

NOTICE OF FILING

Details of Filing

Document Lodged:	Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
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File Number:	VID809/2024
File Title:	JONNINE JAYE DIVILLI v HOUSING AUTHORITY & ANOR
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos". The signature is fluid and cursive, with the first letters of "Sia" and "Lagos" being capitalized and prominent.

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



No: VID 809 of 2024 ★

Federal Court of Australia
District Registry: Victoria
Division: General

Jonnine Jaye DIVILLI
Applicant

HOUSING AUTHORITY and others named in the schedule
Respondents

APPLICANT'S SUBMISSIONS ON STRIKE OUT OF PARAGRAPH 20B OF THE DEFENCE

1. The Applicant seeks an order pursuant to Rule 16.21 of the *Federal Court Rules* 2011 (Cth) that paragraph 20B of the Respondents' defence be struck out on the basis that that paragraph is:
 - a. evasive or ambiguous (16.21(1)(c);
 - b. likely to cause embarrassment (16.21(1)(d); and/or
 - c. fails to disclose a reasonable defence (16.21(1)(e).

2. Paragraph 20B is in the following terms:

Further to paragraph 20A herein, the respondents say that to the extent that any damage to the Divilli Premises was caused by Ms Divilli, or the other occupants of the Divilli Premises, or their lawful invitees, then:

20B.1 pursuant to clause 2.4 of the Divilli Tenancy Agreement, and clause 4.4(b) of the HMA (as pleaded in paragraph 5A.11 herein), the Authority (as the deemed lessor for the purposes of the RT Act) is not liable for the costs incurred in repairing such damage;

20B.2 Ms Divilli and Mr Rivers are liable to the Authority for that damage and, to the extent that the Authority is held liable to Ms Divilli or Mr Rivers, the Authority is entitled to a set-off on account of their liability to it.

PARTICULARS

It may be inferred that the damage was caused by Ms Divilli, or the other

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occupants of the Divilli Premises, or their lawful invitees in circumstances where:

- A. There were regular property maintenance inspections of the Divilli Premises;
- B. No-one reported to the police or to the Authority, and it has not been alleged, that any damage to the Divilli Premises had occurred unlawfully.

3. That paragraph is also cross referenced in other parts of the pleading.
4. The Applicant has written to the Respondents on numerous occasions seeking clarification and further particulars of that paragraph. The series of correspondence is contained in the Affidavit of Rory John Walsh in support of the Applicant's strike out application and proposed orders affirmed on 16 September 2025, at paragraphs 37-45.
5. Essentially, her position is as follows:
 - a. Paragraph 20B lacks clarity in that conditional or hypothetical language is used ("to the extent that") but no material facts are pleaded in support of the allegation one way or the other.
 - b. The manner in which the paragraph is put means that Ms Divilli does not know:
 - i. whether any positive allegation is in fact being made against her as to damage being caused by her or other occupants or lawful invitees;
 - ii. if such an allegation is being made - what that damage was, when it was allegedly caused and on what basis it is alleged that the damage was caused by Ms Divilli, other occupants or invitees; and
 - iii. what is alleged in terms of any set-off.
 - c. Ms Divilli cannot therefore fairly respond to any such allegation or even know whether any such response is required, seek relevant discovery or other evidence or meet the allegation at trial;
 - d. The particulars provided to paragraph 20B only obscure the issue. They indicate where the cause of damage will be "inferred" and appear to suggest that such an inference is being made but without providing adequate detail.
6. The Applicant has asked the Respondent whether any positive allegation is made as to whether she, other occupants or invitees are alleged to have caused damage to her home and if so, that proper particulars be provided. The Respondents initially declined to provide further particulars or clarification. Instead, they simply stated that this paragraph "goes to the proper measure of damages". Subsequently, the Respondents indicated that they would provide particulars of costs they have incurred in carrying out works on Ms Divilli's premises which are the subject of any

unresolved tenant liability notice. However, no proposed amended pleading or further particulars have been provided.

7. It is the position of the Applicant that she needs to see a proposed pleading or particulars that address the matters identified in paragraph 5 for the reasons set out below.
8. Any plea of set off must be founded in fact and have a proper basis and those facts ought to be disclosed.
9. Moreover, a plea in set off which relies on an allegation that a person committed property damage, potentially amounting to a crime (see, eg *Criminal Code Act Compilation Act 1913 (WA)* s 445), requires specificity befitting such a serious allegation (see, by analogy, *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198 at [89]).
10. In addition, in order to properly disclose a defence, an Applicant ought not be taken by surprise and must fairly know the case she has to meet. As presently drafted, the pleading is ambiguous and causes embarrassment as it cannot properly be responded to. (See for example *Chandrasekaran v Commonwealth of Australia (No 3)* [2020] FCA 1629 at [105]; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2017] FCAFC 50 at [44]; *Falkenhagen v West (No 3)* [2021] FCA 1176 at [93]-[95]; *EIX20 v Western Australia* [2022] FCA 1357 at [30]-[31].)
11. By analogy, it would be akin to a defence to a negligence claim pleading that “to the extent” that the plaintiff was contributorily negligent, a reduction in damages would apply but without indicating whether such an allegation was in fact made or what conduct was relied on. Such a plea obviously could not stand.
12. The Respondents have been given ample opportunity to clarify their position and provide particulars but have not yet done so. The paragraph should be struck out.

Dated : 16 September 2025

FIONA FORSYTH

HANNAH HOFMANN