

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 04761

DANIELLE BOPPING

First Plaintiff

- and -

MICHELLE LOUISE PEDERSEN

Second Plaintiff

- v -

MONASH IVF PTY LTD (ACN 006 942 990)  
& ORS (according to the attached Schedule)

Defendants

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JUDGE: WATSON J  
WHERE HELD: Melbourne  
DATE OF HEARING: 12 and 18 December 2024  
DATE OF JUDGMENT: 24 January 2025  
CASE MAY BE CITED AS: Bopping & Anor v Monash IVF Pty Ltd & Ors (No 2)  
MEDIUM NEUTRAL CITATION: [2025] VSC 8

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PRACTICE AND PROCEDURE – Applications by unregistered group members for leave to participate in the settlement – Discussion of relevant principles – Assessment of late registration applications.

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr T Tobin SC with Ms C Nicholson	Margalit Injury Lawyers
For the Defendant	Ms L Barrett	Colin Biggers & Paisley Lawyers



HIS HONOUR:

1 On 19 December 2024 I approved the settlement of this proceeding pursuant to s 33V of the *Supreme Court Act 1986 (Vic)* ('the Act'). I also made a range of orders relating to the distribution of the settlement sum. In my judgment I noted that 171 applications had been filed by persons seeking late registration to participate in the settlement. I was able to approve the settlement without determining those late registration applications because I was satisfied that even if all 171 applications were granted, the settlement sum would remain a fair and reasonable compromise of the group members' claims.

2 In fact there are 174 late registration applications. In two instances an application filed on behalf of a patient and their spouse had been counted as a single application and in one instance the application was not included in the spreadsheet of applications provided by the solicitors for the plaintiffs because it had come late. These reasons deal with the 174 late registration applications.

#### **Opt out and registration notice**

3 On 20 December 2022 Justice John Dixon made orders ('the opt out and registration orders') fixing 3 March 2023 as the date by which:

- (a) A group member could opt out of the proceeding; and
- (b) Subject to any further order of the Court, a group member who wished to participate from the proceeds of any settlement of this proceeding that was agreed between the parties before the commencement of the initial trial of this proceeding must register by doing so in the manner set out in the orders.

4 Those orders provided for the distribution of a notice ('the opt out and registration notice') which advised group members of three options:

- (a) The option to opt out;
- (b) The option to remain a group member and register their claim for the purpose of participating in any judgment or settlement; or



(c) The option of remaining a group member but not registering, in which case the group member would not, without leave of the Court, be entitled to seek any benefit pursuant to any settlement of the proceeding agreed between the parties before the commencement of the trial of the initial proceeding.

5 The opt out and registration orders provided for distribution by email (or in the event of email delivery failure by pre-paid ordinary post) to all potential group members at the last known email or postal address (as the case may be) known to the defendants. The orders provided that the opt out and registration notice was to be distributed on 4 January 2023. I will refer to the period between 4 January 2023 and 3 March 2023 (inclusive) as the registration period.

6 In compliance with the opt out and registration orders the opt out and registration notice was distributed and 696 people registered their claims in accordance with the orders.

7 After 3 March 2023 a further 30 people who had not filed a registration form by 3 March 2023 contacted the plaintiffs' lawyers, Margalit Injury Lawyers ('Margalit') and expressed a desire to become registered group members. On 28 November 2023 Keogh J made orders by consent that those 30 people become registered group members.

### **The settlement notice**

8 On 26 September 2024 the Court made orders for the distribution of a notice of proposed settlement ('settlement notice') by email (and failing email delivery by pre-paid ordinary post) to group members. The orders required the settlement notice to be distributed by 17 October 2024 and the evidence establishes that it was.

9 The 26 September 2024 orders provided that any unregistered group member or former group member (being someone who had been a group member but who had opted out) who sought leave to participate in the settlement should file their application for leave to participate and any affidavits or submissions in support by 28 November 2024.



10 The settlement notice advised unregistered group members and former group members of their right to make an application for late participation in the settlement and provided a form by which they could do so. The settlement notice stated:

You should include in your application:

- an affidavit in support of your application, including any evidence on which you rely; and
- a written submission for the Court setting out why you should be granted permission to participate in the Proposed Settlement.

You may also attend Court on 12 December 2024 to argue your application.

### **Relevant principles**

11 The decision of Matthews J in *Andrianakis v Uber Technologies Inc & Ors*<sup>1</sup> ('*Andrianakis*') helpfully sets out the relevant principles which apply in circumstances where:

- (a) a court has set a deadline for registration for the purposes of participation in a settlement;
- (b) the matter settles; and
- (c) persons who failed to register by the court imposed deadline, make application after the matter has settled in principle to be registered for the purposes of participation in the settlement:

The Class Closure Orders have effect unless the Court otherwise orders. I must determine whether I ought to permit a UGM [unregistered group member] to participate in the settlement pursuant to my discretion under s 33ZF of the Act. In exercising that power, I have a protective role in respect of group members as a whole, and primary consideration must be given to group members. Section 33ZF empowers the Court to make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding. Accordingly, in making my decision, I must be satisfied that it is appropriate or necessary to ensure that justice is done in the proceeding to permit the UGM to participate, or I will decline to order their participation. In doing so, I must be astute to protect the best interests of all group members.

It is self-evident that a group member will suffer prejudice if they are to be bound by the settlement but not able to partake because of the operation of the Class Closure Orders. However, mere prejudice is not enough. The potential for this prejudice was already considered by the Court in the making of the Class Closure Orders and balanced against the 'desirable ends of settlement' to

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<sup>1</sup> [2024] VSC 733.



be facilitated by the greater certainty about the size of the class and quantum obtained as a result of those orders.

In order to be permitted to participate in the proposed settlement, the UGM must sufficiently demonstrate unfair prejudice to them in the operation of the Class Closure Orders, so that I am satisfied that it would be unjust to exclude the UGM from participating in the settlement. This is a high threshold for the UGM to reach.<sup>2</sup>

12 In addition to those broad statements of principle, *Andrianakis* helpfully identifies a range of other matters which are relevant to the disposition of the late registration applications in this matter:

- (a) it may be unjust to exclude a group member from participating in the settlement in circumstances where they have provided persuasive evidence that they did not receive the opt-out and registration notice;<sup>3</sup>
- (b) a relevant factor in the assessment of late registration applications is that the grant of leave for group members to participate in the settlement will dilute the settlement sum available to those persons who registered on time;<sup>4</sup>
- (c) in assessing the reasons and evidence provided by group members in support of their applications, regard should be had to the characteristics of the class and to the Court's protective jurisdiction;<sup>5</sup>
- (d) it may be appropriate to determine some late registration applications by category, whereas others may need to be reviewed individually;<sup>6</sup> and
- (e) where a late registration applicant has provided no reason in support of their application, this will be insufficient for leave to be granted. A bare statement of group membership is an insufficient basis for leave to be granted.<sup>7</sup>

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<sup>2</sup> Ibid, [61]-[63].

<sup>3</sup> Ibid, [65].

<sup>4</sup> Ibid, [67].

<sup>5</sup> Ibid, [71].

<sup>6</sup> Ibid, [73].

<sup>7</sup> Ibid, [99].



13 Those principles need to be applied in the particular context of this proceeding. There are three critical differences between the context of this proceeding and the circumstances of *Andrianakis*:

- (a) First, in *Andrianakis*, there were 5,722 late registration applications, here there are 174;
- (b) Whilst the acceptance of late registration applications will inevitably dilute the amount registered group members receive from the settlement, that factor is of less significance in the present circumstances. Put another way, there is less prejudice to registered group members from dilution in this case. Registered group members will receive more than 100 per cent of their assessed losses if no late registration applications were accepted; and
- (c) The inherent characteristics of the group make more likely the assertion that an unregistered group member was overwhelmed, unable to cope or unable to deal with matters related to their in vitro fertilisation ('IVF') treatment in the registration period.

14 I have granted leave for a further 61 group members to participate in the settlement. The 726 existing registered group members' claims were estimated as totalling approximately \$35 million without exemplary damages and approximately \$38.525 million with an allowance of \$5,000 per group member for exemplary damages. For present purposes I assume the 61 group members whose applications for late registration I have granted are entitled to approximately the same average compensation as the previously registered group members. Following the acceptance of these 61 late registration applications, total registered group member losses are estimated as being approximately \$38 million. That is, group members participating in the settlement are estimated to receive 100% of their losses excluding exemplary damages, but the allowance for exemplary damages will reduce to approximately \$2,600 per group member. In the circumstances I am satisfied that the prejudice to existing registered group members from the dilution of their compensation by reason



of the granting of the 61 late registration applications is not significant.

15 It is appropriate to say something of the general approach I have taken to the affidavits and submissions of the late registration applicants.

16 Where an applicant for late registration has asserted in a general way that they were unaware of the class action or that they did not receive the opt out and registration notice but the evidence establishes that they were sent an email and there was no delivery failure message, then I would not grant leave for late registration unless there is an explanation as to why they would not have received the opt out and registration notice.

17 I would not grant leave for late registration where an applicant has made a considered decision not to register because, for example:

- (a) they were grateful to Monash IVF; or
- (b) they thought, in light of their ongoing contact with Monash IVF, it was better not to register,

unless they can provide evidence that their decision-making at the time was compromised for some reason, or that there is some other basis on which that considered decision can properly be disregarded. In some instances though, applicants have provided evidence showing that their decision-making was compromised. In those instances, I have granted leave.

18 Where an applicant says that, at the time of the registration period, they were 'overwhelmed' by life circumstances and were therefore unable to deal with the opt out and registration notice then, depending on the nature of the explanation, I have sometimes granted leave. However, a generalised description of being overwhelmed is insufficient for leave to be granted, as is an unspecified reference to mental health issues or psychological problems. On the other hand, for example, where an applicant has provided evidence of having had a number of failed IVF cycles together with a number of miscarriages and says that during the registration period they were in the





midst of a difficult pregnancy and so were focussed on the pregnancy rather than the opt out and registration notice, I would generally grant leave. There are, of course, many circumstances which do not fall into those two categories. Where there is sufficient evidence of life circumstances which provide a reasonable excuse for a failure to register, I have granted leave for late registration.

19 In some instances the plaintiffs said I should reject an explanation given for a failure to register because '[t]he applicant's reason is within the normal range of experiences of the [registered group members] or ordinary life stressors'. I am not satisfied that I can apply such an approach. The critical question is whether the applicant has provided an adequate explanation for their failure to register and some applicants will plainly be 'overwhelmed' in circumstances where others are not. In particular the reference to the normal range of experiences of the registered group members as the basis for determining whether group members have a sufficient reason for failing to register is, in my view, misplaced. The nature of this group is that many will have had multiple unsuccessful cycles of IVF, a significant proportion will have had one or more miscarriages and it is apparent that quite a number have received psychological or psychiatric treatment arising out of those experiences. The fact that many group members with similar experiences were able to register does not provide a basis to conclude that a particular applicant does not have a reasonable excuse for their failure to register.

20 That said, there does have to be some evidence of the applicant explaining the failure to register and it is also the case that not every difficult or unpleasant life event will provide a reasonable excuse for failing to register.

21 The plaintiffs in a number of instances said I should reject an application for late registration because the applicant had not provided evidence to corroborate assertions in their affidavits. Applicants were not advised to provide corroborative evidence in the opt out and registration notice. Their affidavit evidence is evidence. Where it is inherently improbable or contrary to other evidence, I do not have to accept it but it would not be appropriate to reject the affidavit evidence merely because corroborating





documents have not been provided. Of course, even if I accept the affidavit evidence provided by an applicant, it may not demonstrate a basis for upholding the application – it may describe circumstances without reference to the registration period or it may describe events in the registration period which do not provide a reasonable excuse for the failure to register.

### **Summary disposition**

- 22 Tanya Wojcik made a late registration application, but was already a registered group member. Her late registration application is therefore unnecessary and may be dismissed.
- 23 Emma and Jonathan Ramke made late registration applications, but on the available evidence are not eligible for group membership and so their applications may also be dismissed.
- 24 Four group members, being Priyani Daluwatte and her husband, Mewan Dissanayake and Fiona Mackay and John Mackay withdrew their applications for late registration. The Mackays’ withdrawal notification was sent by their solicitor on 11 December 2024. On 12 December 2024 Mr Mackay then sent an email to Margalit where he asked them to reconsider their decision (although accepting it is ‘legally correct’). I have considered that email and am satisfied that the basis upon which Mr Mackay asks Margalit to reconsider would not establish unfair prejudice on the part of the Mackays. I will act on the basis that their applications for late registration are withdrawn.
- 25 The following persons provided no reason for their failure to register in accordance with the registration and opt out orders. Their applications for late registration should be dismissed.

Angel, Conor  
Athihe, Sandra  
Bambrick, Lauren  
Beddow, Davielle  
Buzzi, Maryanne  
Coma, Maria  
Comb, Linda  
Cook, Catherine

Irons, Kristy  
Jelbart, Patricia  
Kaur, Rajneet  
Leonard, Suzanne  
Lowe, Kirryn  
Mead, Nathan  
Medrana, Don  
Niproski, Douglas

Roberts, Katherine  
Shoaib, Zoeyrua  
Steel, Nicole  
Sutharshan, Gowthami  
Tait, Aaron  
Tait, Kaitlin  
Taylor, Justin  
Taylor, Natalia



David, Florina  
Dhar, Sanjay  
Diaz, Epifania  
Diaz, Michael  
Douglas, Catherine  
Harley, Sarah

O'Brien, Rosemary  
Pantano, Carla  
Paterson, Sophie  
Phuong, Thi  
Pitts, Irene  
Ranhotra, Mandeep

Valshteyn, Elena  
Van Der Weerden, Majella  
Warren, Matthew  
Williams, Lisabeth  
Wing, Chan

26 The plaintiffs accept that a number of the late registration applicants have demonstrated a sufficient reason for their application to be granted. In light of the consent of the plaintiffs to that position, I will grant those applications. The following persons fall into that category: Lauren Byrne, Maryam Fahad, Kathryn Ford, Ivana Harjac, Steven Harjac, Maria John, Carmen Lobsey, Emma McCormack, Sally Morris and Rebecca Penrose.

#### **Affidavit and oral submissions**

27 A number of late registration applicants supplemented their affidavit material with oral submissions on 12 or 18 December 2024.

28 In a number of instances, having been apprised of the plaintiffs' reasons for not supporting their application for late registration, the late registrants sought to file and serve further affidavit material in support of their application. The plaintiffs objected to the tender of any further affidavit material on the applications. They said that the notice had made clear that applicants needed to provide affidavit material in support of their application and if that material was inadequate, the application should be dealt with on that basis.

29 I will admit the further materials. As a matter of fairness, where those materials are provided in response to the plaintiffs' submissions as to why a person should not succeed in their late registration application that evidentiary material should be admitted. I emphasise that this is not a *carte blanche* ruling that any late registration applicant may now seek to file further material. Late registration applicants who did not seek to avail themselves of the opportunity to make oral submissions and who have not sought to file further affidavit materials will have their applications determined in these reasons on the basis of materials currently before the Court.



30 Ms Patricia Bassett says that during the registration period there were a number of matters going on in her life which significantly impacted her ability to consider or address the matters raised in the notice. Those matters include significant medical issues associated with her son, interactions with NDIS in relation to support for her son, preparation for a further IVF cycle in or around January 2023 and emotional distress related to the 10 year anniversary of her mother's passing. Ms Bassett provided evidence of a medical diagnosis on 23 March 2023 demonstrating satisfaction of the DSM5 criteria for adjustment disorder with depressed mood. The report on that date concluded:

The symptoms are clinically significant - causing distress and impairment in functioning.

In the circumstances I am satisfied that Ms Bassett has provided an adequate explanation for her failure to register by the deadline. Her application for late registration should be accepted.

31 Ms Anneliese Powell says that during the registration period she was having difficulty coping with day-to-day issues. She provides evidence that she was seeing a psychologist in 2022 and that in June 2023 she was diagnosed with a major depressive disorder. She says that she believes she was suffering these symptoms during the registration period. In addition, Ms Powell says that during the registration period she was dealing with the immediate impacts of her father's diagnosis with dementia in or around the end of 2022.

32 Ms Powell says that she received the notice but did not take it seriously because she was not sure whether the email was legitimate or spam. If this was her sole reason for failing to register I would not regard it as sufficient. However, in light of the evidence regarding Ms Powell's mental state during the registration period I am prepared to accept that her decision-making in that period may have been compromised and, in the circumstances, accede to her application for late registration.

33 Laura Kelly initially gave evidence that in the registration period she was pregnant. In a supplementary affidavit she corrected this evidence (in response to submissions



of the plaintiff) and accepted that her pregnancy was in January 2024 not January 2023. Her supplementary affidavit reveals that she and her husband discussed the opt out and registration notice and made a considered decision not to register. In the circumstances Ms Kelly's late registration application should be dismissed.

34 Ms Victoria Coster did not provide an affidavit in support of her application but she did make oral submissions to the effect that during the registration period she was receiving treatment for psychological injury and that she had been told to stay away from 'triggering things'. She also gave submissions regarding the medication she was taking during the registration period. Notwithstanding the absence of an affidavit I accept Ms Coster's submission that during the registration period her psychological condition meant she was unable to deal with the registration notice. In the circumstances her application for late registration should be granted.

35 Ms Renee Wilson notes that during the registration period she was pregnant with twins with what had been described to her as a high risk pregnancy.

36 She deposes to a consultation on 6 January 2023 where the consultation notes record that she had experienced episodes of elevated heart rate. She further deposes to a consultation on 24 January 2023 where she was experiencing heart palpitations and shortness of breath. Results of her blood tests indicated she had an iron deficiency. Further on 22 February 2023 Ms Wilson attended the Royal Women's Hospital Emergency Department in relation to decreased foetal movement. In the midst of these events Ms Wilson and her husband moved house.

37 The plaintiffs oppose Ms Wilson's application. They say that there is no evidence that during the registration period she was suffering a psychological or psychiatric condition and they say that the fact that she and her husband moved house is an indicator of a capacity to function during the registration period. I do not accept these submissions. It is not the case that an applicant for late registration has to show compromised psychological functioning or a treatable psychiatric condition. In my view it is sufficient if they provide an adequately cogent explanation as to their failure



to register, such that it would create substantial prejudice if they were not permitted to participate in the settlement. I am satisfied that Ms Wilson has provided such an explanation.

38 In the circumstances of a stressful pregnancy, the medical appointments attested to during the registration period and the upheaval which is ordinarily associated with moving house, I am satisfied that Ms Wilson has provided a reasonable explanation for her failure to register.

39 The plaintiffs further submitted that I should reject Ms Wilson's application because she is a lawyer and as a lawyer should have appreciated the consequences of a failure to respond to the opt out and registration notice. I agree that ordinarily a lawyer would have considerable difficulty in persuading a court that a late registration application should be granted but I am satisfied that in the particular circumstances of this case to which Ms Wilson has deposed she has a reasonable explanation for her failure to register.

40 Mr Philip Ivanov is Ms Wilson's husband. Essentially his application for late registration relies on the same grounds as hers. Plainly Mr Ivanov was not himself experiencing a high risk pregnancy during the registration period but I accept that he would also have been focused on Ms Wilson and the babies' wellbeing during the registration period.

41 In the circumstances both Ms Wilson's and Mr Ivanov's application for late registration should be granted.

42 Ms Nicole Jensen relevantly deposes as follows:

During this time, David [Ms Jensen's husband, David McLeod] and I were suffering significant hardship:

- (a) David lost a close family member in June 2022 for which he was still grieving with that family member having fought a disease for a number of years;
- (b) In January 2023, I had just returned to work which caused a significant change to our family dynamic;



- (c) In June 2023, David lost another family member who had also been struggling with their health throughout 2023. This again caused much grief;
- (d) In late 2022 and early 2023, my two children were diagnosed with Strabismus causing their eyesight to deteriorate. One of my children required surgery on their eyes;
- (e) Throughout 2023, my health suffered as I was under the treatment of my general practitioner for postnatal nutrient depletion, deficiencies in iron, folate B12 and vitamin D.

Due to the difficulties we were experiencing, we inadvertently did not register being unaware of the Notification and action required date.

43 Mr McLeod essentially provides his evidence in mirror form.

44 Overall, I am not satisfied that Ms Jensen and Mr McLeod have provided a sufficient explanation for their failure to register in accordance with the opt out and registration orders. The loss of a family member in June 2023 can have no bearing on the failure to register. The treatment of the general practitioner referred to in paragraph (e) of the extract above similarly does not provide any cogent basis for the failure to register. I accept that in January 2023 Mr McLeod may still have been grieving for his family member who died in June 2022 and that Ms Wilson's return to work would likely have caused a significant change to family dynamics. However, on balance, I do not regard either of these matters as providing a sufficient explanation for the failure to register. In relation to the diagnosis of the children with strabismus, I note that strabismus is a condition commonly referred to as a 'turned eye'. Whilst the condition can be serious, it would ordinarily be eminently treatable. Ms Jensen does not depose to the timeframe in which her child required surgery.

45 In submissions from the Bar table, it was asserted that Ms Jensen and Mr McLeod had suffered anxiety. No details were provided regarding the timeframe within which that diagnosis was said to have occurred. In the circumstances and on balance, I do not regard Ms Jensen and Mr McLeod as having demonstrated a sufficient reason for their failure to register by the deadline. Their application for late registration should be dismissed.



46 Ms Savana Verman and Mr Natarajan Balasundaram make their application for late registration on the basis that they did not open the email containing the opt out and registration notice or the notice itself because they thought it was a scam. I should note that in their affidavit material, they depose to not having opened the notice because they were concerned following the Medibank data breach, but the affidavit does not suggest that they did not read the email. The plaintiffs submitted that the email made clear that it was sent pursuant to an order of Justice John Dixon and that, at the very least, Mr Balasundaram and Ms Verman should have taken steps to verify whether the email and attachment were real. In response to that submission, Ms Verman and Mr Balasundaram submitted that they had not in fact opened the email. That submission does seem inconsistent with the more narrow description of what occurred in the sworn affidavit material provided by these two applicants.

47 However, accepting for present purposes that they did not read the email, I am not satisfied that these applicants have established an unfair prejudice. I accept that concerns regarding the Medibank data breach may have warranted caution regarding opening an attachment, but I am not satisfied that choosing not to read the email was a reasonable response. Had the covering email been read, these applicants would have been on notice that the email purported to be sent with authority of the Court and could have checked the Court website for its veracity. Their application for late registration is dismissed.

48 Ms Samantha Lawson and her husband Mr Oliver Bladek both say that the notice did not come to their attention because the email was sent to an address which Ms Lawson was not checking during the time as she was on maternity leave. The email was not sent to a work email address but Ms Lawson and Mr Bladek say that because she was on maternity leave Ms Lawson was not checking her private email account during the registration period. In circumstances where Ms Lawson and Mr Bladek have given a cogent explanation as to why the opt out and registration notice did not in fact come to their attention, I am satisfied that their application for late registration should be granted.





49 Olivia and Anthony Lashin make applications for late registration based on the following:

- (a) they went through eight IVF cycles, three pregnancy losses, a high risk pregnancy, a difficult birth culminating in a caesarean section and a difficult post-partum period, amounting to 'three years of hell';
- (b) at the time of the notice they had a seven week old baby and Ms Lashin felt overwhelmed in this period;
- (c) they discussed the opt out and registration notice at length and Ms Lashin felt 'incredibly guilty' for wanting to participate in a class action against Monash IVF when they did in fact assist the Lashins in achieving their goal of completing their family; and
- (d) this guilt led to their inaction in registering.

50 I feel considerable sympathy for Mr and Ms Lashin, but the effect of their evidence is that they made a considered decision albeit in difficult circumstances not to register. In the circumstances their application for late registration should be dismissed.

51 Ms Laura Del Ponte commenced IVF treatment with the defendant in or around July 2014. After various rounds of treatment she was advised in or around January 2022 that it was likely that any further IVF treatments would be unsuccessful. In early 2022, Ms Del Ponte and her husband Mr Robert Del Ponte entered a surrogacy arrangement. That arrangement was approved by the Victorian Patient Review Panel on 16 September 2022.

52 On 13 February 2023, the surrogate underwent an embryo transfer and on 22 February 2023 the Del Pontes were informed that the surrogate was pregnant.

53 The Del Pontes accept that they received the opt out and registration notice but say that at the time they were focussed on the surrogacy process which was complex, time consuming and emotionally draining' and involved multiple sessions with a



counsellor and psychologist. On this basis they say they did not give proper consideration to the opt out and registration notice and, as a result, did not register.

54 Based on the material on which the Del Pontes rely, I am satisfied that they have provided a sufficient excuse for their failure to register and that they would suffer a substantial prejudice if they were not permitted to register late. Their late registration application should be granted.

55 Ms Felicity Fowler provides evidence of her IVF treatments commencing on 12 July 2019 through to October 2020. She deposes to receiving psychological treatment commencing in October 2020 and continuing. She says that since 20 January 2021 she has seen a psychologist approximately 37 times, on average about once per month. She says:

It is not the case that every single one of these sessions was dedicated to the emotional, mental and physical impact that the “IVF process” with Monash IVF had on me, but it has, and still does “come up” in sessions as it arises throughout my life.

56 Ms Fowler deposes to having received the opt out and registration notice on 4 January 2023. She says that at the time of receiving the notice she did not feel she had the emotional capacity to revisit the IVF process and as such she and her husband did not respond to the email. The evidence does not establish that the psychological treatment Ms Fowler was receiving was linked with the failure to register. In the circumstances, I am not satisfied that Ms Fowler has provided a sufficient explanation for her failure to register and their application for late registration should be dismissed.

57 Ms Rachel Varley gives evidence that in February and March 2023 she was suffering severe sleep deprivation, stress and depression. Her affidavit material demonstrates treatment for post-natal depression before and after the registration period. Ms Varley deposes to being on various forms of medication for her depression during the registration period. In the circumstances, I am satisfied that Ms Varley was overwhelmed by other events during the registration period and has provided a reasonable explanation for her failure to register. Her application for late registration should be accepted.



58 Ms Hannah Thomas deposes to not having seen a copy of the opt out and registration notice. She deposes to the belief that it was sent to a former postal address where she no longer resided. She says that she only became aware of the notice because her former partner advised that it had been received and that he advised her he had completed the paperwork and, as a result, she believed she was a registered group member. Ms Thomas' former partner is a group member and so it can be inferred that he did complete a registration on his own behalf but Ms Thomas is not. The plaintiffs oppose Ms Thomas' application on the basis that their records indicate the notice was sent to an email address with no delivery failure notice received. In the circumstances, I am prepared to accept Ms Thomas' explanation that she thought her former husband had completed paperwork on her behalf. Ms Thomas' application for late registration should be granted.

59 Ms Deepthi Vallabhaneni provides evidence that in February 2023 she underwent her third transfer procedure and that during the registration period she was focused on the upcoming transfer procedure. Ms Vallabhaneni asserts without elaboration or explanation that she did not have the emotional or mental capacity at that time to properly understand what was required of her under the notice. I am not satisfied based on the materials provided that Ms Vallabhaneni has demonstrated a lack of capacity to understand what was required of her as part of the notice. I accept that she would have been somewhat focussed on the third transfer procedure. In the circumstances, I am not satisfied that Ms Vallabhaneni has demonstrated a basis on which her late registration application should be granted. Her application is dismissed.

60 Ms Paula Xiberras deposes that on 18 February 2023 she underwent a fourth collection procedure for viable embryos. She says that during the registration period she was focussing on the upcoming collection procedure and did not think she would be eligible to participate in the class action because she had received a goodwill offer from Monash IVF. She says without elaboration or explanation that she did not have the emotional or mental capacity during this period to properly understand what was



required of her as part of that email. I am not satisfied based on the materials provided that Ms Xiberras has demonstrated a lack of capacity to understand what was required of her as part of the email. I accept that Ms Xiberras would have been somewhat focussed on the collection procedure. Insofar as Ms Xiberras decided that she would not be eligible to register because she had received a goodwill offer, she was mistaken, but this evidence indicates a consideration of the notice and a decision not to register. In the circumstances, I am not satisfied that Ms Xiberras has demonstrated a basis on which her late registration application should be granted. Her application is dismissed.

61 Ms Elizabeth Sandiford and Mr Daryl Exton say that they did not receive any 'initial correspondence or invitation to be a party to the Class Action' in 2020. Their affidavit material does not depose to a failure to receive the opt out and registration notice in 2023 and the plaintiffs note that there is no evidence of a delivery failure of the opt out and registration notice in January 2023. In the circumstances, I am not satisfied that the evidence establishes that Ms Sandiford and Mr Exton did not receive the opt out and registration notice and I am not satisfied that they have provided a sufficient explanation as to their failure to register. Their application for late registration is dismissed.

62 Ms Emily Dean states that in January 2023 she had recently separated from her partner and was a single mother to two small children. As part of the separation she was forced to sell the family home at that time and had moved into rental accommodation. In oral submissions it was submitted that at this time there were serious negotiations occurring between Ms Dean and her former husband regarding the custody of her children. Ms Dean said she recalls receiving the initial notice but felt overwhelmed and did not register. In the circumstances, I am satisfied that Ms Dean has provided a sufficient application for her failure to register and that her application for late registration should be granted.

63 Ms Sarah Drew deposes that she did not know how to participate in the class action until she read the settlement notice. Her affidavit does not expressly state that



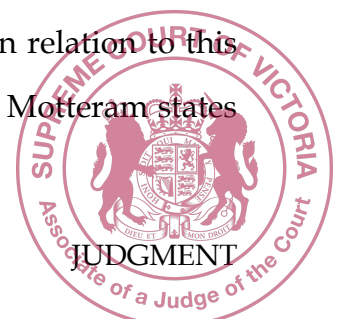
Ms Drew did not receive the opt out and registration notice. The plaintiffs say that the registration notice was sent to an email address which Ms Drew had been using in correspondence with the defendants in 2020 and that there was no delivery failure notice. In all the circumstances, I am not satisfied that Ms Drew has demonstrated that she did not receive the opt out and registration notice and has not provided a satisfactory explanation for her failure to register. In the circumstances, I would dismiss her application for late registration.

64 Ms Krystal Redden made oral submissions on her own behalf. She asked that they be made in the absence of other group members because of their confidential nature. Having heard those submissions there is no reason to treat them as confidential. Ms Redden's submission were to the effect that:

- (a) during the registration period there was a 'horrible stomach bug going through her house'; and
- (b) she and her partner had no knowledge of lawsuits or class actions and could not have afforded a lawyer at the time.

65 In the circumstances, I am not satisfied that Ms Redden has provided a sufficient explanation for her failure to register. I accept that bouts of gastroenteritis might be debilitating but there is no evidence that that situation pertained for the entirety of the registration period. Further, the registration notice specifically stated that group members could contact the plaintiffs' lawyers in order to obtain advice. Ms Redden and her husband did not do so. The application for late registration should be dismissed.

66 Ms Caroline Motteram provided evidence regarding her daughter's diagnosis with biliary atresia, a rare and serious medical condition requiring life-long clinical oversight and management. Ms Motteram gave evidence that in the registration period her daughter was twice admitted to hospital for treatment in relation to this disease, her daughter being around 12 months old at this time. Ms Motteram states that:



Due to the all-consuming focus on my daughter's health, I feel I was not in the right mental state to give the class action the thorough consideration it warranted.

67 In the circumstances, I accept that Ms Motteram has demonstrated serious prejudice if her application for late registration is not accepted. Ms Motteram's application is granted.

68 Mr Riley Eggins attended Court on 12 December 2024 to make oral submissions on behalf of himself and his wife Ms Shelley Eggins. Unfortunately, Mr Eggins had to fly back to Queensland before he could make submissions. He did not make oral submissions on 18 December 2024. In written submissions both Mr and Ms Eggins assert that their decision to opt out of the proceeding was influenced by an oral communication with a representative of one of the defendants who led them to believe that accepting the offer of two frozen embryo transfers excluded them from participating in the legal proceedings. They say they now realise that that advice was wrong and wish to participate in the settlement. The plaintiffs made enquiries of the defendants whether they have any record of such a conversation. The defendants say they have none. In the circumstances, however, it appears that Mr and Ms Eggins opted out on a mistaken basis. In the circumstances, I am prepared to accede to their application to be reinstated as group members and be treated as registered group members.

#### **Balance of late registration applications**

69 The balance of the late registration applications fall to be determined on the basis of the affidavit materials and/or submissions filed.

70 Annexed to these reasons is a table which shows the applicant's name, the basis upon which they have asserted they should be granted leave to register late and a brief description of my reasons for accepting or rejecting that application.



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**CERTIFICATE**

I certify that this, the 20 preceding pages and the 49 pages of the Annexure are a true copy of the reasons for Judgment of the Honourable Justice Watson of the Supreme Court of Victoria delivered on 24 January 2025.

DATED this 24<sup>th</sup> day of January 2025.





## SCHEDULE OF PARTIES

DANIELLE BOPPING	First Plaintiff
MICHELLE LOUISE PEDERSON	Second Plaintiff
- v -	
MONASH IVF PTY LTD (ACN 006 942 990)	First Defendant
ADELAIDE FERTILITY CENTRE PTY LTD trading as Repromed (ACN 116 453 126)	Second Defendant
MONASH IVF GROUP LIMITED (ACN 169 302 309)	Third Defendant
MONASH IVF AUCHENFLOWER PTY LTD (ACN 111 370 891)	Fourth Defendant
PALANTROU PTY LIMITED (ACN 111 795 692)	Fifth Defendant
HOBART IVF PTY LTD (ACN 610 573 889)	Sixth Defendant
COMPASS FERTILITY PTY LTD (ACN 130 793 583)	Seventh Defendant
FERTILITY AUSTRALIA PTY LTD (ACN 117 504 766)	Eighth Defendant

