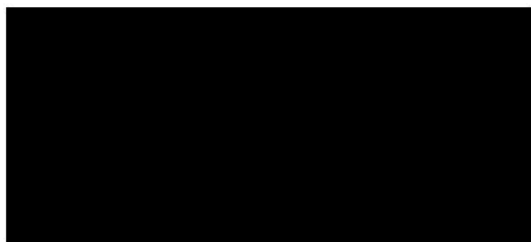




23 November 2020



Thank you for your email of 9 October 2020 to the Ministry of Education requesting the following information:

1. *How much has been spent on lawyers, each year, since the action was first filed in 2013?*

Please separate into:

2. *How much has been paid to Meredith Connell*
3. *How much has been paid to Jim Farmer*
4. *How much has been paid to any other law firm/barrister and name the recipients?*
5. *How much has been paid to expert witnesses in the case?*
6. *Please detail the witnesses name, title and company and how much was paid to them.*
7. *Are any of these costs covered as part of the settlement?*

Can you also provide an update the leaky schools remediation programme:

8. *How many schools are now fixed?*
9. *How many are to go?*
10. *What has the cost been to date?*
11. *What is the current average cost per school?*
12. *What is the estimated cost of what is left to repair?*

Your request has been considered under the Official Information Act 1982 (the Act).

Product Liability Action

Background

The claim against Carter Holt Harvey was launched in 2013. Initially, the claim also included two James Hardie companies and CSR, a lesser known supplier of plywood cladding. The James Hardie companies and CSR settled the claim with the Ministry early on, in late 2013 and early 2014 respectively. Carter Holt did not.

Litigation is not a step that the Ministry takes lightly, but the Ministry is also concerned to ensure that New Zealanders aren't paying for school buildings to be built that do not meet the high standards that schools and communities expect. Accordingly, the action was taken against those that the Ministry believed to be responsible for manufacturing and supplying defective cladding that contributed to the weathertightness issues in school buildings nationwide and as part of the wider programme to recover costs for school buildings with weathertightness failure issues.

Given the widespread use of particular types of cladding (Shadowclad and Fibre Cement sheet cladding products), a portfolio approach was taken. The Ministry had identified a significant number of buildings across the \$29.7bn¹ portfolio clad in what the Ministry and its experts considered to be defective products. Following the settlement with James Hardie and CSR, that portfolio approach remained the same as the Ministry had identified over 800 buildings clad in direct fixed Shadowclad. Many more were clad in Shadowclad over a cavity. A central part of the claim was to understand performance, both of Shadowclad and plywood cladding and buildings more generally. The evidence collected, and testing and examination carried out, as part of this claim has significantly contributed to the Ministry's understanding of its building stock and construction and remediation best practice.

The claim was issued in 2013 and was ongoing for some eight years and was one of, if not the, largest cases before the New Zealand Courts. That included the Ministry successfully defeating Carter Holt's attempts to strike out the claim which they took through to the Supreme Court and responding to Carter Holt's joining 50 Councils to the claim.

Settlement

The settlement was reached after the first week of trial, after the Ministry had delivered its opening submissions and one witness, Dr Caroline Shorter, had given evidence on health and safety issues arising from mould caused by rotting plywood.

The details of the settlement are confidential between the parties but the Ministry can confirm legal and expert costs were factored into the settlement. The settlement also avoided the time and cost of a six-month trial and avoided any costs for subsequent court hearings and appeals that would have occurred.

In addition to any financial benefit that the litigation may have had, it has also had a number of other benefits to both the Ministry and more generally:

- While no final decision was reached, in effect new case law was created in that the Supreme Court held that a manufacturer of defective products, such as cladding, is likely to owe a duty of care to end users/customers, such as the Ministry, schools and homeowners. Carter Holt had argued that they did not owe any duty and, therefore had no liability to the end users of their product. The Ministry regards this as important and means that product manufacturers will be required to take greater care when putting products on the market and will be required to stand behind their products. This also enables the Ministry, as a significant consumer of such product (as well as other consumers), to have greater certainty when using such products on its projects.
- As a result of the evidence gathered for the claim, the Ministry has developed and learned from the science of buildings and weathertightness issues. This has contributed significantly to the Ministry's understanding of its buildings' performance and has led to updated weathertightness design requirements that aim to prevent a reoccurrence of weathertightness failure issues. Our Weathertightness Design Requirements are publicly available at: <https://education.govt.nz/school/property-and-transport/projects-and-design/design/design-standards/weathertightness-design-requirements-for-new-school-buildings>
- The Court accepted the Ministry's approach of splitting this trial into two separate trials: the first to decide whether the product was defective; the second to decide the amount of damages. This novel approach may well have more general application and allow more access to justice for other parties on larger claims of this nature.

¹ Source: Ministry of Education Annual Report 2018/19

- Claims and class actions by home and other building owners had faced significant hurdles in bringing a claim. The case law created and approach accepted by the courts means that the Ministry's claim has made it easier for them and other consumers to pursue a claim as evidenced by a number of class actions currently underway against cladding manufacturers in the High Court.

Legal costs

The legal costs incurred over the eight years of the claim are \$14,017,854.20 for the Ministry's legal fees, including its legal advisers (Meredith Connell and Jim Farmer QC) and related expenses such as court filing fees, discovery costs and travel.

No other law firms or barristers have received fees in respect of the claim.

A breakdown of these costs by law firm and year is provided in attached **Appendix A**.

Set against these costs are the costs awards that have been made in the Ministry's favour that are in addition to the terms of the settlement. Those costs awards are set out below and were made when the Ministry won on pre-trial issues, including the Ministry's successful defence of Carter Holt's attempts to strike out the claim. Those costs awards are made on the basis of the relevant court costs scale, which prescribes the costs payable by the unsuccessful party and, as a result, those costs awarded are significantly less than the actual costs incurred:

Date	Decision	Amount awarded to the Ministry
4 April 2014	Ministry successfully defended Carter Holt's application to strike out the claim in the High Court.	\$29,110.00 (by agreement)
23 July 2015	Ministry successful on Carter Holt's attempt to appeal the High Court's refusal to strike out the Ministry's claim.	\$27,490.35
29 July 2016	Ministry successful on Carter Holt's attempt to appeal the Court of Appeal's refusal to allow the appeal of the High Court strike out decision.	\$48,817.43
21 June 2018	Ministry's successful application to have the issue of whether the product is defective determined as a separate question.	\$50,388.00
15 November 2018	Judgment of Fitzgerald J as to costs in relation to judgment on separate question/pleadings issues.	
25 February 2019	Ministry's successful application regarding the adequacy of Carter Holt's discovery.	\$9,702 awarded to MoE on discovery
1 April 2019	Minute of Fitzgerald J as to costs of admissibility and discovery hearing.	

26 August 2019	Costs awarded to the Ministry as a result of Carter Holt's delay.	Awarded to MoE on a 3B basis.
20 December 2019	Costs awarded for the Ministry's successful challenge to privilege claims made by Carter Holt.	\$3,816.50 to MoE

Expert costs

The expert costs are more difficult to accurately quantify. That is because much of the expert work is for the purposes of both the legal claim and the Ministry's building portfolio more generally and the work carried out by a number of the Ministry's experts was designed for both purposes. Accordingly, where expert fees have reflected both the litigation and wider benefit, the Ministry has discounted the costs to reflect the works wider value to the Ministry's building programme (including maintenance, design, construction and repair). The costs provided below include that discount.

The approximate expert costs incurred in respect of the litigation are \$6,544,424.29 with expert disbursements of \$885,435.34. The experts' company, witness names and total costs paid are included in **Appendix A**. Some individual witness names have been withheld under section 9(2)(a) of the Act to protect the privacy of those persons.

Weathertightness Remediation

In 2011, the Ministry surveyed all risk factors leading to weathertightness issues in school buildings. This identified about 2,400 school buildings at risk with an estimated cost of remediation of between \$1.3 billion and \$1.5 billion.

This informed a comprehensive programme of remediation and prevention strategies, where large and complex property projects are managed by the Ministry. We prioritised work to address the largest and most pressing problems, focusing on known or possible health and safety issues first and foremost. About 600 individual buildings with varying degrees of weathertightness issues remain in the programme and we continue to work through these.

We invest in excess of \$900 million of capital funding annually on maintaining, improving and expanding the state school property portfolio. The overall cost for weathertightness work is difficult to isolate as in many cases, it is included in a larger scope of budgeted works. Therefore I am refusing this part of your request under section 18(g) of the Act, as the information requested is not held by the Ministry, and we have no grounds for believing that it is held by another agency or more closely connected with the functions of another agency.

Repairs and maintenance issues are an ongoing occurrence in any property portfolio. Schools are encouraged to work alongside their property advisors regarding issues that arise with their facilities. We continue to monitor lower risk buildings as necessary and integrate repairs into planned works and the normal schedule of property repairs and maintenance. This reduces disruptions to school operations and is more efficient.

The Ministry set up Education Infrastructure Service (EIS) in 2013 to support schools in the delivery of school-led works and to directly manage the delivery of large and complex property projects. EIS have established a range of delivery and assurance processes to support the delivery of high quality and durable learning facilities. These include:

- robust design standards and guidance;

- a Design Review Panel to independently review the designs for school development projects;
- a Weathertightness Review Panel which provides technical assistance around weathertightness remediation works;
- pre-qualified project management and contractor panels to drive the performance of our suppliers; and
- a construction observation team to ensure that projects are being built to agreed standards.

Our Weathertightness Remediation and Regulatory Strategy document, all of the latest tools and templates and a recent Webinar hosted by the Ministry, are publicly available at <https://www.education.govt.nz/school/property-and-transport/suppliers/weathertightness-remediation/>

Please note, the Ministry now proactively publishes responses under the Act on our website. As such, we may publish this response on our website after five working days. Your name and contact details will be removed.

Thank you again for your email. If you have further questions please feel free to contact our media team in the first instance at media.team@education.govt.nz. If you are unsatisfied with my response, you have the right to ask an Ombudsman to review it. You can do this by writing to info@ombudsman.parliament.nz or Office of the Ombudsman, PO Box 10152, Wellington 6143.

Nāku noa, nā



Kim Shannon
Head of Education Infrastructure Service