Medieval concepts met modern law in the recent case of *Norbrook Laboratories*. **Kate Olley** examines why the latter prevailed

Can access rights survive the extinction of common rights?

Pasturage, pannage, estovers, turbary, piscary, and ferae naturae. These traditional categories of rights of common are not household terms in the urban world. Pannage, incidentally, is the right to graze pigs in woodlands and forests. But is there a practical difference between rights of common and a right of free access over land? And can the latter survive the extinction of the former, even if it is a right over common land?

This issue arose again last month before Stadlen J in *Norbrook Laboratories Limited and Lord and Lady Balleyedmond v Carlisle City Council* [2013] EWHC 1113 (Admin). The underlying problem was whether the council had been correct to conclude that the land in question was public open space due to it being common land with public rights of access to it, such that it was exempt from the tree felling licence regime and thus (on the facts of the case) warranting the imposition of a Tree Preservation Order.

Free access scheme

In 1915 the previous local authority made an order under the Commons Act 1899 creating a scheme giving local inhabitants a right of free access over the commons and the privilege of playing games there. When the land was registered, under the Commons Registration Act 1965, no rights of common over – or in respect of the land – were recorded. The claimants contended that the scheme conferred on the inhabitants not only a free right of access to the land but also a right of common over it.

However, the rights of access were said to be parasitic upon the rights of common (or indeed any pre-existing before the scheme) and were extinguished along with those by virtue of the failure to register them under the 1965 Act. Stadlen J disagreed and simply found that had the relevant Article of the scheme purported to confer rights of common, it would have been ultra vires. The power conferred by the council under the 1899 Act did not extend to making a scheme which conferred rights of common or rights akin thereto.

The language of the scheme was unambiguous and clear. It provided the inhabitants with a right of free access, but there had been no intention to confer new rights of common. Had that been the case, it was, in Stadlen J's judgement, inconceivable that it would have been left by the maker of the scheme to be conferred as a matter of implication, on the coat-tails of the new right of access. There was nothing, then, to be extinguished by not having been registered under the 1965 Act.

While grappling in his usual conscientious style with the various esoteric applicable statutory provisions, Stadlen J seems to have had no trouble in simply following established authority (*Lewis v Mid Glamorgan* [1995] 1 WLR 3131).

He noted that a right of free access to land was conceptually very different from a right of common, not least because the latter rights are vested in ascertainable individuals whereas the former are exercisable by the public at large, and neither transmissible nor extinguishable by consent.

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Public open space

Provisions applicable to the acquisition and extinction of private rights could have no application to public rights exercisable by the public at large. Applying *Lewis*, rights of access were capable of surviving, and did survive, the extinction of rights of common over the same land. It had been held in Lewis that a public right of access was a very special form of public right, not to be extinguished save by clear words or inescapable implication.

The resolution of the main issue in this case appears, therefore, to have been arrived at by a straightforward application of relevant authority. The council had not erred in concluding that the land was public open space and outside the jurisdiction of the Forestry Commission. Stadlen J dealt similarly uncontroversially with the submission that the land itself must have ceased to be common land, due to non-registration of any rights of common over it.

The case run by the claimants in this case therefore presents as a brave attempt to fly a heavy kite, which was bound from the start to get *Lewis* stuck in its string. However, the case is also useful to note if only for the confirmation, albeit obvious, that there are no adverse implications for the continued application of the TPO regime arising from the judgment. This is clearly of relevance in a great number of cases.

Kate Olley is a barrister at Landmark Chambers (www.landmarkchambers.co.uk)