

# Latent Conditions and the Experienced Contractor Test

Resolution Institute  
Perth, 12 February 2019

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# Introduction

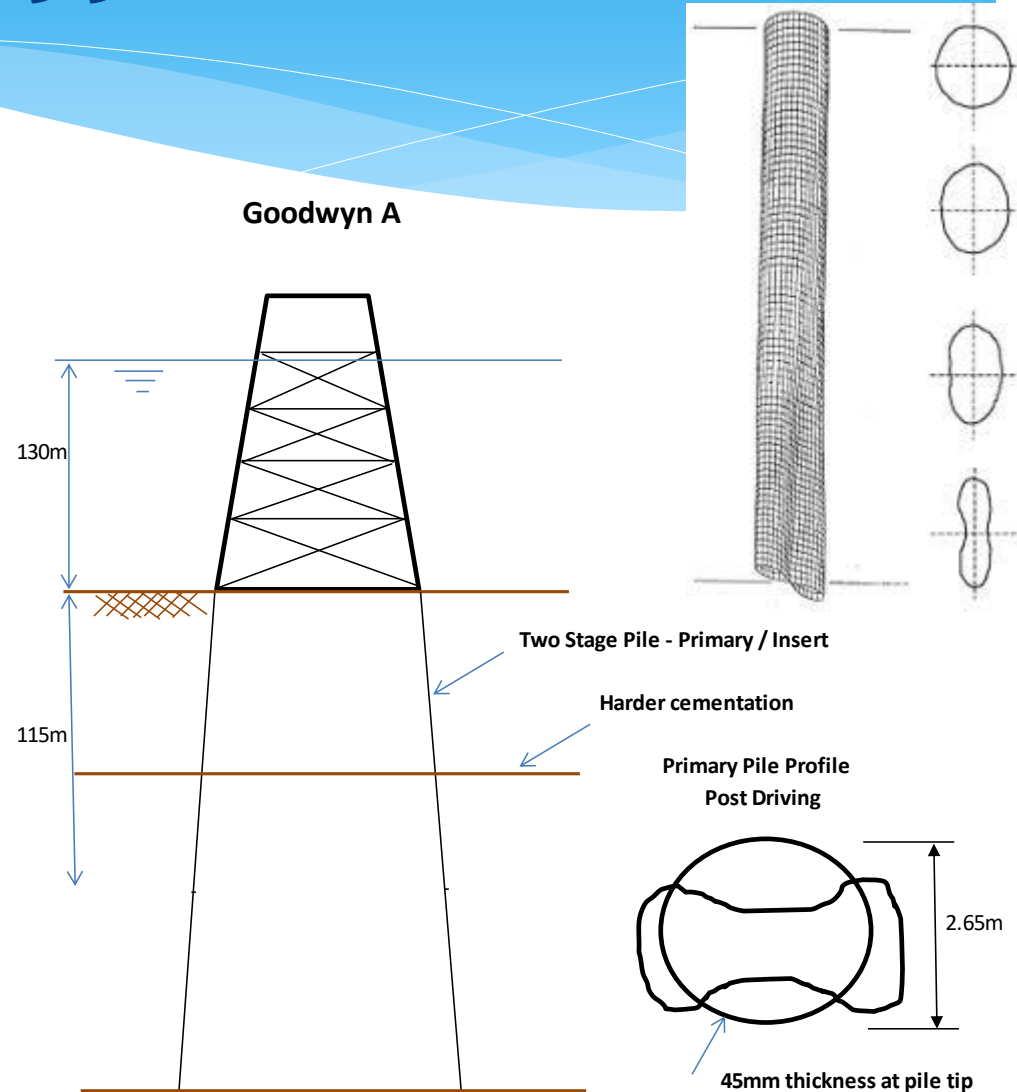
## Karl Terzaghi (1883-1963)

*“Unfortunately, soils are made by nature and not by man, and the products of nature are always complex... As soon as we pass from steel and concrete to earth, the omnipotence of theory ceases to exist. Natural soil is never uniform. Its properties change from point to point while our knowledge of its properties are limited to those few spots at which the samples have been collected. In soil mechanics the accuracy of computed results never exceeds that of a crude estimate, and the principal function of theory consists in teaching us what and how to observe in the field.”*

# Example - Goodwyn A Primary Piles 1992



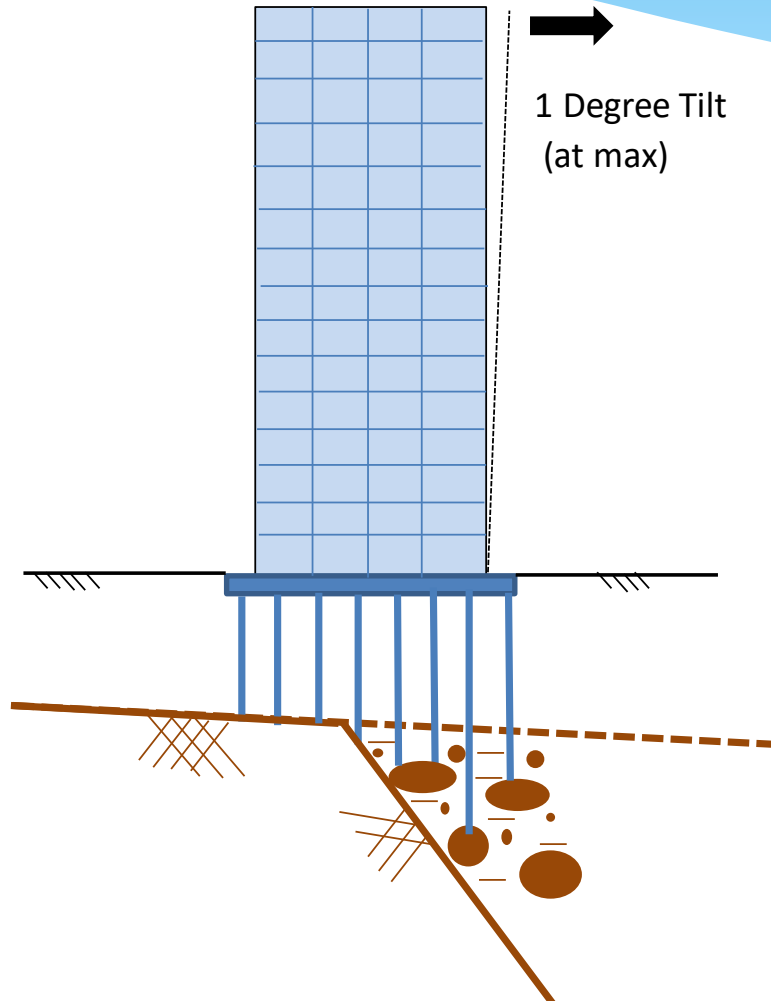
A\$280m loss \$1992  
A\$560m loss \$2019



# Example – High Rise Building, Singapore 2002



# Example – Singapore High Rise 2002



4 Degree Tilt

# Example – Nicholl Highway Collapse 2004



# Example – Nicholl Highway Collapse 2004



# Contractor's Responsibility for Latent Conditions

- \* Contractor Responsible for Site Conditions
  - \* Common law principle – *Thorn v London County Council* [1896] 1 App Cas 120
  - \* Subject to contract provisions to the contrary
- \* *Re Carr and the Shire of Wodonga* [1925] VLR 238
  - \* Construction of a bridge, involving sinking piers into river bed
  - \* Unforeseen large logs – increased cost by 50%
  - \* Held: No warranty by Council as to absence of obstructions
- \* Rationale
  - \* Principal selects contractor for its expertise and experience

# Latent Condition Provisions

- \* Reallocation of Risk – From Contractor to Principal
  - \* Standard forms of contract such as ICE, FIDIC, and AS2124 - 1992
  - \* By means of the “*Experienced Contractor Test*”
  - \* Rationale: Principal only pays for conditions actually encountered

# Latent Condition Provisions

- \* AS2124-1992 – “Latent Conditions” – defined in Clause 12.1(a)

*“physical conditions on the Site or its surroundings, including artificial things but excluding weather conditions, which differ materially from the physical conditions which should reasonably have been anticipated by the Contractor at the time of the Contractor’s tender if the Contractor had –*

- (i) examined all information made available in writing by the Principal to the Contractor for the purpose of tendering;*
- (ii) examined all information relevant to the risks, contingencies and other circumstances having an effect on the tender and obtainable by the making of reasonable enquires; and*
- (iii) inspected the Site and its surroundings;”*

# Relevant Case Law

- \* *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028
- \* *Van Oord UK Limited and SICIM Roadbridge Limited v Allseas UK Limited* [2015] EWHC 3074
- \* *Glenorchy City Council v Tacon Pty Ltd* [2000] TASSC 51
- \* *BMD Major Projects Pty Ltd v Victorian Urban Development Authority* [2007] VSC 409
- \* *Walton Construction Pty Limited v Illawarra Hotel Company Pty Limited* [2011] NSWSC 534

# OHL v Government of Gibraltar

- \* Obrascon Huarte Lain SA (“OHL”) awarded £30.231m contract by Government of Gibraltar (“GOG”) – November 2008 – Yellow Book
- \* Design and Construct Road and Tunnel for Gibraltar Airport
- \* Commencement Date – 1 December 2008 – 2 year Contract
- \* Latent Conditions
  - \* Contaminated soil and water
  - \* Rock higher than expected
- \* “Disastrous” Project
- \* Contract Terminated by GOG – 28 July 2011
  - \* 25% of the work completed
  - \* £14m paid

# OHL v Government of Gibraltar



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# *OHL v Government of Gibraltar*

- \* OHL Alleged Contract Wrongfully Terminated
- \* Held – English TCC Court - April 2013
  - \* GOG validly terminated the contract
  - \* Extent and amount of contaminated material reasonably foreseeable
- \* OHL's Appeal to English Court of Appeal Dismissed – July 2015
- \* GOG and OHL Settlement – June 2016
  - \* OHL to complete the works for revised contract price £24m

# *OHL v Government of Gibraltar*

## TCC Court Reasoning

- \* Environmental Statement
  - \* Low levels of contamination – heavy metals and organic contaminants
  - \* Assessment of 10,000 cubic metres contaminated land
- \* Soil Investigation Report
  - \* Made ground – depths 1.0m to 5.4m
  - \* Non-uniform soil contamination
  - \* Known limitations of boreholes
- \* Contaminated Land Desk Study – History of Site
  - \* Location of rifle ranges – 1869
  - \* Site bombed during WWII
  - \* Fuel farms, fuel lines etc

# *OHL v Government of Gibraltar*

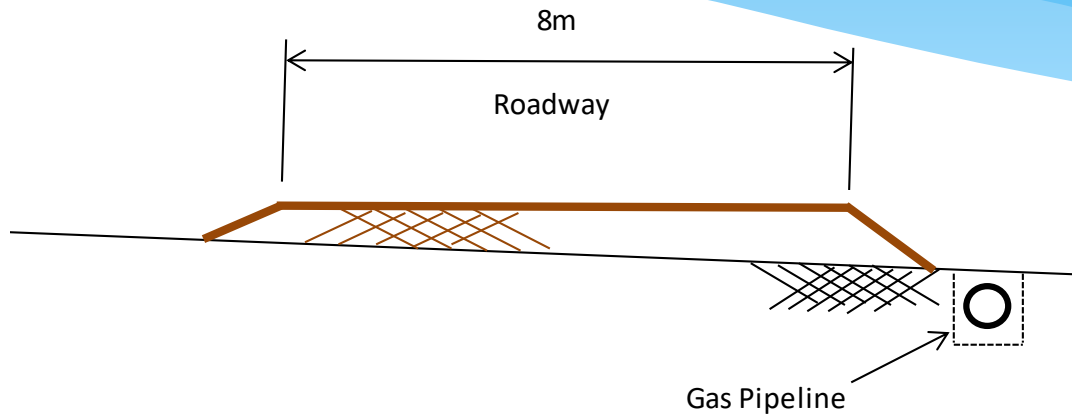
## TCC Court Reasoning

- \* What An Experienced Contractor Would Foresee?
  - \* Substantial quantities of contaminated soil
  - \* 10,000 cubic metres is a “say” amount
  - \* Foreseeable uncertainty of quantity and location contaminants
- \* Conclusion – Contamination Reasonably Foreseeable

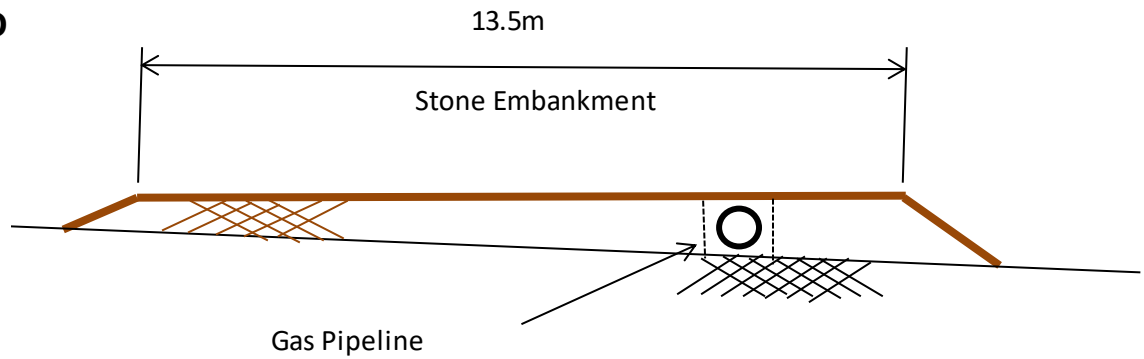
# *OSR v Allseas*

- \* Shetland Islands Gas Field Development
- \* OSR Contracted with Allseas for construction of pipelines
- \* OSR's Claim for Delay and Cost - £8m
  - \* Peat at greater depths than expected
  - \* Relied on results of Mackintosh Survey

# OSR v Allseas



**PLANNED**



**AS CONSTRUCTED**

# *OSR v Allseas*

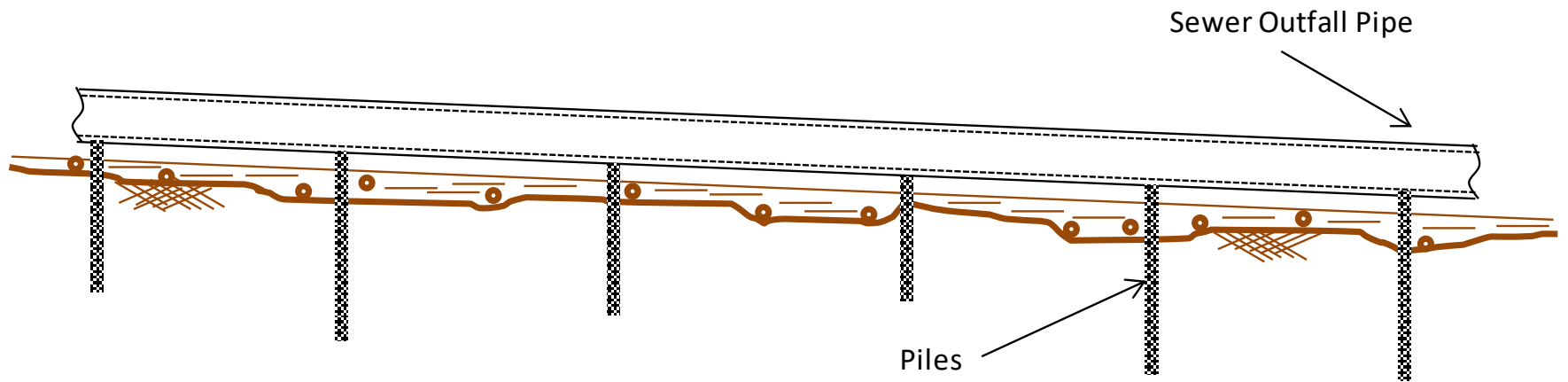
## TCC Court Reasoning

- \* Contract Documents
  - \* Pipe route drawings showed peat of depths up to 5.0m
  - \* OSR's Claim Failed
- \* Experienced Contractor Test
  - \* Mackintosh Survey not a type of guarantee
  - \* For experienced contractor to fill in the gaps
  - \* Actual peat depths reasonably foreseeable

# *Glenorchy v Tacon*

- \* Glenorchy CC Awarded Tacon Pty Ltd Contract for Construction of Sewer Outfall Pipeline
- \* Latent Condition Claim
  - \* Bedrock more variable than reasonably foreseeable
  - \* Additional pile lengths required
- \* Objective Test
- \* Contractor's Examination of Documents Irrelevant

# Glenorchy v Tacon



# *BMD v VicUrb*

- \* Contract for Development of a Quarry
- \* Latent Condition Claim
  - \* Additional quantities of overburden
  - \* Crushing of oversized rocks
- \* Pagone J:
  - \* Nothing in “*Boral File*” to cause non-expert to seek assistance of a geotechnical engineer

# *Walton Construction v Illawara*

- \* Contract for Refurbishment of a Hotel
- \* Latent Condition Claim
  - \* Unexpected deep void in floor slab foundation
  - \* Additional propping – time and cost claimed
- \* Einstein J:
  - \* Inspection of Site is to be informed by other information available
  - \* Engineering drawings showed slab on ground

# General Principles

- \* Objective Test
- \* Effective of Disclaimers and Conflicting Contract Provisions
- \* Information Available to Actual Contractor
- \* Content of Experienced Contractor Test
- \* Degree of Risk Required
- \* Latent Conditions in Made Ground

# General Principles

- \* Limitation of Borehole and Test Pit Information
- \* Materiality of Latent Conditions
- \* Inaccuracies or Inconsistencies in Soil Information
- \* Alternative Design or Construction Methods
- \* Dealing with Latent Conditions
- \* Latent Conditions Involving Groundwater
- \* Expert Evidence

# Additional Requirements

- \* Formalities – eg Notice Compliance
- \* Causation – Between Latent Condition and Claimed Items
- \* Substantiation of Costs and Extension of Time

# Conclusions

- \* Experienced Contractor Test Difficult to Apply
- \* Parties Should be Clear on Tribunal's Likely Application of Experienced Contractor Test
- \* Body of Case Law Provides Guidance
- \* Alternative Methods for Allocating Risk of Latent Conditions
  - \* Baseline reference condition
  - \* Fixed margin, sharing of savings from target costs

# Questions

