Neutral Citation Number: [2016] EWCA Civ 1265

Case No: C1/2015/0448

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR C.M.G. OCKELTON (sitting as a Deputy High Court Judge)
CO/4776/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 December 2016

Before:

Lord Justice Tomlinson
and
Lord Justice Lindblom

Between:

Crystal Property (London) Ltd. — **Appellant**

and

(1) Secretary of State for Communities and Local Government
(2) London Borough of Hackney Council — **Respondents**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Christopher Jacobs (instructed by **Direct Access**) for the **Appellant**
Mr Richard Kimblin Q.C. (instructed by **the Government Legal Department**) for the **Respondents**

Hearing date: 12 October 2016

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this appeal we must consider whether an inspector, when determining an appeal under section 78 of the Town and Country Planning Act 1990, went wrong in his approach to the application for outline planning permission before him.

2. The appellant, Crystal Property (London) Ltd., appeals against the order dated 15 January 2015 of Mr C.M.G. Ockelton, sitting as a deputy judge of the High Court, by which he dismissed its application under section 288 of the 1990 Act challenging the decision of the inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, to dismiss its appeal against the refusal by the second respondent, the London Borough of Hackney Council, to grant outline planning permission for a mixed use development of shops and offices on a site known as Morris House, adjoining 130 Kingsland High Street, London E8. The inspector's decision letter is dated 3 September 2014. At an oral hearing on 13 April 2016 I granted permission to appeal on only one of the six grounds of appeal in the appellant's notice, namely ground 6.

The issue in the appeal

3. The essential part of ground 6 can be extracted from paragraph 53 of the skeleton argument dated 21 March 2015 of Mr Christopher Jacobs, counsel for Crystal Property in this appeal. Mr Jacobs did not appear in the court below, where Crystal Property was represented by its agent, Mr Eric Walton. The issue is whether the inspector erred in the approach he took to the application for outline planning permission before him, neglecting the fact that all matters, including "scale", and thus the height and massing of the proposed building, were reserved for future consideration. Paragraph 53 of Mr Jacobs' skeleton argument states:

> "The Deputy Judge erred in holding that … the Inspector was correct in considering that he was being asked on this occasion to consider the height and massing according to the plan submitted. The planning application was an outline application with all matters reserved … . The Appellant was simply seeking to establish consent for a part 4[,] part 5 storey building as is clearly stated on page 1 of the form. The requirements set out by the Council include the provision of indicative drawings. The Appellant [simply] submitted the same drawings as had been used in the 1990 and 2003 applications and the Deputy Judge erred in effect in holding that had the Inspector allowed the appeal, the Appellant would have established planning consent for a building as depicted in the drawings. This is simply not the case[. Had] the Inspector allowed the appeal then the Appellant would have achieved an outline consent for a part 4[,] part 5 storey building with all matters including height, massing and elevations reserved."

Outline planning permission

4. Under the statutory scheme an outline planning permission may be sought for the erection of a building, with all matters reserved for later consideration. Section 62 of the 1990 Act, "Applications for planning permission", provides:

> "(1) A development order may make provision as to applications for planning permission made to a local planning authority.
> (2) Provision referred to in subsection (1) includes provision as to –
> (a) the form and manner in which the application must be made;
> (b) particulars of such matters as are to be included in the application;
> (c) documents or other materials as are to accompany the application.
> …
> (3) The local planning authority may require that an application for planning permission must include –
> (a) such particulars as they think necessary;
> (b) such evidence in support of anything in or relating to the application as they think necessary.
> …
> (5) A development order must require that an application for planning permission of such description as is specified in the order must be accompanied by such of the following as is so specified –
> (a) a statement about the design principles and concepts that have been applied to the development;
> (b) a statement about how issues relating to access to the development have been dealt with.
> … ."

Section 92, "Outline planning permission", provides in subsection (1) that "[in] this section and section 91 "outline planning permission" means planning permission granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority … or the Secretary of State of matters not particularised in the application ("reserved matters")".

5. Outline planning permission was introduced under the Town and Country Planning General Development Order and Development Charge Applications Regulations 1950 (S.I. 1950/729) ("the 1950 GDO"). An application for outline planning permission enables a local planning authority to decide whether, in principle, a particular form of development on a site is acceptable or not. The concept was explained very clearly in the Ministry of Town and Country Planning's Circular 87, which accompanied the 1950 GDO:

> "Since consideration at the approval stages is limited by the terms of the initial permission, it is essential that that permission should not take the form of a blank cheque, and, correspondingly, the authority must be furnished with sufficient information to enable them to form a proper judgment of what is proposed; there can be no question of entertaining propositions which are still in embryo. The application should indicate the character and approximate size of the building to be erected, and the use to which it is to be put (e.g., 'a three-bedroomed house', a

'two-storied factory for light industrial purposes with an aggregate floor-space of 30/35,000 square feet')."

6. When Crystal Property's application for planning permission was submitted to the council in September 2013, and at the time of the inspector's decision in September 2014, the arrangements for applications for outline planning permission were provided in the Town and Country Planning (Development Management Procedure) (England) Order 2010 (S.I. 2010/2184), as amended ("the Development Management Procedure Order"). The Development Management Procedure Order was replaced by the Town and Country Planning (Development Management Procedure) (England) Order 2015 (S.I. 2015/595), with effect from 15 April 2015.

7. Article 2, "Interpretation", of the Development Management Procedure Order provided:

> "…
> "outline planning permission" means a planning permission for the erection of a building, which is granted subject to a condition requiring the subsequent approval of the local planning authority with respect to one or more reserved matters;
> …
> "reserved matters" in relation to an outline planning permission, or an application for such permission, means any of the following matters in respect of which details have not been given in the application –
> (a) access;
> (b) appearance;
> (c) landscaping;
> (d) layout; and
> (e) scale;
> "scale" means the height, width and length of each building proposed within the development in relation to its surroundings;
> … ."

Article 4, "Applications for outline planning permission", provided, in paragraph (1), that "[where] an application is made to a local planning authority for outline planning permission, the authority may grant permission subject to a condition specifying reserved matters for [its] subsequent approval", and, in paragraph (2), that where the authority is "of the opinion that … the application ought not to be considered separately from all or any of the reserved matters", it is to "notify the applicant … , specifying the further details [it requires]". Article 5 provided the requirements for an "application for approval of reserved matters". Article 8 provided for the content of design and access statements, including, in paragraph (3)(a), the requirement that a design and access statement must "explain the design principles and concepts …".

8. Government guidance on "Outline planning applications" in paragraph 14-034-20140306 of the Planning Practice Guidance, under the heading "What details need to be submitted with an outline planning application?" (replacing the guidance given in Circular 01/2006 – "Guidance on changes to the development control system"), says that "[information] about the proposed *use* or uses, and the *amount* of development proposed for each use, is necessary to allow consideration of an application for outline planning permission". Paragraph 14-035-20140306, under the heading "Can details of reserved matters be

submitted with an outline application?" (reproducing advice to the same effect in paragraph 44 of the Annex to Circular 11/95 – "Use of conditions in planning permission"), confirms that an applicant can choose to submit details of any of the "reserved matters" as part of an outline application, but unless he has "indicated that those details are submitted "for illustrative purposes only" (or has otherwise indicated that they are not formally part of the application), the local planning authority must treat them as part of the development in respect of which the application is being made; the local planning authority cannot reserve that matter by condition for subsequent approval".

9. There is ample authority for the principle that where matters have been reserved for subsequent approval the reserved matters application must be within the scope of the outline planning permission (see, for example, the judgment of Willis J. in *Lewis Thirkwell v Secretary of State for the Environment* [1978] J.P.L. 844 and the decision of the Court of Appeal in *Slough Borough Council v Secretary of State for the Environment* (1995) 70 P. & C.R. 560).

10. At the time relevant in *Slough Borough Council* the statutory definition of "reserved matters" (in article 1(2) of the Town and Country Planning General Development Order 1988 ("the 1988 GDO")) included "siting", "design" and "external appearance", but not "scale". In that case the outline planning permission granted by the local planning authority did not incorporate the application for planning permission, and did not refer to the floor area of the development, which was specified in the application. Stuart-Smith L.J., with whom Morritt and Ward L.JJ. agreed, said (at p.567) that it was "possible when the detailed application is considered that the size of the development can properly be reduced, having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping".

11. In *R. v Newbury District Council, ex parte Chieveley Parish Council* [1997] J.P.L. 1137 the application and drawings had been incorporated into the outline planning permission. In the application form it had been indicated that both "siting" and "means of access" were to be considered "as part of this application". The total proposed floorspace in Class D2 use was stated (5,644 square metres). One of the conditions imposed on the permission – condition 1 – required "[full] details of the siting[,] design and external appearance of the building(s), … (the 'reserved matters')" to be submitted to the local planning authority within three years. The condition said it was to "apply notwithstanding any indications as to the reserved matters which have been given in the submitted application" (p.1149). One of the issues for the court was whether the indication of floorspace given in the application should be treated as fixed by the permission, or as remaining open for consideration as part of the reserved matters. Carnwath J., as he then was, acknowledged that the "size and scale of development – whether in terms of floor area, height or even number of buildings – are not as such defined as "reserved matters"" (p.1151). But he concluded that "[the] indication of floorspace given in the application was … an "indication as to reserved matters" within the meaning of [condition 1]", and that "the condition operated to reserve, as matters for subsequent approval, all aspects of design, including size and floorspace" (p.1152). He endorsed as "correct in law, and appropriate in practice" the Government's advice in paragraph 44 of the Annex to Circular 11/95 (p.1153). The floorspace indicated in the application was, he said, "an aspect of siting or design; it was clearly particularised in the application; accordingly it could not (without amendment) be reserved by condition for

the detailed stage". He concluded that condition 1 was "unlawful, in purporting to reserve for subsequent approval matters of which details had been given in the application" (p.1154). The Court of Appeal (Hobhouse, Pill and Judge L.JJ.) agreed with that conclusion. But Pill L.J. observed (at p.60) that, in his view, gross floorspace could not be brought within the concepts of "siting" and "design" as reserved matters under the 1988 GDO. He went on to say:

> "… If a planning authority wishes to limit, at the outline stage, the scale of development, it can do so by an appropriate condition. An outline application which specifies the floor area, as this one does, commits those concerned to a development on that scale, subject to minimal changes and to such adjustments as can reasonably be attributed to siting, design and external appearance. I do not read Stuart-Smith L.J. as having said more than that in [*Slough Borough Council*] when he said that "it is possible when [the] detailed application is considered that the size of the development can properly be reduced having regard to such reserved matters as siting, design and external appearance of the buildings, access and landscaping." … I consider wrong [the] conclusion that … floor space is still to be determined. Floor space could not be treated as a reserved matter."

12. In *R. (on the application of Saunders) v Tendring District Council* [2003] EWHC 2977 (Admin) Sullivan J., as he then was, distinguished the case of an outline planning permission that specified the floorspace of the development from one that did not. He said (in paragraph 57 of his judgment):

> "There is an important distinction between [*ex parte Chieveley*] and the present case. In [*ex parte Chieveley*] the outline planning permission specified the permitted gross floor space. In those circumstances it is not surprising that the Court of Appeal concluded that the permitted floor space could not be cut down by means of a condition reserving design details for subsequent approval. The details to be approved would have to be details of a building of the permitted size. The present case would be analogous with [*ex parte Chieveley*] if the 1993, 1998 and 2002 outline planning permissions had specified the number of dwellings permitted on the site. They did not. No upper or lower limit was specified. In those circumstances, it was open to the local planning authority to control the number of dwellings to be erected on the site by controlling not merely their design, but also their siting, and indeed the amount of landscaping to be provided on the site. …".

13. The concept of "scale" as a reserved matter under article 1(2) of the Town and Country Planning (General Development Procedure) Order 1995, as amended, was considered by Simon J., as he then was, in *MMF (UK) Ltd. v Secretary of State for Communities and Local Government* [2010] EWHC 3686 (Admin). Simon J. observed (in paragraph 11 of his judgment) that "at the most simple analysis, if one considers a building as a simple three-dimensional shape, a box, the size of the box, and importantly its relationship with other buildings, is a question of Scale".

The planning history of the appeal site

14. The site has a long planning history. In August 1990 the council granted outline planning permission for a five and six-storey building for retail and office use. Design and external appearance were reserved matters. That permission was never implemented. In June 2003 the council's Planning Committee resolved to grant outline planning permission for a building of six storeys, with Class A1 use on the ground floor and 41 flats above, subject to a section 106 agreement. All matters except siting and access were to be reserved for future approval. The section 106 agreement never came into existence, and the planning permission was not granted. In April 2012 the council refused an application for outline planning permission, with all matters reserved, for a six-storey building, with retail use on the ground floor, offices on four of the five floors above the ground floor, and apartments on the fifth. An appeal against that decision was dismissed by an inspector on 26 November 2012. Because the application was in outline with all matters reserved for future consideration, that inspector said he had considered the drawings submitted with it "on the basis that they are illustrative and show a possible, rather than a definitive, layout and design" (paragraph 1 of the decision letter). When considering the effect the development would have on the character and appearance of the surrounding area and the setting of the grade II listed Rio Cinema, he said (in paragraph 8):

> "The appearance and scale of the proposal are reserved matters but the application specifically refers to a six storey building. It would occupy the corner plot with the apartments at the highest level set back slightly and not covering the full footprint at that level. This set back would prevent views of the top floor from close to the site, although it would be visible in longer views along the Street. It is the height of the respective buildings that is important rather than the number of storeys. The proposal would be a similar height to the listed Cinema. However, even in views where the apartments at fifth floor could not be seen, the illustrative drawings indicate that the proposed building would appear significantly higher, some 2.1-2.5 metres, than its neighbours to the north and south, although the latter would be separated from the proposed building by the width of Sandringham Road. This would be at odds with the 4 storey building with a 5 storey feature at the corner anticipated by AAP Policy DTC-CA 01[A]."

15. The Dalston Area Action Plan was adopted by the council in January 2013. Policy DTC-CA 01, "KINGSLAND HIGH STREET CHARACTER AREA SITE-SPECIFIC POLICIES", states:

> "1) Each opportunity site within the Kingsland High Street Character Area is to be developed in a co-ordinated way and to a high design standard, ensuring a mix of suitable and complementary uses. The following site-specific planning policies are to be adhered to:
>
> a) SITE A: 130 KINGSLAND HIGH STREET AND SITE TO THE REAR 130A KINGSLAND ROAD (SITE AREA 1920 SQ.M./0.192 HECTARE)
>
> Site redevelopment for a 4 storey building to include retail, employment and residential with the potential for a key, high quality architectural feature at the corner of Sandringham Road and Kingsland High Street (up to 5 storeys) to complement the Rio Cinema diagonally opposite.

… ."

Crystal Property's application for outline planning permission

16. The application for outline planning permission with which these proceedings are concerned was submitted to the council on 3 September 2013. The application form was the form for an "Application for Outline Planning Permission with all matters reserved …". It was completed by Mr Walton. In part 3, "Description of the Proposal", the proposed development was described in this way:

> "Erection of a part 4 and part 5 storey building providing retail space on the ground floor, office space on the upper floors, car parking, cycle storage and waste storage in the basement".

Part 10, "All Types of Development: Non-residential Floorspace", asked the question "Does your proposal involve the loss, gain or change of use of non-residential floorspace?". Three answers were available: "Yes", "No" and "Unknown". The "Yes" box was ticked. The "[existing] gross internal floorspace …" in Class A1 use ("Shops") was stated to be 493.5 square metres, and the "[total] gross internal floorspace proposed …" 694.4 square metres, so that the "[net] additional gross internal floorspace following development …" was 200.9 square metres. As for Class B1(a) use ("Office (other than A2)"), the"[total] gross internal floorspace proposed …" was stated to be 2,323.2 square metres. The "[net] additional gross internal floorspace following development …" in that use was therefore 2,323.2 square metres, there being no office floorspace on the site at present. Thus the total "gross internal floorspace proposed …" was 3,017.6 square metres, and the total "[net] additional gross internal floorspace following development …" 2,523.2 square metres. In part 16, "Planning Application Requirements – Checklist", which warns that the application "will not be considered valid until all information required by the Local Planning Authority has been submitted", a tick was put in the box for "[the] original and 3 copies of other plans and drawings or information necessary to describe the subject of the application". Three drawings were submitted, for illustrative purposes. Two showed the elevations of the proposed building to Kingsland High Street and Sandringham Road, the third a view of the building in perspective and an axonometric image providing "site data".

17. In the council's decision notice refusing outline planning permission, dated 2 December 2013, the "Particulars of the Application" gave the number of the application and its date, and stated that the "Application Type" was "Outline Planning Application". The "Proposal" was described in this way:

> "Erection of a part 4-storey, part 5-storey building providing retail use on ground floor and offices on upper floors, with associated car parking, cycle parking and waste storage. (Outline planning application with all matters reserved)."

Two "Plan Numbers" were given: "1018 and 1019". These were the illustrative drawings showing the Kingsland High Street and Sandringham Road elevations of the proposed building. The reason for refusal, reflecting the officer's assessment of the proposal, was this:

"1. The proposed development, by reason of its excessive height and massing on this prominent corner junction, would result in a development that would relate poorly to the existing development on Kingsland High Street and Sandringham Road to the detriment of the streetscene and would unduly compromise and compete with the setting of the Grade 2 listed Rio Cinema opposite. The proposal is therefore contrary to Hackney Core Strategy 2010 policy 24 (Design) and 25 (Historic Environment), the Dalston Area Action Plan 2013, London Plan 2011 policies 7.4 (Local Character), 7.6 (Architecture) and 7.8 (Heritage assets and archaeology), and paragraphs 17, 64 and 133 of the National Planning Policy Framework ["NPPF"]."

The section 78 appeal

18. Crystal Property appealed against the council's decision on 11 December 2013. The appeal was determined on the parties' written representations. The lengthy "Grounds of Appeal" submitted to the Planning Inspectorate on behalf of Crystal Property confirmed, in paragraph 5, that the application on appeal was "an outline planning application with all matters reserved". Paragraph 12 stated:

> "12.The current application, the subject of this appeal, is for a part 4, part 5 storey building providing 694 square metres of retail space on the ground floor, 2,475 square metres of office accommodation on the upper floors and a basement car park providing 21 car parking spaces including 6 disabled spaces, 25 cycle storage spaces and a large waste storage area. … ."

In paragraph 20 it was stressed that "the indicative design of the proposed development is the same as that of the building which was approved in 1990 …". In a section headed "Conservation and Urban Design" paragraph 39 said this:

> "39. The application is outline with all matters reserved and the drawings submitted are only an indicative design. This is an important consideration as matters of detailed design remain for determination, and accordingly the Appellant need only demonstrate that a building of this general form would be acceptable on the site, subject to detailed design. The appellant is simply trying to establish the parameters of a building which is deemed acceptable for this site, especially as the LPA's officers and the Appellant and its counsel disagree with the interpretation of policy DTC-CA-01 … ."

Paragraph 42 stated:

> "42. The indicative design submitted, apart from a slight change to the corner element, is almost exactly the same as that submitted in application TP/99497/D/DCK which was granted in August 1990. At (P19) there is a copy of the 1990 design and at (P20-21) a copy of the current design, the pitched roof is steeper in the 1990 version making it slightly taller than the current proposal. The height of the 3rd floor windows in relation to the parapet of the adjoining building on both (P19-20) make comparison of the respective heights easy to judge. … There has been no change in the built environment of KHS, apart from the

> demolition of the buildings on sites D1 and D2, since the 1990 consent was granted. The Appellant therefore submits that the application should be treated in the same way and considered in keeping with the character of the area, given that the only change to the area has been the development of various sites with taller buildings."

In the following passages of the "Grounds of Appeal" there were numerous references to "the proposed building" – the building shown in the illustrative drawings submitted with the application for outline planning permission – in comparison with developments approved by the council on adjacent sites, including, in particular, sites known as C1, C2, D1 and D2. For example, in paragraph 45, it was pointed out that "[the] floor to ceiling heights in the proposed building … mirror those of the adjoining building", and that "[the] proposed buildings on D1, D2 and C2 have the same floor to ceiling heights as the adjoining buildings and as that of the proposed building on the appeal site".

The inspector's decision letter

19. At the beginning of his decision letter, the inspector noted that the appeal had been made "against a refusal to grant outline planning permission", and that "[the] development proposed is erection of a part 4 and part 5 storey building providing retail space on the ground floor, office space on the upper floors, car parking, cycle storage and waste storage in the basement". Under the heading "Preliminary Matters", he said (in paragraph 2):

> "The application is for outline permission with all matters reserved for subsequent approval. However, plans accompanying the application indicate the built form reflecting the description of development, although this is a possible rather than definitive layout and design. As the Council had regard to these indicative plans in determining the application, I have dealt with the appeal on the same basis."

20. The "main issue" in the appeal was, said the inspector, "the effect on the character and appearance of the surrounding area, and related to this, the effect on the setting of the nearby Rio Cinema, a Grade II listed building" (paragraph 5).

21. His attention had been drawn to "a recent appeal decision involving an outline application for erection of a six storey building on the appeal site". And, he said, given the relevance of that decision to the appeal before him, he had had regard to it (paragraph 7). This was the appeal decision of 26 November 2012.

22. The inspector referred (in paragraphs 8 to 12) to relevant policies in the Dalston Area Action Plan. In Policy DTC 04 the maximum building height for the appeal site, and others, was said to be "4 to 6 storeys". The front of the site was "also identified as a character sensitive area influencing building height" (paragraph 9). Policy DTC-CA 01, as he said, "requires site redevelopment for a 4 storey building with the potential for a key, high quality architectural feature at the corner of Sandringham Road and Kingsland High Street (up to 5 storeys) to complement the Rio Cinema diagonally opposite" (paragraph 10). He went on (in paragraph 11) to say this:

"11. … While the detailed design of the building is yet to be determined, to the extent that the proposal is for a 4 and 5 storey building I accept also that it reflects the numerical requirements of Policy DTC-CA 01. I note, however, that the appellant is seeking to establish the parameters of a building that would be considered acceptable on the appeal site. To my mind this reinforces the importance of the Inspector's comment in the previous appeal that it is the height of the respective buildings that is important rather than the number of storeys (paragraph 8)."

Policy DTC-CA 01 was, in the inspector's view, consistent with the NPPF, "particularly section 7 concerning good design". He gave it and the other relevant policies of the area action plan "considerable weight in this case" (paragraph 12).

23. The inspector discussed the merits of the development shown in the illustrative drawings (in paragraphs 13 to 16):

"13. To the immediate south of the appeal site is a four storey terrace, while the adjoining terrace to the north is three storeys high. The tallest building in the immediate vicinity is the Rio Cinema. The indicative drawings show a four storey building (excluding the basement) extending across the full site frontages on both the High Street and Sandringham Road. Above this, a fifth storey and pitched roof form covers the majority of the footprint, with insets adjacent to the northern and eastern boundaries.

14. A comparison of the current proposal with that in the previous appeal shows buildings of broadly similar height. This is despite the additional storey in the previous case and results from the larger storeys and roof form in the current proposal. I accept that the floor to ceiling heights appear to be similar to those of neighbouring buildings. However, it is the fact that the fifth storey and roof form covers much of the building's footprint that defines the overall height of the building and adds to the perception of a building of greater bulk and mass. The resulting effects would be a building that would dominate rather than complement this part of the street scene at the northern end of the town centre. The height, bulk and mass of the building would be particularly prominent in views from the south on the High Street due to the differences in ground levels.

15. Approaching from the north and the south along the High Street, the proposed building and the Rio Cinema would be the tallest buildings in the immediate street scene. However, the presence and height of the appeal proposal would detract from the appearance of the listed cinema as it would compete with and visually dominate this existing building. This would in large part be due to the extent of the fifth storey and roof form across much [of] the building, which in my view would not readily conform to the requirements of Policy DTC-CA 01 for a key architectural *feature* of up to 5 storeys on the corner of the two roads.

16. The appellant contends that views of the cinema, specifically the auditorium, are limited in relationship to the appeal site and proposed building. However, the cinema as a whole is a designated heritage asset and, as such and due to its

physical prominence, is recognised as a landmark building in the AAP. Furthermore, its relationship with the development of the appeal site is specifically defined in Policy DTC-CA 01 and my findings above are that there would be a clear visual relationship between the two buildings in views from the High Street. For these reasons, I give the appellant's contentions on these matters little weight."

24. The inspector then turned (in paragraphs 17 and 18) to consider recent grants of planning permission on other "Opportunity Sites". He observed that "[in] the case of the appeal site the more general policy provisions in the AAP are refined into specific requirements having particular regard to the unique relationship with a nearby landmark [listed] building, which is referred to in the policy", and that "[in] this respect, the permitted development on other sites cannot be seen as a direct precedent for development of the appeal site" (paragraph 17). The fact that these recent planning permissions had not been taken into account in the appeal decision of 26 November 2012 did "not invalidate that decision as a material consideration in this case". But he had reached his findings "on the merits of the proposal before [him] assessed against relevant national and local policies and other material considerations" (paragraph 18). As for the outline planning permission granted in 1990 and the council's decision to approve another scheme for the appeal site in 2003, he said (in paragraph 19):

> "19. Reference is also made to an outline approval in 1990 for an equally tall, if not taller, building on the appeal site … ; and a similar one, which was deemed acceptable but not formally permitted in 2003 … . The appellant contends that these are material to the current proposal, particularly as the development plan policies relied on at the time have effectively been carried forward into current plans. The AAP has, however, been adopted since those decisions and I am not aware that earlier plans included a site-specific policy akin to Policy DTC-CA 01, which now has the most significant bearing on the site's development. Moreover, the previous appeal and the Council's decision that led to it are more recent relevant decisions involving a proposal of broadly similar height to the current one, which were assessed against the provisions of the AAP. For these reasons, I give little weight to a direct comparison with these much earlier permissions."

25. The inspector concluded that the proposed development "would have an unacceptably harmful effect on the character and appearance of the surrounding area and on the setting of the listed Rio Cinema", and was therefore contrary to the area action plan, the corresponding policies in the NPPF, Policy 24 and Policy 25 of the Hackney Core Strategy 2010, and Policy 7.4 and Policy 7.8 of the London Plan 2011 (paragraph 20). Conscious of the requirement in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 to have special regard to the desirability of preserving the setting of a listed building (paragraph 21), he found the harm to the significance of the listed Rio Cinema as a heritage asset "while unacceptable, would be less than substantial" under the policy in paragraph 134 of the NPPF. But in the absence of evidence to show that "a building of a different form" on the appeal site would not be viable, the harm was not outweighed by the "public benefits of the proposal" (paragraph 22). Only "limited weight" could be given to the contention that the proposal, as "sustainable development", earned the support of the presumption in paragraph 14 of the NPPF (paragraph 23). It followed that the appeal must be dismissed (paragraph 24).

The judgment in the court below

26. The issue with which we are concerned was one of several for the judge to decide. He dealt with it in paragraph 24 of his judgment:

> "There is a further point, which is this: the present decision is one which is specifically based on the height and massing of the proposed development. However, questions of height and massing were specifically reserved in the 2003 decision, so that decision cannot be read as consent for the height and massing, which is the subject of the present application, for a similar development. In the present application, the plans were not marked as illustrative, and given the 2012 decision where the application and appeal essentially failed because of the height, the inspector considered, obviously correctly, as I have said, that he was being asked to consider, on this occasion, the height and massing according to the plan submitted. The 2003 consent, therefore, although it relates to a building said to be identical to the one which was the subject of the 2013 application, is not, in truth, comparable at all: not only was it made subject to different policies but the decision itself is a decision on a different issue."

Did the inspector adopt an incorrect approach to the application for outline planning permission?

27. For Crystal Property, Mr Jacobs submitted that the judge's error was to conclude that the inspector was being asked to consider whether the height and massing of the proposed development shown in the illustrative drawings were acceptable. This was a misconception. The proposal before the inspector on appeal was an application for outline planning permission with all matters reserved. As the planning application form made clear, Crystal Property was seeking to secure the principle of the site's development with a part four, part five storey building – as was required by policy DTC-CA 01 of the area action plan. The council's requirements for applications for outline planning permission included the submission of indicative drawings. Crystal Property therefore submitted, though for purely illustrative purposes, drawings showing a development very similar to that for which planning permission had been granted in 1990. The inspector should have asked himself, but clearly did not, whether there was any reason to withhold outline planning permission for that development, leaving height and massing to be determined when the "scale" of the proposed building was considered at the reserved matters stage. And the judge should have seen the inspector's error. But he did not.

28. Mr Richard Kimblin Q.C., for the Secretary of State, opposed that argument. He submitted that the inspector's decision letter reflects a true understanding of the status of the application for outline planning permission, and of the illustrative drawings on which Crystal Property relied in the appeal. The inspector did not, in fact, mislead himself to a false approach. As is clear from paragraph 11 of his decision letter, he understood that Crystal Property was seeking to establish acceptable parameters for the development of the site, but that it was doing so firmly and solely on the basis of the proposal described in the application and shown in the illustrative drawings. The approach he took to the proposal before him was faultless.

29. The first question here concerns the status of the application for outline planning permission. Was it, as it purported to be, an application for outline planning permission with all matters reserved for future consideration? In my view it clearly was. The application form made that entirely plain. The form itself was the one provided by the council specifically for applications for outline planning permission "with all matters reserved". We were shown another form which is to be used in making outline applications "With Some Matters Reserved". Unlike the form for outline applications in which all matters were reserved, it includes in part 3, "Description of the Proposal", the request that the applicant "indicate all those reserved matters for which approval is being sought" and a box for each of the five matters that may or may not be reserved ("Access", "Appearance", "Landscaping", "Layout" and "Scale"). In this case there was never any indication, either when the application was before the council for determination or when it was before the inspector on appeal, that Crystal Property, as applicant, intended any of those five matters to be decided at this stage. The drawings submitted with the application, though not marked as "illustrative" or "indicative", could only sensibly be understood as having that purpose. Again, there was never any suggestion otherwise.

30. How then is one to understand the areas specified in part 10 of the application form as the floorspace for each of the uses – Class A1 ("Shops") and Class B1(A) ("Office …") – in the development? Are they part of the proposal for which outline planning permission was being sought? And if so, how do they relate to the "scale" of the development, a matter deliberately reserved for future consideration? Some caution is needed in tackling these questions, for three reasons. In the first place, the authorities to which I have referred in paragraphs 9 to 13 above are concerned with the interpretation of a local planning authority's grant of planning permission, an exercise to be conducted in accordance with the well-established principles referred to by the Supreme Court in *Trump International Golf Club Scotland Ltd. v Scottish Ministers* [2015] UKSC 74, whereas we are seeking to understand an application for planning permission that was never granted. Secondly, some of those cases were concerned with the legislative regime for outline planning permission as it was before the concept of "scale" was introduced to the definition of "reserved matters". And thirdly, in all of those cases the court's decision turned, as must ours in this appeal, on the particular circumstances of the case in hand, considered under the law, policy and guidance for outline planning permission current at the relevant time.

31. In this case, however, it seems entirely consistent with the law as it emerges from the authorities to regard the proposed floor areas – specified, use by use, in the application form – as being an essential component of the outline proposal. They quantified the floorspace of the proposed development in precise terms, identifying the amount of proposed "retail space on the ground floor" and the amount of proposed "office space on the upper floors", and thus refined the description of the development in part 3 of the application form as "a part 4 and part 5 storey building …". Such specificity as to floorspace is not inconsistent with the "scale" of the proposed development being reserved for future consideration. Floorspace and "scale" (as defined in article 2 of the Development Management Procedure Order) are not synonymous. There will necessarily be some relationship between them. But there is nothing incompatible between the floorspace of a proposed development being identified in an outline application and its "scale", including the dimensions of the proposed building – its "height, width and length … in relation to its surroundings" – being left for future determination as a reserved

matter. That is what would have been achieved in this case if outline planning permission had been granted and it had incorporated, as a grant of planning permission generally does, the application itself.

32. I see no reason to think that the council misunderstood the status of the application for outline planning permission when making its own decision. The description of the "Proposal" in its decision notice was accurate: an "[outline] planning application with all matters reserved". The illustrative drawings showing the elevations of the proposed building to Kingsland High Street and Sandringham Road were referred to. The reference in the single reason for refusal to the "excessive height and massing" of the proposed development does not conflict with the description of the proposal as an outline application with all matters reserved. It does not indicate that the council fell into the error of treating the "height" and "massing" of the proposed building shown in the illustrative drawings as if they were matters for determination at the outline stage. The council clearly recognized that the illustrative drawings represented a building, partly of four storeys, partly of five, accommodating the aggregate amount of floorspace specified in the application form for the two uses proposed.

33. The same may be said of the inspector as decision-maker in the appeal against the council's decision. He did not misunderstand the status of the proposal before him as an application for outline planning permission with all matters, including "scale", reserved. Paragraph 2 of the decision letter leaves no room for doubt about that. In that paragraph the inspector said, in the clearest possible terms, that "[the] application is for outline permission with all matters reserved for subsequent approval". He also noted, however, that the drawings accompanying the application "indicate the built form reflecting the description of development", though he recognized that this was a "possible rather than definitive layout and design". The council, he said, had "had regard to these indicative plans in determining the application" and he had "dealt with the appeal on the same basis". All of this is impeccable. And so are the inspector's observations in paragraph 11 of his letter, where he acknowledged that the "detailed design" of the proposed building was "yet to be determined", that in so far as the proposal was for a four and five storey building it reflected the "numerical requirements" of Policy DTC-CA 01, but that Crystal Property was also "seeking to establish the parameters of a building that would be considered acceptable on the appeal site".

34. Implicit in that last observation is the fact that the application for outline planning permission, while it reserved all matters, including "scale", for future consideration, had identified a specific floorspace for each of the uses in the proposed development and a total proposed floorspace for those uses, and that the illustrative drawings on which Crystal Property had relied in its "Grounds of Appeal" showed a building containing that much floorspace. Crystal Property's case on appeal was put to the inspector squarely on the basis that the illustrative drawings represented the proposal in the application for outline planning permission. It was that scheme, and only that scheme, on which Crystal Property depended in seeking to establish, as the inspector put it, "the parameters of a building that would be considered acceptable on the appeal site".

35. No other possible scheme was mooted, let alone described or illustrated. Nor was it suggested that the floor areas specified in the application form were to be regarded as other than integral to the proposal, that they were merely indicative or approximate or maximum floorspaces, or that they might change in some material way when the

reserved matters were submitted. Nor again was it suggested that the floorspace of the proposed development might be reduced by means of a condition attached to the outline planning permission, and, if so, by how much. Indeed, in paragraph 12 of the "Grounds of Appeal", to avoid any uncertainty on the point, it was unambiguously confirmed that the "application" on appeal was not merely for a building of four and five storeys, but "for a part 4, part 5 storey building providing 694 square metres of retail space on the ground floor, 2,475 square metres of office accommodation on the upper floors …". There was no suggestion that a building on this site with that number of storeys and that amount of floorspace might be designed so as to be materially different in its height and massing from the building shown in the illustrative drawings. This was not a matter for conjecture; it was a matter of basic geometry.

36. Can it be said, in these circumstances, that the inspector erred in his approach to the application and appeal? In my view it cannot. On a fair reading of his decision letter, he did not venture into a consideration of any of the reserved matters. He did not seek to determine that which was not before him for his decision. He took the scheme before him at face value. And he was right to do so. He considered the "height" of the proposed building, and its "bulk and mass", as Crystal Property clearly intended he should, with the aid of the "indicative" drawings. He was perfectly entitled to do that. He did it not to pre-empt the consideration of "scale" as a reserved matter which would be necessary if he allowed the appeal and granted outline planning permission. He did it to test the acceptability of the outline proposal itself.

37. Given the way in which the case for allowing the appeal had been presented to him, he could not sensibly have dealt with the main issue – the effects of the proposed development on the character and appearance of the area and on the setting of the listed Rio Cinema – in any other way. He concluded that the proposed building would "dominate rather than complement this part of the street scene at the northern end of the town centre", that the "height, bulk and mass of the building would be particularly prominent in views from the south on [Kingsland] High Street …" (paragraph 14), and that in views along Kingsland High Street the "presence and height" of the building "would detract from the appearance of the listed [Rio Cinema] as it would compete with and visually dominate this … building" (paragraph 15). Comparing the proposed building with the others nearby for which the council had recently granted planning permission, again with the benefit of the drawings illustrating the proposed building and the comments made in the "Grounds of Appeal", he was not persuaded to a different view of the merits of the proposal before him (paragraphs 17 and 18). He found he could give "little weight" to the suggested comparison between the height of the building now proposed and that of the buildings granted planning permission in 1990 and the subject of a resolution to approve in 2003, before the adoption of the area action plan. Not surprisingly, he saw more relevance in the more recent decisions to reject a "proposal of broadly similar height" (paragraph 19).

38. The inspector thus resolved the main issue in the appeal, as Crystal Property had effectively required him to do, on the basis of the proposal described in paragraph 12 of the "Grounds of Appeal". Unfortunately for Crystal Property, his conclusions on the merits of that scheme were contrary to those it had urged upon him. As he said when applying the policy in paragraph 134 of the NPPF, there was no evidence to show that "a building of a different form" from that proposed would be viable (paragraph 22). In the

end, he was left wholly unconvinced that the proposal before him could produce a satisfactory development of the site if outline planning permission were granted for it.

39. I see no error of law in the inspector's conclusions. In my view they embody a lawful exercise of planning judgment on the considerations relevant to deciding whether, in this particular case, outline planning permission ought to be granted, with all matters reserved. As the inspector plainly appreciated, Policy DTC-CA 01 does not contemplate the approval of any and every scheme for a building of four storeys on the appeal site, with an "architectural feature" at the corner of Sandringham Road and Kingsland High Street. That is not what the policy says. Some proposals for a building of four and five storeys will comply with the policy. Others will not. In this case, as is plain from the inspector's conclusions, he was not satisfied that a building of the floorspace proposed could be accommodated on the site in accordance with the policy. He did not have to speculate about the possible merits of some other, hypothetical proposal for the site. It was not up to him to redesign the development to comply with Policy DTC-CA 01, or to try to work out for himself how much floorspace an acceptable scheme might comprise. His task was to consider the merits of the development actually proposed in this application for outline planning permission, a building whose height and massing were shown in the illustrative drawings. And that is what he did.

40. It follows that in my view the inspector's decision is legally sound and, as the judge concluded, should therefore be upheld. It will be clear, however, that my reasoning to this conclusion is not the same as that of the judge in paragraph 24 of his judgment. It seems the judge may have thought that the "height and massing" of the proposed building were not within the scope of the reserved matters and were formally before the inspector for determination in the appeal. That is not correct. The height and massing of the building were shown, for illustrative purposes, in the "indicative" drawings. Those drawings clearly informed the inspector's decision, as they should. But as he very clearly recognized, they did not alter the status of the application as an application for outline planning permission with all matters reserved. His decision letter demonstrates an entirely lawful consideration of that outline scheme, on the correct understanding that none of the reserved matters fell for his determination in the appeal. In my view, therefore, the judge's decision was undoubtedly right, even if his reasons were not.

Conclusion

41. For the reasons I have given I would dismiss this appeal.

Lord Justice Tomlinson

42. I agree.