

**THE HIGH COURT****2007 No. 1559 SS****IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 AS EXTENDED BY SECTION 52 (1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961****BETWEEN****MOIRA ROSBOROUGH****CLAIMANT****AND  
CORK CITY COUNCIL****RESPONDENT****AND  
THE HIGH COURT****2007 No. 1560 SS****IN THE MATTER OF SECTION 2 OF THE SUMMARY JURISDICTION ACT, 1857 AS EXTENDED BY SECTION 52 (1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT, 1961****BETWEEN****RICHARD MURPHY****CLAIMANT****AND  
CORK CITY COUNCIL****RESPONDENT****Judgment of Mr. Justice Clarke delivered on the 7th day of March, 2008****1. Introduction**

1.1 It hardly needs to be said that charges in respect of local authority services, not least those in relation to waste collection, have been a subject of significant controversy over the last number of years. These proceedings are not concerned with the principle of the levying of such charges, but rather relate to the precise way in which the respondent ("Cork City Council") has dealt with, and charged for, waste collection for the calendar year 2006. While this judgment relates to two separate cases, the factual and legal basis of both are identical in all material respects.

I therefore propose dealing specifically with the first above named proceedings. In that case the claimant ("Ms. Rosborough") initiated a claim to the Small Claims Registrar in March of last year claiming a refund of some of the refuse collection charge which she had previously paid, in respect of the calendar year 2006, to Cork City Council. In circumstances which I will set out in more detail, the matter ultimately came before District Judge David Riordan who found that there was a contract between Ms. Rosborough and Cork City Council, that Cork City Council were in breach of that contract, and that Ms. Rosborough was entitled to €86.66 in damages. An identical finding was made in the second case.

1.2 Significant legal issues arise as to whether Ms. Rosborough's claim is correct in law. In practical terms it would also appear that the claim she makes would be available to most other residents in the Cork City Council area who have made similar payments for refuse collection. While the scale of each individual case is, as the decree made by the learned District Judge makes clear, very small, nonetheless the overall effect on Cork City Council has the potential to be very significant indeed.

1.3 In those circumstances the learned District Judge was invited, on behalf of Cork City Council, to state a case as an appeal by way of case stated for the opinion of this Court on the legal issues arising. This the learned District Judge did and this judgment is directed to the issues raised.

1.4 While it will be necessary to set out the facts in some more detail in the course of this judgment, at its simplest the case which Ms. Rosborough makes is that Cork City Council engaged in a unilateral change to the level of service provided subsequent to levying the refuse collection charge concerned. This was said to be a breach of contract and the amount of damages awarded related to a proportion of the charge concerned which, in the opinion of the learned District Judge, was proportionate to the change in service.

1.5 As it is particularly unusual for a case which was commenced by the small claims machinery to come to this Court, I should start by setting out the procedural history of the case as set out in the case stated.

**2. Procedural History**

2.1 On the 7th of March, 2007, Ms. Rosborough made an application to the Small Claims Register in the District Court area of Cork City (bearing claim No. 108/2007 PIN46956). Ms. Rosborough made her claim in a commendably succinct way in the following terms:-

"On the 17th April, 2006, I accepted Cork City Council's offer of a 10% discount in respect of the annual refuse charges payable for 2006, and I paid over the sum of €261.00. Subsequently Cork City Council varied the collection from what was then a weekly service to a fortnightly service. I hereby claim a refund of €130.50 or such sum as the court may order."

2.2 The proceedings came before the learned District Judge on the 14th of May, 2007. It will be necessary to refer to the facts found by the learned District Judge as set out in the case stated in due course. However, as indicated, the District Judge made findings which, as set out in the case stated, are in the following terms:-

"(a) That there was a binding contract between the parties.

(b) That the unilateral introduction of the revised system of waste collection by the City Council in early May, 2006 amounted to a breach of that contract.

(c) That there was no legal principle which would prevent the said breach of contract being actionable by the claimant.

(d) That, therefore the claimant was entitled to a decree of €86.66 (being one half of the charge attributable to the period from the introduction of the revised waste collection system in May, 2006 until the end of 2006, reflecting the reduction in frequency of wheelie-bin collections from weekly to fortnightly)."

2.3 Both cases stated were listed for hearing before me at the March Cork Chancery Non-Jury sessions. When the cases were called on for hearing, counsel for Ms. Rosborough (who also represented the other claimant) indicated a difficulty which had arisen, from both claimants' perspective, concerning the costs which would be incurred in dealing with the cases stated. The position of Cork City Council was clear. In the light of the fact that the cases are of considerable importance to the City Council (and in the nature of a test case so far as they are concerned), counsel had been instructed to indicate to the court that, irrespective of the result of the cases stated, it would not be Cork City Council's intention to seek costs against either claimant. While it was acknowledged on behalf of Ms. Rosborough that this was of some considerable assistance to her, it was, nonetheless, indicated that, in the absence of Cork City Council agreeing to pay Ms. Rosborough's costs irrespective of the outcome of the proceedings, it would not be possible for Ms. Rosborough to participate in any meaningful sense in the case stated. The same position pertained in the other proceedings.

2.4 The height of any possible jurisdictions the courts to deal with cost matters in cases such as this, in advance of a hearing, arises under the so called "protective cost order" jurisdiction which was considered by Kelly J., in *Friends of the Curragh Environment Ltd v. An Bord Pleanála* [2006] IEHC 243. While being prepared to accept the possibility that the courts in this jurisdiction might follow the jurisprudence of the courts of the United Kingdom in making, in a very limited category of cases, a so called "protective costs order", Kelly J., was not persuaded on the facts of the case then before him that the applicant concerned had brought itself within the parameters of such a jurisdiction even it could be said to exist. However, it is clear that the jurisdiction of the court to make a "protective costs order" relates only to insulating a plaintiff or claimant who brings public interest proceedings, and who meets the other criteria set out in the jurisprudence, from the risk of having to pay the relevant defendant or respondent's costs. As counsel for Cork City Council had made clear that it was not the intention of Cork City Council to seek costs, even should they succeed, a "protective costs order" would have been of no additional value to Ms. Rosborough in this case. I know of no suggestion that a jurisdiction could possibly exist on the part of a court to require not merely that a claimant be insulated from the costs that might be awarded against it should it lose, but also become entitled to an order, in advance, in its favour, to the grant of costs.

2.5 I should, in passing, say that it is regrettable that no adequate system is in place to consider making provision, in appropriate cases, for the costs of parties who may find themselves caught up in litigation which has a significant degree of public importance but which is, so far as that party is concerned, of only a very small scale indeed. Such a situation is brought into clear relief by a consideration of the facts of this case where the complex legal issues involved are important to the tune of a number of millions of euro to Cork City Council (not to mention the important issue of principle involved) but are relevant only to a sum of less than €100 to either of the claimants. It seems to me that it would be appropriate to give consideration to putting in place a scheme whereby funding could be made available (perhaps on a system analogous to the so called "Attorney General's Scheme" in relation to criminal judicial review matters and the like) so that the difficulties which have arisen in this case would not re-occur. However, in the absence of such a scheme, it did not appear to me, and I indicated as such, that Cork City Council could be obliged to give a guarantee in advance to pay the costs of Ms. Rosborough or the other claimant irrespective of the result of the proceedings. It was clear that Cork City Council were not willing to give such an undertaking and on that basis counsel for Ms. Rosborough did not take any substantive part in the hearing of the case stated before me. Counsel did, however, remain in Court for the duration of the hearing and did address me on costs.

2.6 Having set out the procedural history of the case it is appropriate next to turn to the facts as found by the learned District Judge, which are set out by him in the Case Stated.

### **3. The Facts**

3.1 It was established that there had been an evolution in the manner in which Cork City Council collected waste over the last number of years. By 1997 waste was collected in plastic bins but, from 1998 onwards, wheelie bins were introduced. Charges were made in respect of wheelie bin collection, initially on the basis of a fixed annual charge but more laterally on the basis of a fixed charge together with a separate charge for each time the wheelie bin concerned was, in fact, put out for collection. A further innovation occurred in 2005 whereby householders became entitled to leave out dry recyclables in a clear plastic bag provided by Cork City Council, which bags were collected on a fortnightly basis. The traditional wheelie bin collection of all other waste continued, as previously, on a weekly basis.

3.2 While the annual charge for the collection of waste imposed by Cork City Council operated on a calendar year basis, the learned District Judge was satisfied, on the evidence, that the normal practice was that invoices were issued in February of the relevant year. For the year in question, that is 2006, invoices did not issue until the 20th of February and provided, as an incentive to early payment, that if the full sum was discharged by the 21st of April, 2006, then a discount of 10% would be made available.

3.3 The learned District Judge also accepted, and found as a fact, that Cork City Council had distributed a circular to the approximately 34,000 households in its functional area advising of a change to the waste collection system. The change in substance meant that there would be, as heretofore, a fortnightly collection of dry recyclables but that "ordinary" waste, in wheelie bins, would only be collected on a fortnightly basis in the alternative weeks to those in which the dry recyclables collection would take place. The learned District Judge found as a fact that Ms. Rosborough had not received that notice prior to paying her invoice for the 2006 refuse collection charge which she did in time to avail of the 10% discount to which I have referred.

3.4 The only document which passed between the parties relating to the refuse collection is a standard form invoice which simply sets out the details of the 2006 fixed charge together with other relevant items (including the discount) which might be necessary to calculate the full sum due. That document makes no reference to any particular frequency of collection. Against the background of those facts it is next necessary to turn to the legal issues which arose before the learned District Judge, and which formed the basis of the case stated.

### **4. The Legal Issues**

4.1 In substance Cork City Council raised two legal questions concerning the claim as made by Ms. Rosborough. Firstly it was argued that the arrangements by which the conduct of refuse collection is carried out by a local authority, such as Cork City Council, arise on foot of a statutory obligation so do to. I will refer to the relevant statutory framework in due course. Likewise it was said that the charge raised was imposed on foot of an entitlement to so charge found in that same statutory framework. In those circumstances it was submitted to the learned District Judge that the arrangements between Cork City Council and householders, such as Ms. Rosborough, could not be said to amount to a contract between those parties at all, but rather involved the carrying out of a statutory function by a statutory body in respect of which that statutory body was entitled, under the relevant statute law, to make a charge.

4.2 Secondly, it was said that, even if the relationship between Ms. Rosborough and Cork City Council was governed by a contract, it was not appropriate to imply into any such contract a term relating to the frequency of collection at all, or at least in a manner which would have the effect of fettering the discretion of Cork City Council as to how it carried out its statutory functions.

4.3 In substance the learned District Judge found in favour of Ms. Rosborough on those issues and it is as to the correctness or otherwise of those determinations that this case stated is directed. As is clear from the outline of the issues which I have set out an important aspect of the matter concerns the statutory framework within which waste charges are levied and it is to that statutory framework that I now turn.

## **5. The Statutory Framework**

5.1 The principal legislation is the Waste Management Act, 1996 ("the 1996 Act"). Part II of the 1996 Act deals with waste management planning. Section 22 obliges local authorities to make (and periodically review and as appropriate vary) a waste management plan with regard (inter alia) to "the prevention, minimisation, collection, recovery and disposal of non-hazardous waste within its functional area." Such plans are public documents and may be adopted only after a process of public consultation: see s. 23. Part III of the Act imposes functions and obligations on local authorities in relation to waste prevention and minimisation, including waste recovery. Finally, Part IV contains provision in relation to the holding, collection and management of waste.

5.2 Section 33(1) (a) of the 1996 Act provides that "Each local authority shall collect, or arrange for the collection of, household waste within its functional area." That general obligation is subject to the provisions of s. 33(3) which excludes the obligation in circumstances which have no relevance to the functional area of the City Council.

5.3 Section 35 of the 1996 Act contain provision empowering local authorities to make bye-laws for the purpose of the proper management of waste (inter alia) and which provide for the presentation of waste for collection (including the times during which the waste is to be made available for collection).

5.4 The 1996 Act, as originally enacted, was silent on the issue of charges. At least since the enactment of the Local Government (Financial Provisions) Act, 2000, however, local authorities have been authorised to levy a charge in respect of waste collection. That Act served to extend the effect of the Local Government (Financial Provisions) (No.2), 1983 ("the 1983 Act") to enactments such as the 1996 Act. Section 2 of the 1983 Act empowered local authorities to charge for the provision of a "service" which they are required or enabled to provide by any enactment. "Service" is defined in s.1(1) of that Act as meaning "any service, facility, licence, permit, certificate, approval or other thing which a local authority may render, supply, grant, issue or otherwise provide in the performance or exercise of any of its functions, powers or duties to any person or in respect of any premises and includes the processing of an application for such a licence, permit, certificate or approval." Section 6 (1) of that Act provided that, in default of payment of an amount payable to a local authority on foot of a charge made under s. 2, the amount could "be recovered by the authority as a simple contract debt in any court of competent jurisdiction."

5.5 Although there was power to charge, in *O'Connell v. Cork Corporation* [2001] 3 IR 602, the Supreme Court ruled that it was not open to local authorities to refuse to collect the waste of a householder who had failed or refused to pay the charge concerned. It will be necessary to refer further to *O'Connell* later in this judgment. The Protection of the Environment Act, 2003, ("the 2003 Act") inserted a new section (s. 75) into the 1996 Act providing specifically that a local authority "may make a charge in respect of the provision of any waste service by, or on behalf of, that authority." See s. 75 (1). Again, provision was made for the recovery of unpaid charges "as a simple contract debt in any court of competent jurisdiction". Secondly, the 2003 Act amended s. 33(6) of the 1996 Act so that a local authority is under no duty to collect waste from any person "if that person has failed to pay a charge made under s.75 of the Local Government (Financial Provisions) (No.2) Act, 1983 in respect of the collection of the waste concerned." It seems clear that the new s. 33(6) was intended to have the effect of reversing the decision in *O'Connell*.

5.6 Certain provisions of the Local Government Act, 2001 are also relevant. Part 9, Chapter 1 of that Act contains provisions relation to the general functions of local authorities. Section 69 provides that, in performing the functions conferred under any enactment, a local authority shall have regard to certain matters, including the resources available to it, the need to maintain essential services, relevant Governmental or Ministerial policy and "the need for a high standard or environmental ... protection and the need to promote sustainable development."

Section 149 provides for the executive functions of a local authority, which are in essence all functions other than reserved functions: see s. 149 (4). Section 149 (5) provides that "all such matters and things, including the making of contracts and the affixing of the official seal, as are necessary for or incidental to the exercise of performance of the executive functions of a local authority shall ... be done by the manager for such local authority." Section 151 (1) of the 2001 Act further provides that the manager shall act by written order signed and dated by him.

5.7 The fixing of a charge in respect of the collection of waste is an executive function: see s. 75 (8) of the 1996 Act. The making and revision of a local authority's waste management plan is also, since the enactment of the Protection of the Environment Act, 2003 an executive function.

5.8 It is clear, therefore, that a relevant local authority, and this clearly includes Cork City Council, has a statutory obligation to collect or arrange for the collection of household waste within its functional area, is entitled to charge, under statute, for that service and is entitled to collect any service charge not paid "as a simple contract debt" in a court of competent jurisdiction. It is also clear that the relevant statutory framework now allows for the local authority concerned to cease providing a service such as waste collection in the case of any householder who has not made payment of the charges levied. In addition contracts which are within the executive functions of a local authority require a written and dated order of the manager.

5.9 Against that background Cork City Council argues that the relationship between it, on the one hand, and a householder, such as Ms. Rosborough, who avails of a refuse collection service, are not governed by a contract between those parties but rather by statute. It is appropriate, therefore, to turn to the question of whether the learned District Judge was correct in his view that there was a contract between the parties.

## **6. Was There a Contract?**

6.1 Before considering the argument put forward on behalf of Cork City Council it is important to emphasise that the question of whether the relations between a public authority and persons who may avail of services from that authority are governed by, on the one hand, contract, or, on the other hand, by statute and public law can be of very considerable legal importance. While there can, of course, be difficulties encountered in determining the terms of a contract or whether those terms have been breached, the basic principles by which the law of contract operate are clear. The parties come to a bargain. They are kept by the courts to their bargain. If one party is in breach of that bargain, then the court will intervene, whether to award damages or apply some other appropriate remedy. It is not, at least in most cases, any function of the court to consider the merits or otherwise of the bargain made. It is the parties own bargain and, for better or worse, they will, ordinarily, be required to stick to it. Neither side has an entitlement to unilaterally change the terms of the bargain unless the bargain itself allows for a one sided change and only then when the change is in accordance with whatever terms may have been agreed as to the mode and manner of permitted alteration.

6.2 On the other hand statutory bodies charged with carrying out statutory functions (including those where such bodies are entitled to charge for services provided) will normally be required to keep the manner in which those functions are carried out under review and are precluded, as a matter of public law, from fettering their discretion as to how they might exercise any genuine statutory discretion as to how they might carry out their functions in the future. That is not to say that there may not be circumstances where, at least within certain limits, a statutory body may be precluded from altering its policy or, perhaps, so doing without notice. It is at least possible that a statutory body may, for example, so conduct itself as to give rise to a legitimate expectation that a particular practice will not alter without reasonable notice (see, for example, *Glenkerrin Homes v. Dun Laoghaire Rathdown County Council* [2007] IEHC 298). However, the benchmark by reference to which the actions of a public authority in such circumstances is to be judged is that of public law involving principles such as those embodied in the doctrine of legitimate expectation. Such public bodies can change policy and, subject to any legitimate expectations which may have been created, can ordinarily do so unilaterally.

6.3 I emphasise these distinctions simply for the purposes of illustrating that it is no mere technicality to determine whether the relations between a public authority and those who may avail of its services are governed by the law of contract on the one hand or by statute and public law on the other hand. There are very significant differences indeed between the principles by reference to which the relationship between the parties, and the actions of those parties, will be judged depending on the answer to the question as to whether the relations are governed by contract or by statute and public law.

6.4 It should also be emphasised that the mere fact that a public authority is carrying out a statutory function does not, of itself, necessarily mean that the manner in which that function is carried out cannot involve the public authority concerned entering into contractual relations with third parties. Indeed the 1996 Act expressly provides (in s. 33(5)) that a local authority may enter into arrangements with third parties for the collection, on its behalf, by those third parties of waste in a relevant area. Therefore, a local authority can, in effect, contract out the collection of waste. In such circumstances it is almost certain that the arrangements between the local authority concerned and the waste collection utility involved would be governed by contractual terms freely entered into between the local authority and the contractor. Where a public authority, on foot of a statutory power, enters into a contract with a third party, then the ordinary principles of contract will apply to their relations thereafter save to the possible extent that the statutory framework within which the contract was entered into might, in certain circumstances, have an effect on the proper interpretation of the contract or the legitimacy of some or some of its provisions. Thus, for example, in *Irish Pharmaceutical Union v. Minister for Health* [2007] IEHC 222, I made clear that the relevant Minister, on the facts of that case, having entered into a contract with pharmacists for the provision of services to patients (on foot of a statutory obligation on the Minister to make such provision) was not entitled to unilaterally change the terms of the contracts entered into. There was not, of course, on the facts of that case, any doubt but that there was a contract between, in the events that had happened, the Health Service Executive, and the relevant pharmacists. The fact that such contracts arose within a statutory context did not prevent them from being construed in accordance, by and large, with the ordinary principles applicable to contract law.

6.5 Against those general observations it is necessary to turn to the precise terms within which the particular functions with which I am concerned were exercised and the documentation which passed between the Cork City Council and householders such as Ms. Rosborough.

6.6 The starting point has to be the clear mandatory language contained in s. 33 of the 1996 Act, which imposes an obligation on Cork City Council to collect refuse (or arrange for its collection) within its functional area. The primary obligation is, therefore, to collect waste. In order to enable such collection to be done in an economic way the legislation also, at least now, provides that a charge may be levied which can, in turn, be recovered as a simple contract debt. It seems to me that if the legislation contemplated a local authority entering into individual contracts with householders within its functional area, for the collection of waste from such householders, the legislation would be likely to be expressed in very different language and contain very different provisions. Furthermore, there would be no need to provide that any charges levied were to be capable of being recovered as a simple contract debt. The arrangements for payment which would be entered into between householders and the local authority concerned, if their relationship was governed by contract, would allow any amounts agreed to be paid to be recovered as a true contract debt in any event. The "arrangements" spoken of in s. 33(5) are, of course, arrangements not with householders but with other local authorities or third parties who actually collect the waste on behalf of the local authority concerned. The fact that language such as "arrangements" is used in that subs., but not present in subs. (1), seems to me to emphasise the fact that the statute contemplates the possibility of a local authority entering into contracts with those who might collect waste on its behalf, but not with householders within its functional area, whose waste might be collected. It also seems unlikely that the legislation contemplated the manager authorising each separate household collection arrangement as a contract requiring a separate written managerial order.

6.7 Against that analysis of the statutory framework, and the issues which arise under it, it is appropriate to turn to the limited case law which has, at least, given some consideration to the relevant statutory provisions.

## **7. The Case Law**

7.1 It is fair to say that there is no case which is, even remotely, directly in point. However, the courts have had to consider some aspects of the operation of the relevant legislation.

7.2 In *Fingal County Council v. Lynch* [1997] 2 I.R. 569, this Court had to consider issues arising out of charges imposed by the local authority concerned for water supply in circumstances where proceedings had been brought before the District Court for the recovery of the relevant charges under the provisions of s. 65(A) of the Public Health Act (1878), the relevant provisions of which had been inserted by the s. 8 of the 1983 Act. The proceedings had been brought against one only of a married couple and it was suggested that, in accordance with the ordinary principles of contract law, any liability was joint and several with the spouse concerned. In rejecting that argument Geoghegan J. stated that:-

"With regard to the second submission I think that there is a basic fallacy in it. The importation of the law of contract is only in relation to recoverability and not to any other aspect of the statutory debt. All the subsection provides is that it shall be recoverable as a simple contract debt in any court of competent jurisdiction. That is essentially a procedural provision and it could have no relevance to the question of whether in the first instance the debt owing to the plaintiff was a joint debt or a joint and several debt."

7.3 It seems clear that Geoghegan J. was not satisfied that the mere fact that a statute provided that a charge to be levied for a public service could be recovered as a simple contract debt did anything more than provide a procedural mechanism whereby the debt concerned could be sued for in a court of competent jurisdiction. It did not import any of the principles of contract law into the question of whether the debt was due in the first place, let alone turn the relationship between the parties into one of contract rather than one governed by statutory obligation both to provide the service and to pay the charge levied. As pointed out earlier, in *O'Connell* the Supreme Court held that the failure by the householder concerned to pay a charge levied did not, in the absence of a statutory provision permitting same, entitle the relevant local authority to discontinue the service rather than enforce the debt. While

the issue does not appear to have been specifically raised, it, nonetheless, seems to me that the judgment in O'Connell is consistent only with the Supreme Court being of the view that the relationship between the householder concerned and the local authority was grounded in statute and public law rather than in contract. If there were to have been a contractual relationship between the parties then there could be little doubt but that the service provider could, at least after persistent breach, refuse to continue to provide the service when it was not paid for.

7.4 Such authority as there is, therefore, in my view supports the proposition that the relationship between a householder receiving a service under the legislation to which I have referred and the local authority providing that service, is, *prima facie*, to be governed by statute and public law rather than by contract. That view is reinforced by the analysis of the legislation itself which I have already conducted. In the absence of clear documentation which established the intention of the local authority concerned to bind itself by contractual relations with the householder concerned, I would not, therefore, be prepared to hold that any contract could be said to exist for the provision of such services. There is, in my view, no documentation in this case from which an intention to create contractual relations could reasonably be inferred. In all those circumstances I am satisfied that there was, in fact, no contract in being between Cork City Council and Ms. Rosborough. It follows that I should answer the question raised by the learned District Judge in the case stated to the effect that the learned District Justice was wrong in concluding that there was a contract between the parties.

7.5 In stating that position I should emphasise that nothing in this judgment should be taken as commenting in any way on whether there might, or might not, be any basis in public law for asserting that householders, such as Ms. Rosborough, might have a maintainable claim in public law against Cork City Council for the manner in which waste services were provided for 2006 against the background of the way in which charges were levied. The importance of the decision to the effect that the relationship between the parties is governed by statute and public law rather than contract is that the principles by reference to which the actions of the parties needs to be judged are different dependant on that answer. Equally any entitlements arising under statute or public law can only be determined in appropriate judicial review proceedings.

7.6 Any entitlements that might arise are, therefore, outside the scope of the claim maintained in these proceedings. I have emphasised the important differences between the operation of public law and contract law for a number of reasons, but these include the need to emphasise the fact that any claim which Ms. Rosborough, and those in her position, may be entitled to pursue, cannot be brought, procedurally, in the way in which this claim could be brought. If properly based on contract, then, of course, the claim was brought in an entirely correct way. I have, however, come to the view that the claim could not properly be based in contract. The only way in which issues such as those which, in general terms, Ms. Rosborough wishes to raise, could form the basis of properly constituted proceedings would be by maintaining appropriate judicial review proceedings in this Court. I fully understand that, having regard to the amount of money involved, any such proceedings might not be considered to be worthwhile from the perspective of someone in Ms. Rosborough's position. However, for the reasons which I have sought to analyse, the difference between relations governed by contract on the one hand and statute and public law on the other hand are more than merely procedural. They affect the basis upon which the court must review the actions of parties involved.

7.7 Lest I be wrong in the basic finding which I have just set out there are some additional issues which I should deal with.

## **8. The Additional Issues**

8.1 The second issue which was raised before the learned District Judge concerned the question of whether, even if there was found to be a contract between the parties, it could be said that there was an implied term in such contract to the effect that the frequency of service in the shape of wheelee bin collections would not alter during the currency of the year in respect of which the charge had been levied. Two subsidiary questions arise. The first as is to whether it would be appropriate, as a matter of contract law, to imply such a term in the first place. The second is as to whether, even if it were appropriate in general terms, as a matter of contract law, to imply such a term, any such term could be implied in the circumstances of this case because so to do would, it is said, involve the fettering of a statutory discretion.

8.2 So far as the first issue is concerned Cork City Council drew attention to a number of recent decisions of the Supreme Court which analysed the circumstances in which the Courts would imply a contractual term. See *Sweeney v. Duggan* [1997] 2 I.R. 531, *Carna Foods Limited v. Eagle Star Insurance Company (Ireland) Limited* [1997] 2 I.R. 193 and *Sullivan v. Southern Health Board* [1997] 3 I.R. 123. In general terms those cases are authority for the proposition that the Courts will imply a term into contract where such a term could be inferred on the basis of the presumed intention of the parties or where the suggested term derived from the nature of the contract itself and was necessary as well as reasonable, provided always that a term cannot be implied if it is inconsistent with the express wording of the contract or if it would be difficult to formulate an appropriate term with reasonable precision.

8.3 On that basis it said that, in the absence of the parties having agreed any particular level of frequency of collection, the Court should not draft a term providing that the frequency was to remain as it had been in 2005. It is clear that there had been a number of alterations in the way in which waste was collected by Cork City Council over the number of years leading up to the year in question i.e. 2006. On that basis it does not seem to me that the parties must be presumed to have had an intention that there might not be at least some further changes and I am not, therefore, satisfied that, even if the relationship between the parties were properly to be regarded as governed by contract, it would be appropriate to imply a term requiring continuance of the precise type of service that had, immediately prior to 2006, been available.

8.4 On the other hand it does seem to me that some term concerning the level of service could properly be said to be derived from the nature of the contract itself and would be necessary and reasonable. It could hardly be said, for example, that a single collection, once in the year, would have met a contractual obligation if the relationship between the parties were properly held to be grounded in contract. It seems to me, therefore, that had I been satisfied that a contract existed, some term as to the level of service would properly be said to be derived from the nature of the contract itself and would be necessary and reasonable. While not, therefore, satisfied that a hypothetical contract, such as might have existed between the parties to this case, would have had an implied term to the effect that the precise level of service enjoyed in 2005 would continue, I am satisfied that had such a contract existed it would have been appropriate to imply into the contract a term that a level of service which was reasonable in all the circumstances would have been required to be provided. In that eventuality it would have been up to the learned District Judge to assess the level of service that could be regarded as reasonable in all the circumstances, but in so doing it would have been necessary for the learned District Judge to take into account the fact that householders, such as Ms. Rosborough, appeared to have been able to have all of their waste, which was required to go through the wheelee bin system, collected notwithstanding that such collections were only on a fortnightly basis.

8.5 As a fall back position, Cork City Council argued that, even if the relationship between the parties were to be governed by contract, any such contract could not have prevented Cork City Council from embarking upon a revised waste collection system, for

so to do would fetter Cork City Council's entitlement to exercise an appropriate and informed discretion as to how to carry out its statutory functions under s. 33(1) of the 1996 Act. On that basis it was argued that no term could be implied which would prevent the exercise of such discretion.

8.6 In that regard reliance is placed on a passage from the judgment of Costello J., in *Gilheaney v. Revenue Commissioners* [1998] 4 I.R. 150, in the following terms at p. 165:-

"It is a long established principle of administrative law that a public authority cannot by contract disable itself from exercising a discretionary power conferred on it by the legislature."

Following a reference to the leading case of *Ayr Harbour Trustees v. Oswald* (1883) 8 App Case 633, Costello J. continued:-

"Furthermore, a great many of the conditions which would normally be included in a contract relating to an office in the public service (e.g. those relating to retirement, suspension and discipline) are already regulated by the Act of 1956.

I must conclude therefore that in the absence of a clear intention to enter into the very restricted type of agreement which the law would permit him to enter into the minister in making the applicant's appointment to the civil service had no intention of entering into a contractual relationship with him, and that the legal basis for his appointment is an administrative act made by the exercise of statutory powers."

8.7 There is no doubt that a statutory body cannot fetter its discretionary powers by contract. However, it does not seem to me to follow that, where a statutory body properly chooses to exercise its statutory functions by entering into contracts with third parties, it necessarily follows that the statutory body concerned must be taken to have an entitlement to unilaterally vary the terms of the contract. Indeed I came to the opposite view in *Irish Pharmaceutical Union*. A simple example from the very statutory regime within which this litigation is conducted will suffice. A local authority might choose to exercise the discretion conferred on it by s. 33 to employ a contractor to collect waste. If the local authority concerned decided, during the currency of the relevant contract, that it did not need to carry out its statutory function in as intensive a way as heretofore, would it be any answer to a claim by the contractor for the local authority to say that it was exercising its statutory function to vary the service provided to householders, and thus reduce the service required to be provided by the contractor. It might be that an argument could be raised as to whether, by entering into a very long term contract, a local authority was exceeding its powers by fettering its discretion as to how it would carry out its functions. However, it would seem unlikely that, in practice, a local authority would be able to exercise the discretion conferred on it by s. 33, to contract out waste collection services, unless it were prepared to commit to at least some minimum period for the contract to last, or alternatively a minimum notice period. In those circumstances it could hardly be said that there was necessarily implied into the contract an entitlement on the part of the local authority concerned to vary the contract, by reducing the services to be purchased, simply because such a term was required in order to retain the local authorities statutory discretion.

8.8 Likewise, I am not satisfied that, if there were a contract in being in this case, it would necessarily involve an implied term that the local authority would be entitled to vary the services required to be provided to householders, at least during the currency of the relevant calendar year. It would not seem to me that it would amount to a significant impingement on the discretion of a local authority which, after all, has chosen to fix its charge on a calendar year basis, to require that that local authority continue to provide the same level of service for one calendar year (or to recalculate the charges and provide an abatement in the event that a change is required). If, therefore, I had been satisfied that there was a contract in being between the parties, which provided for a particular level of service at a particular charge, then I would agree with the view expressed by the learned District Judge, that there was no principle which would have prevented such a contract from continuing in existence without unilateral variation being available to the local authority. It might well be that a contract which bound a local authority to provide a particular level of service for a very prolonged period might offend against the principle that a local authority cannot fetter its discretion as to how it carries out its statutory functions. However, in circumstances where a local authority can and does give effect to its statutory obligations by entering into contracts with third parties, it does not seem to me that requiring a local authority to continue within the parameters specified in such a contract for a reasonable and short period of time could be said to amount to an interference with its statutory discretion. If, therefore, properly construed, a contract was held to involve an agreement on the part of the local authority concerned to provide a particular level of service for a period such as one year then there would not, in my view, be any legal reason why such a contract could not be enforceable.

## **9. The amount awarded**

9.1 The final, and admittedly most minor, point raised by Cork City Council concerned the manner in which the learned District Judge proceeded to calculate the damages to be awarded. The calculation itself is not in contest. The sum awarded was calculated by taking half of the standard charge for the portion of the year subsequent to the change in collection frequency. Taking half the charge was based on the fact that the frequency of wheelie bin collections was, itself, halved. It is accepted that that calculation was correctly carried out by the learned District Judge. It is, however, to the principle behind that method of calculation that the argument raised on behalf of Cork City Council is directed.

9.2 In the light of the facts as found by the learned District Judge (to the effect that Ms. Rosborough did not, in fact, have to avail of any other services for waste collection) it is said that it is inappropriate to measure the damages in that way. The argument is put on the following basis.

9.3 It is said that Cork City Council did, in fact, collect all of the waste which was required to be collected from Ms. Rosborough's house. It is clear that it was unnecessary for Ms. Rosborough to expend any money in arranging for alternative collection services to replace those which were discontinued (in part) by the actions of Cork City Council. In those circumstances the only loss is said to be that attributable to the additional inconvenience which the learned District Judge found Ms. Rosborough would have suffered by virtue of the fact that waste had to be collected in her house for two weeks rather than be emptied on a weekly basis. While there would, undoubtedly, have been some inconvenience attributable to such an eventuality, I agree with counsel for Cork City Council that it could not amount to half of the cost of the service.

9.4 In truth if there had been a contract, its real basis could only be that all relevant refuse would be collected on a timely or reasonable basis. That, in fact, occurred. The only way in which it might be said that there was failure to comply with such a contract is the suggestion that collections were not as frequent as they might have been. If I had, therefore, been satisfied that there was a contract and if I had been satisfied that the contract contained a term requiring weekly collections, I would have been minded to answer the question concerning the quantum of damages to the effect that the method adopted for calculating same was incorrect and that the learned District Judge should make an estimate of the value of the inconvenience caused by virtue of a wheelie bin being more full than it would otherwise have been during the second week of each two week cycle, together with any inconvenience that might be attributable to the fact that slightly older waste would have been present during that second week. It is

difficult to see how any such damages could approach the sum awarded by the learned District Judge.

## **10. Costs**

10.1 It is, finally, necessary to deal with costs. At the close of the hearing counsel for Ms. Rosborough suggested that I should award costs to her, irrespective of the result. I cannot agree. Whatever might be the position in relation to a party who fully participated in a case stated such as this, I can see no basis for awarding costs in favour of a party who, in substance lost, and who did not participate in the substantive hearing. There will, therefore, be no order as to costs as Cork City Council have not sought costs.