IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 6/2026
[2026] NZSC 59

BETWEEN	VORTAC NZ LIMITED Applicant
AND	THE KING Respondent

SC 24/2026

BETWEEN	GRANT STANLEY NICHOLLS Applicant
AND	THE KING Respondent

SC 25/2026

BETWEEN	GRAYSON JAMES OTTAWAY Applicant
AND	THE KING Respondent

Court:	Ellen France, Williams and Kós JJ
Counsel:	Grant Stanley Nicholls as representative of Applicant in SC 6/2026 Applicants in SC 24/2026 and SC 25/2026 in person M J Lillico for Respondent
Judgment:	21 May 2026

JUDGMENT OF THE COURT

The applications for an extension of time to file the applications for leave to appeal are dismissed.

REASONS

Introduction

[1] The applicants, Vortac NZ Ltd; its director, Mr Nicholls; and its manager, Mr Ottaway; were found guilty after a jury trial of charges brought under the Resource Management Act 1991 (the RMA).

[2] All three applicants were convicted of an offence under s 338(1)(a) of the RMA for contravening the District Plan. This charge related to the construction of a retaining wall or closed board fence in a floodable area. Vortac and Mr Nicholls were convicted of a second s 338(1)(a) offence relating to the construction of earthworks over 5 m^3 in a floodable area. Finally, all three applicants were convicted of a s 338(1)(c) offence arising from non-compliance with an abatement notice. Their appeals against conviction were dismissed by the Court of Appeal.[1]

[3] Now, some four years later, the applicants seek an extension of time to appeal against their convictions.

Background

[4] The facts are set out in the Court of Appeal judgment.[2] Relevantly, Vortac engaged a company to build a retaining wall on its property between an open drain on the property and the western boundary line. After the building began, neighbours complained to the Council that the modifications to the drain were adversely impacting downstream properties.

[5] Council officers visited Vortac's property on 22 July 2015. They saw about 70 posts (3.6 m long) had been placed at 1.2 m centres. The posts were up to 1.5 m in height and had butted edges which created a solid face. A further 11 posts had also been installed along the northern boundary.

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1 *Vortac NZ Ltd v R* [2021] NZCA 200 (Courtney, Woolford and Mander JJ). The Court allowed Mr Ottaway's appeal against sentence on the first charge. The sentence appeals by Vortac and Mr Nicholls were dismissed.

2 At [1]–[18].

[6] The Council, later in July 2015, served an abatement notice on the applicants and the construction company requiring them to stop building "a closed board fence, retaining wall or structure in a floodable area". The construction company advised the Council that it would be carrying out no further work. After heavy rainfall in August 2015, a large amount of water was conveyed through a gully. The partially built wall blocked the natural flow path of the water and this exacerbated flooding and ponding. Subsequently, the Council learned that further boards had been put up closing the gap between the bottom of the wall and the ground. Some 100 cement bags had been placed against the wall and in the drain. With further rainfall on 1 September 2015, the works again impeded the natural flow of the path of water. The Council told the applicants they had breached the abatement notice.

[7] Council officers visited the property again in mid-September 2015. They saw that the works undertaken by the applicants had caused erosion and slope instability. Some 220 cement bags had been put in the drain and against the retaining wall. Later that month, the Council found out that the applicants had engaged an earthworks company to undertake some further work — filling in the drain with soil. Further abatement notices were issued and ultimately charges laid. As was noted by the Court of Appeal, the main focus at trial was whether the property in issue was a floodable area.

The proposed grounds of appeal

[8] The proposed grounds of appeal are helpfully summarised in the respondent's submissions as follows:[3]

> 24.1 exclusion of defence evidence directed at "Council's admission of stormwater diversion" and the "defensive nature" of the structure;
>
> 24.2 absence of Crown expert evidence establishing whether the structure was a retaining wall;
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> 24.3 absence of evidence about the "personal authorisation, knowledge, or intentional participation" of Mr Nicholls and Mr Ottaway;
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> 24.4 the liability of landowners for flooding within a "Council controlled easement corridor".

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3 Footnotes omitted.

[9] Essentially, the applicants say that as a result of the matters identified, the jury did not have key defence evidence.

Our assessment

[10] The lengthy delay in filing the present leave applications is, as the respondent submits, unexplained. Against that background, the strength of the proposed appeal is not such as to provide a compelling reason to extend time to appeal.[4]

[11] In terms of the first and fourth of the proposed grounds, the Court of Appeal held that the alleged illegality of the Council's discharge of stormwater onto the property was not relevant to the determination of the charges against the applicants. Rather, the charges required the Crown to prove that activities which were proscribed by the District Plan had been carried out in a floodable area without resource consent. Nothing raised by the applicants suggests that this approach was incorrect in this case.

[12] In any event, the present case is not a suitable one for considering the applicants' arguments in relation to these two grounds. The respondent makes the point that there was no evidence put before the trial court to show that the Council caused the flooding at the property. The respondent additionally submits that the claim about the need to build a "defensive" structure to mitigate the Council's own alleged negligence is also not made out evidentially. This was raised for the first time at sentencing when the trial Judge observed that it had not been a proposition advanced at trial.

[13] In terms of the second proposed ground, the respondent notes that although the applicants were represented by senior counsel on appeal, this issue was not raised by the applicants in the Court of Appeal. That does not make this a promising ground for an appeal, particularly after the lengthy and unexplained delay. In any event, in agreement with the submission for the respondent, it is not clear why expert evidence was required on the definition of "retaining wall". That was a question of ordinary usage of the word in the absence of any definition in the District Plan or the RMA.

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4 *Ellis v R* [2019] NZSC 83 at [15].

Further, the respondent notes that the evidence of the contractor was that he was asked by Mr Ottaway to build a "retaining wall".

[14] The third proposed ground was also not a matter raised in the Court of Appeal. In any event, as the respondent submits, the jury was told they had to find that the applicants were "responsible" for the work and "permitted it" or that it was done by an "agent".

[15] In these circumstances, it is not in the interests of justice to grant an extension of time.

Result

[16] The applications for an extension of time to file the applications for leave to appeal are dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent