



- [4] Atlas requests an award of prejudgment interest at the average rate from the commencement of proceedings to the release of the Reasons for Judgment, which is 1.8%.
- [5] Harvie opposes this relief and submits that the court should use the presumptive rate of interest of 0.8%, because the mild fluctuation in interest rates within the applicable period does not warrant deviation from the prescribed rate.
- [6] The authority to allow prejudgment interest at a higher or lower rate than prescribed by s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended (the “CJA”) is found in s. 130 (1)(a). Where it considers just to do so, the court may set a different rate, taking into the following factors set out in s. 130(2):
- (a) changes in market interest rates;
  - (b) the circumstances of the case;
  - (c) the fact that an advance payment was made;
  - (d) the circumstances of medical disclosure by the plaintiff;
  - (e) the amount claimed and the amount recovered in the proceeding;
  - (f) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding; and
  - (g) any other relevant consideration.
- [7] The onus is on Atlas to justify departing from the rate prescribed by s. 128. Atlas’ submissions focus on the first factor, the changes in market interest rates.
- [8] The principles that govern this decision are set out in *Graham v. Rourke*, [1990] O.J. No. 2314 (C.A.). With respect to the issue of changing interest rates after the date the proceeding began, the Court held that fluctuations in the rates is only one factor to be considered, and its significance will depend in large measure on the extent of the fluctuation (paras. 15-16).
- [9] In *Graham* the trial judge had fixed the prejudgment interest at 12%, which was what the plaintiff was *prima facie* entitled to when notice of the claim was given. The rates fluctuated between 9% and 13% prior to judgment. That fluctuation resulted in a difference of 1.15% between the presumptive rate of 12% and the average rate of 10.85%. The Court of Appeal referred to this as “relatively mild fluctuation” and stated that “a four point fluctuation in pre-judgment interest rates which results in only a 1.15 percent deviation between the statutory rate and the averaged rate is not a substantial one in the circumstances of this case” (at para. 17). The Court held that the trial judge did not err in exercising his discretion to not depart from the definition of prejudgment interest rate in the *CJA* given the small difference in the two possible rates.

- [10] Each counsel has provided cases that support their position. Atlas relies on cases in which the average rate has been applied: *Apotex Inc. v. Nordian (Canada) Inc.*, 2018 ONSC 2195, [2018] O.J., No. 2218; *Duff v. Gensys Laboratories Canada Inc.*, 2016 ONSC 1168, [2016] O.J. No. 1311; and *DC Electric Ltd. v. Brauer*, [2009] O.J. No. 2022. In addition to *Graham*, Harvie relies on cases in which there was no deviation from the presumptive rate: *Monarch Construction Ltd. v. Axidata Inc.*, [2008] O.J. No. 1206 (S.C.); and *Flammia v. Royal Glen Eagle*, 2015 ONSC 1465, [2015] O.J. No. 1110.
- [11] In this case, even though the interest rate had jumped to 5.3% in the first quarter of 2024 when this case was decided, there was a stabilization of low interest rates following the first quarter of 2016 that never rose above 2% until the last quarter of 2022. As Harvie's counsel have outlined in their submissions, for 27 out of the 33 quarters the prejudgment interest rate ranged from 0.5% to 2.0%, a range of only 1.5%. During that time, the average prejudgment interest rate was 1.13%, which is only 0.33% greater than the presumptive rate of 0.8%.
- [12] The difference between the average rate of 1.8% and the rate prescribed by s. 128 of the *CJA* is only 1%. I do not consider this difference to be significant enough to warrant departing from the presumptive rate.
- [13] As earlier stated, Atlas did not submit that any the other considerations in s. 130(2) were relevant to this decision, such as the amount claimed and recovered, or the conduct of any party that tended to shorten or lengthen the proceeding. While I have turned my mind to these and any other factor that may impact on this decision, none create a reason to increase the rate from 0.8%.
- [14] Accordingly, this court orders that the applicable prejudgment interest rate is 0.8%.
- [15] Costs of this action have yet to be decided, unless counsel have reached an agreement.
- [16] Should a timetable for written submissions be required, I direct that Atlas' submissions shall be submitted within 15 days of release of these supplementary reasons, Harvie's submissions within 15 days after being served with Atlas' submissions, and any reply by Atlas to be submitted within 5 days after being served with Harvie's submissions. This timetable may be amended by mutual agreement between counsel, with notification to the court. All submissions are to be filed through the Civil JSO portal, as well as a copy being delivered directly to my judicial assistant at the email from which this decision will have been sent.

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Madam Justice S.E. Healey