committed an infraction of the Rules in that he wagered on the outcome of tennis matches. It is to his credit that he has admitted the facts; this was properly taken into account by the AHO as an attenuating circumstance in establishing the sanction.
48. At the oral hearing, the Appellant's counsel argued that the Panel should invalidate the rule against wagering on the ground that online betting was private entertainment which should not warrant a decision by the sports authorities having the effect of interrupting the pursuit of his livelihood. This is an unpersuasive and over-ambitious argument; the arbitrators are wholly disinclined to act as censors of *bona fide* legislation in this field. Competitive sports depend on the public perception that events are not fixed. The sports authorities determined several decades ago that wagering by professional athletes on events in their own sport, even by athletes not involved in the relevant event, is likely to erode the legitimacy of the sport and give opportunities for unscrupulous exploitation of athletes who embark on the slippery slope of betting. This is especially true of sports like tennis, where it is sufficient to corrupt a single player to fix the outcome.
49. The sport of professional tennis has therefore established a prohibition of wagering by its practitioners. This is a condition of participating in the sport. The Appellant has not come close to convincing the Panel that this policy and legislation is illegitimate, let alone an "injustice" (as argued by his counsel).
50. The Appellant moreover, asserts that he was unaware of the prohibition. His argument in this respect is unacceptable. One part of being a professional athlete is precisely to conduct oneself as a professional. The Appellant complains that the rule against wagering is but one of many prescriptions in a lengthy code which is not available in his native language. Yet he signed the one-page "*Consent and Agreement to ATP Official Rulebook*" by which he undertook to "*comply with and be bound by*" the ATP Rules, and acknowledged that he had "*received and had an opportunity to review them*". This was not a consumer signing a contract of adhesion proposed by a dominant commercial enterprise, but rather a professional athlete acknowledging a proper understanding of rules established by a professional association intent on protecting the sport, in the interest of all of its stakeholders including players like the Appellant himself. If he had doubts as to his capacity to understand the import of his consent to be bound by the Rules of the sport, there were many ways he could have informed himself without undue effort or expense.
51. Moreover, the Appellant cannot complain that the prohibition of wagering was practically unheard of in 2005, as though it were somehow hidden within the numerous pages of the Official Rulebook. To the contrary, the ATP has submitted numerous items from past issues of Player News and the ATP Players' Weekly, publications written in simple language for the athletes of the sport, in which the existence and seriousness of the prohibition were spelled out quite clearly. Indeed, as early as October 2003, the ATP's Player News specifically referred to the "unfortunate reality" of the recent increase of gambling on sports "due in large part to the internet".

52. Yet the Appellant consciously went through the steps of opening an internet account with the online betting company Bwin, and proceeded to bet on a number of tennis matches. It is accepted that he bet very small amounts, and that overall he lost more money than he won. It is accepted that he did this out of curiosity, as a pastime rather than an attempt to win money. It is accepted that he ceased wagering once his curiosity was sated, after barely three months, and that he did so on his own initiative. It is accepted that he was not involved in any acts of corruption; that his small bets could have no influence on the matches in question, and that he did not bet on his own matches or in tournaments in which he was a participant. It is finally accepted that the Appellant did not attempt to hide his identity when opening his betting account, and that he admitted the facts when he was confronted by the ATP investigators.
53. None of these factors are, however, exonerating; they are attenuating circumstances which were duly taken into account as such by the AHO. In the absence of these factors, the sanctions against the Appellant would without doubt have been far more severe. As it was, the Appellant was guilty of a serious infraction. He was one of eight players who had bet in similar circumstances in recent years, and therefore cannot claim the status of an unfairly persecuted scapegoat. Nor do the sanctions imposed on the other seven players evidence greater lenience to the others.
54. As for the proportionality of the sanctions, the Appellant's counsel suggested that they were grossly wrong given that the Appellant was only guilty of “36 clicks of his mouse”; she insisted that the sanctioning authority should not impose discipline on a mindlessly quantitative basis. She insisted that justice demands individualised judgments. One might query whether the frequency of particular individuals’ betting is not precisely one way of “individualising” the assessment of the gravity of infractions. Be this as it may, the Panel is not especially impressed by the “number of clicks”. What seems far more significant is that the Appellant consciously went through the process of opening an account with a betting company and promptly went on to wager on a significant number of tennis matches. The proportionality of his sanction is not to be measured on the mechanical basis that “x bets equals y months’ suspension, 2x bets equals 2y months” – or indeed anything of the sort.
55. In sum, the Panel does not find fault with the AHO’s analysis, assessment, or decision. Yet that is not the end of the Panel’s deliberation. The Appellant's infraction took place more than three and one-half years ago. The infraction did not falsify any competition; nor indeed did it relate to any competition in which he took part. There is therefore no need to disqualify him from any particular competition, or to invalidate the result of any event. In light of this factor, it seems clear that the issue of the timing of a suspension may be of great importance, particularly if the suspension is relatively short. It would seem arbitrary for a suspension in one case to deprive an athlete of participation in significant competitions, while in another case the same period of suspension at a relatively inactive part of the year is of very little consequence.
56. In this case, the original eight weeks decided by the AHO, in August 2008, realistically do not equal eight weeks at the present time. In the first place, the Appellant was already *de facto* suspended for one week in August 2008 – simply because it was administratively impossible for CAS to rule on his request for a suspension of the ineligibility sanction pending this appeal. In fact his application was successful, but given the timing, he was nevertheless unable to compete in a tournament taking place at

that very time. In addition, his national federation decided at that moment, to allocate a wild card to the US Open to another player, and it seems quite plausible that this decision was due to the cloud hanging over the Appellant's head. In other words, the single accidental week of *de facto* ineligibility in 2008 had significant detrimental and collateral effect on the Appellant and certainly could not be ascribed to his conduct. For these reasons, the Panel considers that the unintended week in 2008 should be given triple weight because of the collateral effect of denial by the national federation of a wild card to participate in the 2008 U.S. Open Tennis Tournament (not an ATP sanctioned event), and that the Appellant should suffer only five weeks' additional suspension.

57. Similarly, the timing of the present hearing has been delayed for purely organisational reasons. The Appellant was ready to have his simple case heard in late 2008. In this circumstance, it seems arbitrary to deprive him of the possibility of participating in the Grand Slam Championships simply by happenstance. Accordingly the Panel considers the period of ineligibility should run from 6 July 2009.

7. Costs

58. Art. R65 of the Code is in the following terms:

“R65 Disciplinary cases of an international nature ruled in appeal.

R65.1 Subject to Articles R65.2 and R65.4, the proceedings shall be free.

The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

R65.2 Upon submission of the statement of appeal, the Appellant shall pay a minimum Court Office fee of Swiss francs 500.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

R65.3 The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.”

59. As this is a disciplinary case of an international nature brought by the Appellant, the proceedings will be free, except for the Court Office fee, already paid by the Appellant, which is retained by the CAS.
60. Having taken into account the outcome of the arbitration, the conduct and the financial sources of the parties, the Panel is of the view that each party shall bear its own costs.

ON THESE GROUNDS

The Court of Arbitration for Sport decides:

1. The appeal filed by Mathieu Montcourt on 8 August 2008 is partially upheld.
2. The decision of the ATP Anti-Corruption Hearing Officer is amended as follows: Mathieu Montcourt is suspended for a remaining ineligibility period of five weeks running as from 6 July 2009.
3. The US \$ 12,000 fine imposed by the ATP Anti-Corruption Hearing Officer is confirmed.
4. This award is pronounced without costs, except for the Court Office fee of CHF 500 already paid by Mathieu Montcourt which is to be retained by the CAS;
5. Each party shall bear its own costs;
6. All other motions or prayers for relief are dismissed.

Lausanne, 13 May 2009

THE COURT OF ARBITRATION FOR SPORT

Jan Paulsson
President of the Panel

Richard H. McLaren
Arbitrator

Olivier Carrard
Arbitrator