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5 **IN THE COMPETITION**

Case No: 1523/7/7/22

6 **APPEAL**
7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Friday 22nd September 2023

13
14 Before:

15
16 The Honourable Mr. Justice Marcus Smith

17
18 Michael Cutting

19
20 John Davies

21
22 (Sitting as a Tribunal in England and Wales)

23
24 BETWEEN:

25 **Proposed Class Representative**

26
27 **BSV Claims Limited**

28
29 And

30 **Respondents**

31
32 **Bittylicious Limited & Others**

33
34
35 **APPEARANCES**

36
37 Sarah Ford KC & William Hooper (Instructed by Velitor Law) on behalf of BSV Claims
38 Limited

39 Alan Bates (Instructed by Band Hatton Button) on behalf of 1st Defendant (Bittylicious)

40 Andrew McIntyre (Instructed by RPC) on behalf of 2nd & 4th Defendants (Kraken)

41 Rob Williams KC (Instructed by Clyde & Co LLP) on behalf of 3rd Defendant (Shapeshift
42 Global Limited)

43 Jonathan Scott (Instructed by Hogan Lovells International LLP) on behalf of 5th Defendant
44 (Shapeshift AG)

45 Brian Kennelly KC & Jason Pobjoy (Instructed by Allen & Overy LLP) 6th Defendant
46 (Binance Europe Services Limited)

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1 **Friday, 22 September 2023**

2 **(10.30 am)**

3
4 **Case Management Conference**

5 **MR JUSTICE MARCUS SMITH:** Ms Ford, good morning. Before you begin, just the
6 usual live stream warning. These proceedings are being transmitted and a transcript
7 and recording is being made by my direction. However, any other recording,
8 transmission or photography of these proceedings is strictly prohibited and a failure to
9 observe that could be a contempt of court, so please don't do it.

10 Ms Ford, welcome.

11
12 **Submissions by MS FORD**

13 **MS FORD:** Mr President, Members of the Tribunal, I appear with Mr Hooper for the
14 Proposed Class Representative. Mr Bates appears for the First Proposed Defendant,
15 Bittylicious. Mr McIntyre appears for the Second and Fourth Proposed Defendants,
16 Kraken. Mr Williams KC appears for the Third Proposed Defendant, Shapeshift Global
17 Limited. Mr Scott appears for the Fifth Proposed Defendant, Shapeshift AG. And
18 Mr Kennelly and Mr Pobjoy appear for the Sixth Proposed Defendant, Binance Europe
19 Services Limited.

20 As the Tribunal is aware, this is the first CMC in this application for a Collective
21 Proceedings Order. The proceedings concern what we contend was
22 an anti-competitive collusion in relation to the delisting of the cryptocurrency Bitcoin
23 Satoshi Vision by the proposed defendant crypto exchanges. The Tribunal should
24 have in bundle volume C behind tab 2 a draft order. And that is largely agreed, subject
25 only to one outstanding point of dispute concerning the time for the Proposed Class
26 Representative's response to any interim applications.

1 **MR JUSTICE MARCUS SMITH:** Yes.

2 **MS FORD:** Unless the Tribunal has a preference, I was proposing to simply work
3 through the items on the Tribunal's agenda.

4 **MR JUSTICE MARCUS SMITH:** That's very sensible.

5 **MS FORD:** In that case, starting with forum, this is paragraph 1 of the draft order. The
6 parties agreed that it is England and Wales, subject to the Tribunal's approval.

7 **MR JUSTICE MARCUS SMITH:** You will have no pushback from us on that.

8 **MS FORD:** On confidentiality, the parties have agreed the terms of an interim
9 confidentiality ring order, that is in bundle B, behind tab 5, and I'm told that one addition
10 needs to be made to that in that Mr Williams KC's name needs to be added to
11 a schedule but subject to that the terms of the draft order are agreed as between the
12 parties, so subject to the Tribunal's agreement.

13 **MR JUSTICE MARCUS SMITH:** Again, we're happy with that, Ms Ford.

14 **MS FORD:** I'm grateful.

15 **MR WILLIAMS:** The Tribunal does have a version of the order with my name in it. It
16 was sent to the Tribunal last Wednesday afternoon.

17 **MR JUSTICE MARCUS SMITH:** I don't think I have seen it.

18 **MR WILLIAMS:** It is there.

19 **MR JUSTICE MARCUS SMITH:** (Inaudible).

20 **MS FORD:** The Tribunal would have seen that there have been some exchanges
21 between the parties concerning the scope of the material that has been designated as
22 confidential but we understand that the ongoing points of difference have now been
23 resolved so we don't need to trouble the Tribunal further in relation to those points at
24 this stage.

25 **MR JUSTICE MARCUS SMITH:** I'm very grateful for that, certainly.

26 **MS FORD:** Moving on, then, to pleading amendments, and the heading "Permission

1 to amend the CPR application and witness statements".

2 The Proposed Class Representative has made certain changes to its funding
3 arrangements primarily in response to the Supreme Court's judgment in *PACCAR*.

4 We provided draft copies of the revised documents to the Proposed Defendants along
5 with a draft amended collective proceedings claim form. The revised funding
6 documents have not yet been executed but we will do so by 6 October 2023 and in
7 those circumstances what we've done is we've sought the Proposed Defendants'
8 consent to the amendments essentially on a provisional basis, and so the consent
9 would necessarily be conditional because the documents haven't yet been executed.

10 That is paragraph 5 of the draft order, which is agreed in the form that the Tribunal
11 sees there, subject to the Tribunal's approval.

12 **MR JUSTICE MARCUS SMITH:** Yes.

13 **MS FORD:** There's then potential interim applications regarding the revised funding
14 arrangements and paragraph 7 of the draft order is setting out a timetable for any
15 applications that the Proposed Defendants might see fit to make in respect of those,
16 including, for example, any application for security for costs that they may see fit to
17 make.

18 It's common ground between us that any such application should be filed and served
19 within 21 days of service of the revised funding material. So that would take us to
20 27 October 2023. The short point of dispute between us is then the time that should
21 be permitted for the Proposed Class Representative to respond to those applications.

22 **MR JUSTICE MARCUS SMITH:** Yes.

23 **MS FORD:** The Proposed Defendants say we should be given only seven days to
24 respond. We are asking for 28 days, which would take us to 24 November. We say
25 that seven days to respond would simply be unworkable and unfair. The Proposed
26 Defendants have obviously already got the draft versions of these documents in the

1 form substantially that we envisage they will be executed and then they have a further
2 21 days to prepare their application. Seven days for us then to respond to that
3 application is simply unworkable and that's particularly the case where it's necessary
4 for us to consult with third parties, specifically the funder, Softwhale or the ATE
5 insurers and suchlike, in order to actually respond to an application.

6 We see the point that's being made that because this is concerned with pre-CPO
7 costs, it needs to be conducted with relative expedition, but nevertheless, in our
8 submission it would be appropriate to give us 28 days to respond to those applications.

9 **MR JUSTICE MARCUS SMITH:** Well, we've been thinking about this and, whilst we
10 can see merit in there being a date that circumscribes the defendants', or Proposed
11 Defendants' ability to make an application for security for costs, we're not sure that we
12 need anything more than that.

13 Frankly, I'm not that keen on indicating in advance of seeing the application how
14 quickly you should respond. Nor am I keen to have the Tribunal committed to dealing
15 with an application which is likely not to be suitable for dealing with on the papers on
16 an expedited basis. That is always a matter for the Tribunal. I know the parties
17 appreciate that we will move as quickly as we can on all things, but I do have other
18 things to consider, and we will look at the application on the merits when it is made, if
19 it is made, and Ms Ford, your clients can expect that we will require your clients to
20 move appropriately quickly. That may be a week, that may be more. It all depends.
21 But we're not going to commit the parties to something which may be entirely
22 inappropriate, given the application that is made, and we equally are not going to
23 commit the Tribunal to a process which it finds it can't deliver because of other
24 questions.

25 So our thinking, but we'll obviously want to hear from the Defendants on this, I don't
26 expect much pushback from you, but our thinking is that we probably end the

1 paragraph at 27 October 2023, "The Proposed Class Representative shall ...", delete
2 from that. But for our part we're actually quite happy to have paragraph 7 removed
3 altogether on the basis that what I've just said about the responsibility of Proposed
4 Class Representative also goes for the Proposed Defendants. They know that these
5 applications need to be brought on quickly, particularly when it's a question of security.
6 If it's brought on late, then that will have to be explained, and we'll take it into account.
7 So I'm not a fan of this sort of pre-baking, but if the Proposed Defendants wanted to
8 tell us more about why this is needed, then of course we would be delighted to hear
9 from them.

10 Mr Bates.

11 **Submissions by MR BATES**

12 **MR BATES:** Sir, at least on behalf of Bittylicious, we are content with a more flexible
13 approach. There's certainly no intention to bind the Tribunal into a timetable within
14 which these matters should be considered.

15 Obviously the reason why that paragraph is in the draft order is partly because of the
16 history of how we got to where we are now, but there have been very extensive efforts
17 by the Proposed Defendants to obtain information particularly about how the Proposed
18 Class Representative is making provisions for pre-CPO costs and being able to pay
19 any adverse costs orders in relation to that.

20 I don't know if the Tribunal has had any opportunity, and there is no reason why you
21 should have spent time reviewing all the historical correspondence, you may have
22 dipped into some of it.

23 **MR JUSTICE MARCUS SMITH:** We certainly got a very good flavour from the written
24 submissions.

25 **MR BATES:** Indeed. Sir. So at least on behalf of Bittylicious perhaps I can put it this
26 way, which is that we are not necessarily committed to having that paragraph remain

1 in the order. The important thing from our perspective is that we've laid down a marker
2 that there is an important issue here, that it does need to be resolved very quickly
3 because, of course, costs will be being accumulated.

4 And of course security for costs isn't the only application that may need to be made,
5 there may also need to be an application in relation to the redactions that are made to
6 the material we will receive on 6 October 2023, and that's also something that would
7 need to be dealt with very quickly, given that it would impinge on the Proposed
8 Defendants' time for preparation of our response.

9 I think perhaps I've already laid down a marker from what I've said.

10 **MR JUSTICE MARCUS SMITH:** Mr Bates, I think that is very helpful. What I certainly
11 didn't want to say -- I don't think I did -- was that we obviously appreciate that both of
12 the potential applications, and there may be others, are both significant from the
13 position of the Proposed Defendants' rights of defence, as it were, and are
14 appropriately urgent. You can, of course, take it that the Tribunal will react as best it
15 can to ensure that these matters are brought forward appropriately quickly.

16 So I think you're right, the marker has been made, and it may be that we should, in
17 light of the fact that the marker has been laid down, prefer flexibility over a straitjacket,
18 and simply take paragraph 7 out, but on the basis that you've made your position very
19 clear.

20 I mean, can I also put my own marker down in terms of redactions from the funding
21 arrangements. There are two questions here. One is the extent to which the
22 arrangements go into a confidentiality ring unredacted, and the extent to which there
23 are redactions even so.

24 For our part, we can see that there is likely to be quite a lot of argument about the
25 funding arrangements. That's evident from the correspondence and the written
26 submissions already received. We obviously have no view about those, except to say

1 that the chances are that those controversies will indicate a need for a broader
2 disclosure, rather than a narrower one, of the arrangements.

3 So we wouldn't want there to be too much selectivity on the part of the PCR in terms
4 of what goes in and what goes out of what is disclosed.

5 That being said, at least for the coming months, we have no particular difficulty in those
6 documents being disclosed into a confidentiality ring, provided it is appreciated that
7 the closer we get to a hearing, the more important it is that the Tribunal is able, for
8 purposes of its own judgment, to render a meaningful description of what is going on.

9 So it seems to us that, Mr Bates, your concern can be dealt with by Ms Ford's clients
10 making full disclosure of the funding arrangements with as minimal redactions as
11 possible but them provisionally all going into the confidentiality ring so that
12 confidentiality is protected, but with a view to taking things out of the confidentiality
13 ring the closer we get to a hearing, so that we can march on.

14 But the BGL problems don't arise in this case because we're not going to be having
15 witnesses for the application, and we're perfectly well able to deal with references to
16 confidential material elliptically and so on.

17 So it's not a BGL-type case, and I think we can afford to be appropriately relaxed about
18 the way in which we handle this material, provided the closer we get to the hearing,
19 the more we appreciate that open justice is best served through an appropriately
20 detailed reference to those funding arrangements in our judgment.

21 Mr Bates, I see you are on your feet. Mr Bates will respond first and then I will hear
22 from Ms Ford.

23 **MR BATES:** That all sounds very sensible, of course, but if I may just make one
24 observation.

25 **MR JUSTICE MARCUS SMITH:** Of course.

26 **MR BATES:** Which is that a difficulty about over-redaction is that it does cause us

1 problems as the Proposed Defendants in taking instructions, and certainly on the part
2 of Bittylicious the main decision-maker is not in the confidentiality ring. So if there is
3 any unnecessary redaction, just putting material into the confidentiality ring is not going
4 to help me in being able to take instructions. So I would ask that that be borne in mind,
5 as no doubt it will be, by the PCR's representatives in keeping any redactions to the
6 necessary minimum.

7 **MR JUSTICE MARCUS SMITH:** Well, Ms Ford, is there any reason why one cannot
8 extend -- I'm not talking about an unlimited extension but extend the confidentiality ring
9 names to those who are giving instructions if that's appropriate, or is that ...

10 **MS FORD:** Sir, I would have to seek instructions on that. It's not a point that has been
11 raised, to my knowledge, in advance. So it's a matter on which I can seek instructions
12 and perhaps we can take it offline.

13 **MR JUSTICE MARCUS SMITH:** I think take it away, but Mr Bates makes a perfectly
14 fair point that my proposal regarding the confidentiality ring only works if the legal
15 teams can operate in an unfettered way.

16 I confess that it seems to me, or seemed to me when I thought about this, that this
17 was not a case where one needed to confine the confidentiality ring to purely external
18 lawyers. It's not the case where one has got a risk of a competitive advantage being
19 obtained through the knowledge of this information. I may be wrong about that but it
20 didn't seem to me that it was, and so I anticipate that Mr Bates' concern can be
21 addressed by a careful extension of the number of persons in the ring. That's
22 something which I think the parties will need to think about. If I'm wrong about that,
23 and you can't deal with that, then we'll have to move back to the notion of an open
24 disclosure with redactions, by which I now mean things which are only disclosed in the
25 confidentiality ring being kept to an absolute minimum, and there Mr Bates is obviously
26 absolutely right. But I suppose what I'm flagging is that the open justice question is

1 one which I am content to put on the back-burner until early to middle of next year.

2
3 Submissions by MS FORD

4 **MS FORD:** Sir, I can certainly confirm, if it may provide the Tribunal a degree of
5 reassurance, that there has been dialogue about the extent of the redactions. We
6 have, indeed, sought to keep the redactions to a minimum.

7 At present, leaving aside redactions of personal information such as email addresses
8 and suchlike, there are only two categories of redactions maintained. One concerns
9 the confidential information of a third party, Mt Burgos Holdings Limited, and my
10 understanding is that those redactions in respect of its financial documents are not
11 presently contested, and then there's the information about the premiums under the
12 ATE insurance, which the redactions follow the principles that the Tribunal will be
13 familiar with in cases such as Kent v Apple and Coll v Alphabet. So certainly our
14 present position is that such redactions as are maintained are minimal and consistent
15 with the familiar principles that the Tribunal applies.

16 Of course, we will hear what the Proposed Defendants have to say should they wish
17 to bring forward a challenge and we'll meet it as appropriate but certainly our position
18 at the moment is that we have very much sought to keep it to a minimum.

19 **MR JUSTICE MARCUS SMITH:** Well, I'm grateful for that. I think, subject to what
20 the Proposed Defendants might have to say, we've probably taken that as far as we
21 can. The only message that I think I have added in is that it may be that the
22 redactions/confidentiality debate is eased by the use of the confidentiality ring provided
23 it is broad enough, but I don't want to get into the granularity of specific redactions.
24 That's something which I don't think we're able to deal with today, and it would be,
25 I think, wrong to anticipate the parties' discussions on that.

26 The only thing that absolutely needs to be made clear is that the Proposed Defendants

1 can't be disadvantaged by not being able to see what they need to see in order to
2 respond. But you have that point well in mind.

3 **MS FORD:** Sir, indeed. And we do say, and we will say, that that is not the case in
4 relation to the redactions that we seek to maintain.

5 **MR JUSTICE MARCUS SMITH:** I'm grateful.

6 **MS FORD:** That takes us to the heading in the Tribunal's agenda, "Future conduct of
7 proceedings" and in relation to subparagraph (a) "Dates for filing and serving of
8 pleadings and evidence". That's draft order paragraphs 8 and 9. And the proposal
9 was a response by 4.00 pm on 16 February 2024 and then a reply by 4.00 pm on
10 12 April 2024, subject to the Tribunal's approval.

11 **MR JUSTICE MARCUS SMITH:** We are happy for that, thank you.

12 **MS FORD:** And then matters relating to publicity. Draft order paragraphs 2-4 makes
13 a provision in respect of that. Essentially the proposed date is 27 October 2023. The
14 parties have been liaising on the form of the draft notice. The draft notice was provided
15 with the CPO application, and there have since been exchanges to suggest some
16 minor changes to it. I don't know if the Tribunal --

17 **MR JUSTICE MARCUS SMITH:** We have seen a revised redline version.

18 **MS FORD:** Excellent. I understand that to be agreed as between the parties. So,
19 again, subject to any points that the Tribunal may have on it.

20 **MR JUSTICE MARCUS SMITH:** Is that the case? There's no problem on the --

21 **MR KENNELLY:** That is agreed.

22 **MR JUSTICE MARCUS SMITH:** That is agreed. In that case, I don't think we ...
23 No, in that case we are (inaudible: off microphone). Thank you.

24 **MS FORD:** I'm grateful, thank you.

25 There's then provisions for persons with an interest to make either objections or
26 observations, and that's paragraphs 10 and 11 of the draft order, and the date for that,

1 the proposed date, is 16 April.

2 **MR JUSTICE MARCUS SMITH:** Yes.

3 **MS FORD:** And then we get into the directions to the CPO hearing.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MS FORD:** We're grateful to the Tribunal for indicating that it can accommodate
6 a hearing in the window of 3-12 June. For our parts, on behalf of the PCR, we have
7 a preference for towards the end of that window because of the availability of our
8 specialist costs counsel, Mr Bacon KC. We understand that the other parties can
9 confirm their positions. We understand that counsel for Bittylicious, Kraken and
10 Binance are available for the period 5-7 June 2024, and we understand that counsel
11 for Shapeshift have presently said that they are not available for a part of the relevant
12 period, but they haven't proposed any alternative.

13 **MR JUSTICE MARCUS SMITH:** Well, as I think our correspondence indicated, it's
14 going to have to be within this period. We were given various dates that were earlier
15 than that, which the Tribunal couldn't make, and so this is it. But we do need to
16 crystallise the three days within that period. So we're happy to say that the parties
17 have 14 days to agree it, but that may be problematic if there are diary issues, and
18 maybe it's easier, if we've got a problem in terms of a diary clash, that we achieve
19 certainty now.

20 **MS FORD:** Certainly from our perspective we would be content to --

21 **MR JUSTICE MARCUS SMITH:** You want the 10th, 11th and 12th; is that right?

22 **MS FORD:** That would be our preference. We can also accommodate the 5th to the
23 7th, which is, we understand, a period that the Proposed Defendants, or certainly one
24 of the Proposed Defendants, have indicated. In relation to some of them, we don't
25 know whether they could equally accommodate the 10th to the 12th.

26 **MR JUSTICE MARCUS SMITH:** Okay. So let's hear from the Proposed Defendants

1 as to which of those two slots they prefer, and we'll see what we end up with.

2 Is there anyone who has a preference for 10-12 over 5-7?

3 **MR WILLIAMS:** Sir, I do. I have a personal commitment on the 6th. Not a court
4 commitment, but a personal commitment. The 6th is the only day in the window you've
5 identified that I have difficulty with. But as between those two three-day periods, my
6 preference is for the second one.

7 **MR JUSTICE MARCUS SMITH:** The second one. Is there anyone who wants to
8 speak against that?

9 No. In that case, Ms Ford, it will be the 10th to the 12th.

10 Oh, I'm sorry.

11 **MR MCINTYRE:** Sir, I'm sorry. I misunderstood what I was to be speaking against.
12 Can I just indicate on behalf of the Second and Fourth Defendants, we have a very
13 strong preference for the week of the 3rd, any time within that week, because our
14 leading counsel is instructed in the Gutmann rail fares proceedings, which begin on
15 the 17th, making the week of the 10th extremely difficult. So we have a very strong
16 preference for any time within the week of the 3rd, please.

17 **MR JUSTICE MARCUS SMITH:** Which includes the 5th, 6th and 7th?

18 **MR MCINTYRE:** Yes.

19 **MR JUSTICE MARCUS SMITH:** Yes, okay. Right. So it's Mr Williams versus your
20 leading counsel.

21 A very strong preference due to professional commitments, I am afraid, I think, trumps,
22 Mr Williams; otherwise I think you would have got an avoidance of the 6th. Though
23 I think it will have to be, because the 6th sits as it does, and because of Ms Ford's
24 designation of those two windows, it will have to be the 5th, 6th and 7th. I'm sorry
25 about that, Mr Williams. But that we'll direct.

26 And then the dates in paragraphs 12, 13 and 14 can be precisely calibrated by

1 reference to those three dates, or a commencement date of the 5th. Is that clear?

2 **MS FORD:** I'm grateful, sir. That's very clear.

3 Unless anybody else has any further points, I think that covers it.

4 **MR JUSTICE MARCUS SMITH:** Well, I'm very grateful. Do we have any further
5 points?

6 No. Well, can I thank the parties for the very efficient way in which we've been able to
7 go through these matters. Thank you all very much. We will rise, and see you again
8 next year.

9 Thank you very much.

10 **(10.58 am)**

11 **(The hearing concluded)**

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