

O-262-08

TRADE MARKS ACT 1994

**IN THE MATTER OF APPLICATION NOS 2398277 AND 2398278
BY INSTITUTE FOR PERSONALITY & ABILITY TESTING INC
TO REGISTER THE TRADE MARKS:**

16PF

AND

16PF5

IN CLASSES 9, 16, 41 AND 42

AND

**THE CONSOLIDATED OPPOSITIONS THERETO
UNDER NOS 94135 AND 94136
BY PSYTECH INTERNATIONAL LIMITED**

Trade Marks Act 1994

**In the matter of application nos 2398277 and 2398278
by Institute For Personality & Ability Testing Inc
to register the trade marks:
16PF and 16PF5
in classes 9, 16, 41 and 42
and the consolidated oppositions thereto
under nos 94135 and 94136
by Psytech International Limited**

Introduction

1) On 1 August 2005 Institute For Personality & Ability Testing Inc (IPAT) filed two applications to register the trade marks 16PF and 16PF5 (the trade marks). Both applications were published for opposition purposes on 18 November 2005 with the same specification:

computer software; computer software for use in behavioural testing, personal evaluation, personality interpretation, personality assessment, personality testing; computer software for use in the administration, scoring, interpretation and reporting of personality tests, personality assessment, personal evaluation and personal interpretation; pre-recorded CD-ROMS, magnetic data carriers, pre-recorded data carriers providing manuals, test booklets, answer sheets, profile sheets, norm tables, scoring keys, work sheets, work books, reports, questionnaires, record forms, user guides, planning booklets, reference materials, hand books, technical reports and books particularly in the area of behavioural testing, personality assessment, personal evaluation and personal interpretation or the administration, scoring, interpretation and reporting of personality testing and personality assessment;

printed matter and printed publications relating to behavioural testing, personality assessment, personal evaluation and personal interpretation; paper testing materials for personality assessment, personality testing, personal evaluation and personal interpretation; manuals, test booklets, answer sheets, profile sheets, norm-tables, scoring keys, work sheets, work books, reports, questionnaires, record forms, user guides, planning booklets, reference materials, hand books, technical reports and books, particularly relating to personality assessment, personality testing, personal evaluation and personal interpretation, administration, scoring, interpretation and reporting of personality assessment, personality testing, personal evaluation and personal interpretation;

education and training services; education and training relating to personality assessment, personality testing, personal evaluation and personal interpretation and the use of printed matter, printed publications and pre-recorded CD-ROM, magnetic data carrier or other pre-recorded data carriers in personality

assessment, personality testing, personal evaluation and personal interpretation; conducting workshops and training sessions in the field of personality testing, personality assessment, personal evaluation and personal interpretation;

computer programming, data processing and data analysis services, particularly relating to personality assessment, personality testing, personal evaluation, personal interpretation and the administration, scoring, ministration, scoring, interpretation and reporting of personality assessments, personality tests, personal evaluations and personal interpretation.

The above goods and services are in classes 9, 16, 41 and 42 respectively of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

2) On 10 February 2008 Psytech International Limited (Psytech) filed notices of opposition against the two applications. The oppositions are based upon sections 3(1)(b), (c) and (d) of the Trade Marks Act 1994 (the Act). Section 3(1) of the Act reads:

“3.-(1) The following shall not be registered -

- (a) signs which do not satisfy the requirements of section 1(1),
- (b) trade marks which are devoid of any distinctive character,
- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services,
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* and established practices of the trade:

Provided that, a trade mark shall not be refused registration by virtue of paragraph (b), (c) or (d) above if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it.”

3) Psytech claims that the sign 16PF has become synonymous with a theory of personality developed by Dr Raymond Cattell in the 1940s or, in the alternative, serves as a common abbreviation for the words “sixteen personality factors”. Psytech claims that, consequently, the trade marks are devoid of any distinctive character. Psytech claims that the signs designate goods and services which are

based upon or related to Dr Cattell's theory of personality and, consequently, registration of the trade marks would be contrary to section 3(1)(c) of the Act.

4) Psytech claims that

"it has become customary in the current language or in the bona fide and established practices of psychometrics and related disciplines to refer to the large number of goods and services which are based on and relate to Cattell's theory of personality generically under the sign[s]". Consequently, registration of the trade marks would be contrary to section 3(1)(d) of the Act.

5) Psytech claims that registration of the trade marks would be contrary to section 3(1)(b) of the Act as they are devoid of distinctive character.

6) IPAT filed counterstatements in which it denies the grounds of opposition.

7) Both sides furnished evidence which is summarised in the annex to this decision.

8) A hearing was held on 3 September 2008. IPAT was represented by Mr Michael Edenborough of counsel, instructed by Grant Spencer Caisley & Porteous LLP. Psytech was represented by Mr Nicholas Saunders of counsel, instructed by Barlow Robbins LLP.

9) A large amount of evidence filed in these proceedings is copied from proceedings at the Community trade mark office. It has not been prepared for these proceedings and is not in witness statement form. As Mr Saunders submitted, this evidence has to be considered as hearsay evidence. The issue of the evidence is further muddled as many of those who have given evidence have a relationship with the parties and the evidence is contradictory. In the case of the evidence of Professor Barrett, for Psytech, his evidence not only contradicts the evidence of Psytech but also his own evidence. In his evidence, considered at xxi of the annex, he states:

"Cattell **was** and **is** the "16PF" – and vice-versa. This became the world benchmark test for trait measurement of personality, and a fully-fledged theory of personality in its own right – appearing in many textbooks of personality theory published over the intervening years."

However, in his evidence in response to the evidence of Professor Claridge, Professor Barrett, considered at lix of the annex, states:

"27. I agree with Professor Claridge here insofar as the term 16PF is rarely associated with Cattell's theory in such an explicit manner. That is, there is no 16PF theory. But, an association does exist between the 16PF, Cattell's personality factors, and Cattell's Trait theory such that in

practice the 16PF has come to become almost synonymous with Cattellian Personality Theory.....”

(Professor Claridge does not appear to have had a relationship with either party in this dispute.) The parties seem to have approached the issue of evidence somewhat like the Bellman, repetition being the equivalent to truth¹. As the sides are repeating conflicting views, the repetition serves even less purpose. If those giving evidence had done so by witness statement, affidavit or statutory declaration, it might have concentrated their minds as they would be making statements of truth and know that they were liable to be cross-examined upon their evidence. I can only make the best of the evidence in the form in which it has been submitted.

10) In my summary of the evidence I have dismissed a survey that was submitted by Psytech. Despite Mr Saunders continuing to cling on to the survey at the hearing, its conduct and presentation mean that for the purposes of these proceedings it is worthless.

11) Psytech considers that the use by others of 16PF by others is of significance. It has put into evidence the use of the 16PF Industrial test. IPAT does not consider that this use was legitimate, it is also stated, and not contradicted, that the use of the 16PF Industrial test has ceased. Whether the use was legitimate or not I am not in a position to judge. Part of agreement 2 of the memorandum of agreement (see xlv of the evidence summary) seems to give Industrial Psychology, Inc of Chicago a fair degree of autonomy:

..... “Each publisher may make available its own edition of the test in terms of format, and sale or profit on the forms, except for the author royalty, will be separate for each publisher.”

However, this seems to sit ill with another part of the agreement:

“4. Industrial Psychology, Inc and the Institute for Personality and Ability Testing shall jointly act as the exclusive agents for the authors in matters concerning these tests. Such matters will include re-sale distribution to other publishers and representatives, foreign translation, licensing and publication, etc. Such matters will be stated in writing and signed in agreement by both publishers.”

A further complication arises as to whether the purchase of Industrial Psychology, Inc by The Test Agency would have led to the devolution of rights from the memorandum of agreement. That two highly similar or even identical

¹ “Just the place for a Snark! I have said it thrice:
What I tell you three times is true.”
The Hunting of the Snark by Lewis Carroll.

trade marks for identical goods have been used in the marketplace does not mean that the trade marks are not acting as trade marks, as is shown by the use of Budweiser in the United Kingdom and many other jurisdictions by Budejovicky Budvar Narodni Podnik and Anheuser-Busch, Inc (and the vast amount of litigation between the two parties). This does not necessarily sit comfortably with the oft expressed view of the European Court of Justice (ECJ) as to the purpose of a trade mark². However, there is no automatic sequitur that because a sign identifies more than one undertaking that it falls foul of section 3(1) of the Act. The one is not the corollary of the other. Also, on the evidence of the two parties there is a conflict as to what the purpose of the use has been. The logic of Psytech's attack means that it must see the use by The Test Agency as non trade mark use, a descriptive use. It is the position of Psytech that it's use has been trade mark use. I consider that little turns upon The Test Agency use.

12) The evidence from Psytech indicates other usage, in relation to software and training. It is not intrinsic to this use that it is in relation to a generic or descriptive use. The use, with the possible exception of use relating to The Test Agency, is use in relation to Psytech's psychometric questionnaire, there is nothing that militates against this use being use in relation to a trade mark. A garage may advise that it specialises in a particular make of car, this does not turn the brand of the car into a generic or descriptive term³. I do not consider that the type of

² See for example the judgment of the ECJ in *Björnekulla Fruktindustrier AB v Procordia Food AB* Case C-371/02:

"20 The essential function of the trade mark is to guarantee the identity of the origin of the marked goods or service to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or service from others which have another origin (see, inter alia, Case C-39/97 *Canon* [1998] ECR I-5507, paragraph 28, and Case C-517/99 *Merz & Krell* [2001] ECR I-6959, paragraph 22). For the trade mark to be able to fulfil its essential role in the system of undistorted competition which the EC Treaty seeks to establish, it must offer a guarantee that all the goods or services bearing it have been produced under the control of a single undertaking which is responsible for their quality (*Canon*, paragraph 28)."

³ See for instance: *Bayerische Motorenwerke AG (BMW) and BMW Nederland BV v Ronald Karel Deenik* Case C-63/97:

"3. Articles 5 to 7 of First Directive 89/104 do not entitle the proprietor of a trade mark to prohibit a third party from using the mark for the purpose of informing the public that he carries out the repair and maintenance of goods covered by that trade mark and put on the market under that mark by the proprietor or with his consent, or that he has specialised or is a specialist in the sale or the repair and maintenance of such goods, unless the mark is used in a way that may create to the impression that there is a commercial connection between the other undertaking and the trade mark proprietor, and in particular that the reseller's business is affiliated to the trade mark proprietor's distribution network or that there is a special relationship between the two undertakings."

A similar matter was considered in *Ulrich Freiesleben v Michael Hölterhoff* Case C-2/00:

"Article 5(1) of First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks is to be interpreted as meaning that the proprietor of

third party use under consideration here is determinative of the issues before me as there no clarity or certainty as this use will be viewed by the average, relevant consumer as use in relation to a trade mark or generic/descriptive use.

13) In its evidence Psytech makes reference to other psychometric tests/instruments, the names of which have been registered as a trade marks. Those registrations turn upon their own facts, I have to consider the facts before me in relation to the two trade marks the subjects of the applications. There is nothing that debars the registration of a trade mark for a psychometric test, the question is whether in the applications under consideration registration is debarred under section 3(1) of the Act. Other registrations tell me nothing in relation to this matter.

14) Mr Saunders referred to other honest traders having to rely upon the savings provisions if the trade marks were registered. This is a circular argument as it would only be relevant if the signs are generic or descriptive and if they are they would not be registered, subject to the proviso. Trade marks cannot be registered if the registration would give rise to the need for the honest trader to rely upon the saving provisions⁴.

a trade mark cannot rely on his exclusive right where a third party, in the course of commercial negotiations, reveals the origin of goods which he has produced himself and uses the sign in question solely to denote the particular characteristics of the goods he is offering for sale so that there can be no question of the trade mark used being perceived as a sign indicative of the undertaking of origin.”

⁴ See the judgment of the Court of First Instance (CFI) in *Nordmilch eG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-295/01*:

“55. It must be observed that the purpose of Article 12(b) of the Regulation, in the context of its relationship with Article 7(1)(c), in particular for trade marks which do not fall within the scope of that provision because they are not exclusively descriptive, is to ensure, inter alia, that use of an indication relating to geographical origin, which also forms part of a complex trade mark, does not fall within a prohibition that the proprietor of such a mark is entitled to enforce under Article 9 of the Regulation, where that indication is used in accordance with honest practices in industrial and commercial matters (see, by analogy, *Windsurfing Chiemsee*, cited above, paragraph 28, and Case T-359/99 *DKV v OHIM (EuroHealth)* [2001] ECR II-1645, paragraph 28).

56. If it is to apply, therefore, there must be a prior finding that a trade mark has been validly registered and that the proprietor thereof is enforcing his rights. The alleged infringer may then rely on Article 12 of the Regulation as a defence to resist a claim of infringement of the proprietor's rights.

57. Consequently, application of that provision may not be taken into account during the registration procedure. Therefore, given that the trade mark is not registrable, the second plea must also be rejected.”

Also judgments: *Borco-Marken-Import Matthiesen GmbH & Co KG c Office de l'harmonisation dans le marché intérieur (marques, dessins et modèles) (OHMI) Case T-405/04* and *Interquell GmbH v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-20/02*.

15) One of the few matters that appears to be agreed between the parties is that 16PF and 16PF5 have been used in relation to psychometric questionnaires and manuals in relation to those questionnaires. In relation to such goods Mr Edenborough and Mr Saunders agreed that the relevant, average consumer is an informed person who is purchasing and administering the tests. It is likely to be someone in a personnel department, for instance. The relevant, average consumer is **not** the person taking the tests. This relevant, average consumer is not a psychologist per se; although it might be a psychologist working for a company that undertakes psychometric testing. The majority of the goods and services are so linked to psychometric testing, so they share the same relevant, average consumer. There is also no real doubt that the average, relevant consumer will know that 16PF stands for sixteen personality factor.

16) However, in relation to *education and training services, printed matter and printed publications relating to behavioural testing, personality assessment, personal evaluation and personal interpretation* the average relevant consumer will also include teachers and students. The battle lines in this case are clearly drawn up in relation to psychometric testing and the oppositions are based on matters relating to psychometric testing. So the considerations I make in relation to these goods and services will be in relation to the teaching and studying of psychometric testing.

17) The relevant, average consumer is not a specialist academic, like Professors Barrett and Claridge, and so the state of knowledge that such persons has is not relevant to my decision; although the evidence of these two individuals in relation to the use of 16PF and 16PF5 is relevant. As I have noted above, Professor Barrett resiled from his initial position that there is a 16PF theory when he commented upon the evidence of Professor Claridge. However, the resiling is to some extent one more of nuance rather than substance:

“27. I agree with Professor Claridge here insofar as the term 16PF is rarely associated with Cattell’s theory in such an explicit manner. That is, there is no 16PF theory. But, an association does exist between the 16PF, Cattell’s personality factors, and Cattell’s Trait theory such that in practice the 16PF has come to become almost synonymous with Cattellian Personality Theory.....”

In considering the registrability of the trade marks I am looking at the perception of the average, relevant consumer; I am not looking at whether something is an established academic fact or not. It is a matter of distinguishing between what Vygotsky referred to as *znachenie* and *smysl*⁵⁶.

⁵ “The first and basic one is the preponderance of the sense [*smysl*] of a word over its meaning [*znachenie*] – a distinction we owe to Frederick Paulhan. The sense of a word, according to him, is the sum of all the psychological events aroused in our consciousness by the word. It is a dynamic, fluid, complex whole, which has several zones of unequal stability. Meaning is only one

18) In considering the matters before me I have given more weight to evidence which is not born of proceedings between the parties than to evidence that has been born of the disputes between the parties, evidence that is clearly at a remove from the arguments and interests of the parties. I have taken note of the following:

A journal article by SV Golubkov from 2002:

“The paper discusses the so-called clinical (deductive) and scientific (inductive) approaches to elaborating personality theories as well as integrative attempts of trait theorists to find “the golden mean” between objectivity and universal structure of personality, among which the basic models are the 16PF, the PEN and the B5.”

(To be found at paragraph vii of the evidence summary.)

A journal article by B Merson and RL Gorsuch from October 1988, the abstract includes the following: “Many researchers support a 5- to 8- factor personality theory; Cattell urges a 16-factor system.” (To be found at paragraph vii of the evidence summary.)

Exeter University notes:

“Cattell’s Sixteen Personality Factor Model (16PF)”

of the zones of sense, the most stable and precise zone. A word acquires its sense from the context in which it appears; in different contexts it changes its sense. Meaning remains stable throughout the changes of sense. The dictionary meaning of a word is no more than a stone in the edifice of sense, no more than a potentiality that finds diversified realization in speech.”
Thought and Language by Lev Vygotsky translated by Alex Kozulin, The MIT Press.

⁶ I am fortified in my view by the recent judgment of the CFI in *Ratiopharm GmbH v Harmonisierungsamt für den Binnenmarkt (Marken, Muster und Modelle) (HABM)*, Case T-48/07:

“29 Was erstens das Argument angeht, der Ausdruck „biogenerics“ könne hinsichtlich der fraglichen Waren nicht beschreibend sein, weil es aus wissenschaftlicher Sicht keine generischen Biopharmaka gebe, so ist daran zu erinnern, dass das maßgebliche Kriterium für die Beurteilung des beschreibenden Charakters die Wahrnehmung durch die maßgeblichen Verkehrskreise ist (vgl. Urteil WEISSE SEITEN, Randnr. 90 und die dort angeführte Rechtsprechung). Selbst wenn nämlich insoweit das Bestehen biotechnologisch hergestellter generischer pharmazeutischer Erzeugnisse in technischer Hinsicht streitig sein sollte, steht doch fest, dass der Ausdruck „biogenerics“ von den maßgeblichen Verkehrskreisen so verstanden werden wird, dass er einem Erzeugnis aus dem pharmazeutischen, medizinischen oder wissenschaftlichen Bereich entspricht. Zum einen werden nämlich Durchschnittsverbraucher den Ausdruck als eine Beschreibung patentfreier biotechnologisch hergestellter pharmazeutischer Erzeugnisse wahrnehmen, da sie sich nicht der Schwierigkeiten bewusst sind, mit denen eine Reproduktion der Wirkstoffe dieser Erzeugnisse verbunden ist. Zum anderen belegen die Beweismittel, auf die sich die Prüferin und die Beschwerdekammer gestützt haben, dass eine Verwendung des Ausdrucks „biogenerics“ zur Bezeichnung dieser Erzeugnisse durch gewerbliche Verbraucher und in Fachkreisen trotz seiner in technischer Hinsicht bestehenden Ungenauigkeit üblich ist.”

Raymond Cattell considered that an individual's behaviour is a function of personality, combined with environmental factors.....

.....Cattell (1971) gathered lists of adjectives, descriptions of behaviour in real life and items from other personality tests, and through a process of factor analysis, identified 16 factors that he believes are basic personality dimensions.Cattell developed the Sixteen Personality Factor (16PF) questionnaire..... By using the 100 item 16PF questionnaire a personality profile can be established.....

NB: Any good text book will contain details of Cattell's factors, and so I will not list them here."

(To be found at paragraph x of the evidence summary.)

Pages from *Test Critiques Volume IV* comprising a critique, written by Dr Brent Edward Wholeben, of the Sixteen Personality Factor Questionnaire. Dr Wholeben writes:

"The Sixteen Personality Factor Questionnaire (16PF) is an objective test of 16 multidimensional personality attributes arranged in omnibus form. In general, it provides normed references to each of these attributes (the primary scales).....

.....The 16PF assesses a total of 16 indices, or attributes, of the human personality to convey a map of the individual's "personality sphere" as originally intended by Cattell....."

(To be found at paragraph xxxi of the evidence summary.)

Psychological Testing Principles & Applications by Kevin R Murphy and Charles O Davidshofer. These pages include commentary upon the Sixteen Personality Factor Questionnaire:

"Better known as the 16PF, the Sixteen Personality Factor Questionnaire was developed by Raymond Cattell and first published commercially in 1949 by the Institute for Personality and Ability Testing, Inc.....

.....The end result was a personality test built by factor-analytic methods containing 16 factors generally independent of one another that was potentially capable of describing all aspects of normal personality functioning....."

(To be found at paragraph xxxv of the evidence summary.)

In a copy of pages from *The Corsini Encyclopedia of Psychology and Behavioral Science Vol 4* S E Krug writes:

“The primary scales of the test, which are designated by alphanumeric symbols are as follows: A – Warmth, B – Reasoning, C – Emotional Stability, E- Dominance, F- Liveliness, G – Rule-Consciousness, H – Social Boldness, I – Sensitivity, L – Vigilance, M – Abstractedness, N – Privatness, O – Apprehension, Q1 – Openness to Change, Q2 – Self-reliance, Q3 – Perfectionism, Q4 – Tension. The five global factors (Extroversion, Anxiety, Tough-mindedness, Independence, Self-control) assess features similar to those described as the “big five” in contemporary personality research. Besides the primary scales and global factors, the 16PF can be scored for approximately 100 criteria that derive from years of research on 16PF applications in clinical, counselling and organizational psychology.”

(To be found at paragraph xlvi of the evidence summary.)

From *Personnel Selection: Adding Value through People* (Third Edition) by Mark Cook. A paragraph headed 16PF begins:

“Cattell’s 16PF measures 16 personality *source traits*, derived from factor analysis..... The current fifth edition of the 16PF, 16PF5, has good internal and re-test reliability, as well as good American and British norms.....”

(To be found at paragraph xlvi of the evidence summary.)

In *Psychological Testing and Assessment* by Lewis R Aiken includes the following:

“In addition to the 16 primary factors, the 16PF can be scored, by hand or computer, on three Validity Indices and five Global Scores....”

(To be found at paragraph xlvi of the evidence summary.)

Personality: Multivariate Systems Theory and Research” by Barry Smith, in the Handbook of Multivariate Experimental Psychology, 2nd Edition, edited by John Nesselrode and Raymond Cattell (1988), Plenum Press...page 695, 2nd column, 2nd para..

Quote #1: “The search for basis dimensions began with a list of 4000 trait variables that Allport and Odbert (1936) found in the dictionary. Elimination of similar terms narrowed the number to 182, and correlational techniques identified 40 clusters (Cattell, 1946), later increased to 45 (Cattell, 1949, 1950: Cattell and Saunders, 1950), **and these 16 have**

constituted the core dimensional set upon which much of the subsequent research has been based. That research has expanded the domain to 23 factors in normal populations (Cattell, 1972, Delhees, 1972)”

(To be found at paragraph lix of the evidence summary.)

19) In considering the matters before me I have found the judgment of the Court of Appeal in *Bach and Bach Flower Remedies Trade Marks* [2000] RPC 513 of assistance. Mr Edenborough submitted that the judgment of the Court of Appeal in *West (t/a Eastenders) v Fuller Smith & Turner Plc* [2003] FSR 44 superseded that of the Court of Appeal in *Bach and Bach Flower Remedies Trade Marks* [2000] RPC 513. In relation to one aspect of section 1(1)/ section 3(1)(a) this is the case but this is not the case in relation to the rest of the judgment. In the former judgment Arden LJ stated:

“60 I agree with the judgment of Pumfrey J. but add a few words of my own as this is the first opportunity which this court has had of expressing a view of the effect of the decision of the European Court of Justice in *Koninklijke Philips Electronics NV v Remington Products Ltd*, Case C-299/99, June 18, 2002 (the *Philips* case) [FN9] on the decision of the Court of Appeal in *Healing Herbs Ltd v Bach Flower Remedies Ltd* [2000] R.P.C. 513 (the *Bach* case).

61 Accordingly, I turn to the issue of distinctiveness. The words "extra special bitter" on their face are descriptive and they are not inherently distinctive. But, the findings of the judge, following a careful review of the evidence, were that, by the date of registration of the trademark "E.S.B", those initials would have had a distinctive meaning to the average consumer as denoting the product of the respondent. Accordingly, on the judge's findings, this is not a case where, to use the words of Chadwick L.J. in the *Bach* case, the consumer would know "that the words ... are widely used in a generic or descriptive sense." (p.535). Thus, the trade mark was not rendered invalid by virtue of the absolute grounds in s.3(1)(b) to (d) of the Trade Marks Act 1994. Despite the detailed submissions of Mr Michael Bloch Q.C., for the appellant, I see no basis on which the judge's findings can be disturbed by this court.

62 The judge did not have to consider s.3(1)(a) of the Act of 1994. His decision preceded in time the decision in the *Philips* case. That decision supersedes the decision of the Court of Appeal in the *Bach* case on the question of the interpretation of s.1(1) in conjunction with s.3(1)(a) of the 1994 Act. The words in question in s.1(1) are "capable of distinguishing the goods and/or services of one undertaking from those of other undertakings". These words reproduce equivalent wording in art.2 of the First Council Directive 89/104 of December 21, 1988, which the 1994 Act

was designed to implement. In the *Philips* case, the European Court of Justice adopted a purposive construction of the Directive, holding that Art.2 established a general proposition, that a trademark must serve to distinguish the proprietor's product, but that that proposition did not extend the boundaries of the grounds for refusal or invalidity separately covered by Art.3. In other words the relevant words in Art.2 are merely expegetical of the grounds in Art.3(1)(b) to (d) and Art.3(3). Thus the answer given by the European Court of Justice in the *Philips* case on this issue states:--

"1. There is no category of marks which is not excluded from registration by Article 3(1)(b), (c) and (d) and Art.3(3) of First Council Directive 89/104/EEC of December 21, 1988 to approximate the laws of the Member States relating to trade marks which is nonetheless excluded from registration by Art.3(1)(a) thereof *on the ground that such marks are incapable of distinguishing the goods of the proprietor of the mark from those of other undertakings.*" (emphasis added).

63 Neither Art.3 of the Directive nor the propositions of law set out by the judge in para.[16] of his judgment (and contained in para.[27] of the judgment of Pumfrey J.) define the point at which a mark is outside Art.3(1)(b) to (d) (the equivalent of s.3(1)(b) to (d) of the 1994 Act), for example, because it is "devoid of any distinctive character". The test applied by the judge is that of the average consumer. This is the correct test: see, for example, the *Bach* case. This test has its roots in the proviso to Art.2. Accordingly, if the mark passes s.3(1)(b) to (d) (as the case may be) on that test, it is "capable of distinguishing the goods or services of one undertaking from those of other undertakings" for the purposes of s.1(1) and 3(1)(a) and properly registrable. At least where a sign is not inherently distinctive but only becomes distinctive by use, the court has to consider whether the average consumer test is passed on the basis of the position in fact.

64 I thus agree with Pumfrey J. that, in the light of the answers given by the European Court of Justice in the *Philips* case, the critical words in section 1(1) are now to be interpreted:

"as imposing no distinctiveness requirement separate from that imposed by articles 3(1)(b), (c) and (d) and 3(3)" (above para.34).

65 In this passage, Pumfrey J. refers to the provisions of the Directive contained in the relevant answer of the European Court of Justice (see above). It follows that the provisions of the 1994 Act which must now be read as imposing no separate distinctiveness requirement from those imposed by s.3(1)(b) to (d) are ss.1(1) and 3(1)(a), and in addition the

provisos to ss.3(1) and 47(1) of the 1994 Act, which are designed to implement Art.3(3) of the Directive. The conclusions which I have expressed are in line with tenor of the solutions to the primary question, the subject of the reference in the *Philips* case, preferred in the current edition of *Kerly Law of Trade Marks and Trade Names*, (13th ed., 2001), which was published after the reference to the European Court of Justice in the *Philips* case but before that decision was announced.

66 Even though the decision of the Court of Appeal in the *Bach* case on the point identified above has been superseded by the decision of the European Court of Justice, the rest of the decision is unaffected.” (my emphasis)

Mr Edenborough also considered that *Bach* was not to point as it was dealing with section 1(1)/ section 3(1)(a). However, I consider that the considerations of Morritt and Chadwick LJJ, as they tackle the perception of the average, relevant consumer and the effect as a sign has upon this hypothetical person, is relevant:

In paragraph 45 Morritt LJ stated:

“If to a real or hypothetical individual a word or mark is ambiguous in the sense that it may be distinctive or descriptive then it cannot comply with the requirements of the Act for it will not provide the necessary distinction or guarantee. It is in that sense that a common or descriptive meaning must be displaced. It is also in that sense that I accept the second submission made by counsel for HHL before Neuberger J.”

At paragraph 49 he stated:

“First, use of a mark does not prove that the mark is distinctive. Increased use, of itself, does not do so either. The use and increased use must be in a distinctive sense to have any materiality.”

In his part of the judgment Chadwick LJ stated on page 534 at line 11 et seq:

“The test of capacity to distinguish must, as it seems to me, reflect the test which is to be applied, following the decisions of the Court of Justice in *Gut Springenheide and Tusky* [1998] E.C.R. I-4567 (at paragraph 31) and *Lloyd Schufabrik Meyer v. Klijsen Handel BV* [1999] E.T.M.R. 690, in determining whether there is a likelihood of confusion in the context of Article 5(1)(b) of Directive 89/104. That has not been in dispute on this appeal. The test is whether the average consumer of the category of products concerned would recognise the words as distinctive--that is to say, as a guarantee of origin. For that purpose the average consumer is deemed to be reasonably well informed and reasonably observant and circumspect.”

On page 535 at line 11 et seq he stated:

“As Morrit L.J. has pointed out, a reasonably well informed and reasonably observant and circumspect consumer would know, if it be the case, that the words or word are widely used in a generic or descriptive sense--even if he is, himself, aware that they are also used in a distinctive sense. With that knowledge, it seems to me impossible for him to say that the words identify, for him, the goods as originating from a particular undertaking. Knowing, as he does, that the use of words may be intended as descriptive, he cannot assert that he understands them as necessarily distinctive.”

20) The above references show that 16PF is identified as relating to 16 personality factors. (Of course, the knowledge of the abbreviation also makes this link). The references above are not necessarily likely to be read by the average, relevant consumer; they seem far more likely to be read by academics and students. However, they reflect, in my view, what is inevitable from the purpose of the 16PF instrument, a link between the instrument and the idea that personality can be defined by 16 factors. The purchaser of the test will see it as identifying the personality of a test subject by the use of the 16 factors. The test, the manuals relating to the test, they all identify the 16 personality factors. For the relevant, average consumer there is an effective equivalence between 16PF and sixteen personality factors. Will, for the average, relevant consumer, 16PF have the “sense” of identifying goods and services that relate to a system that identifies 16 personality factors or will this consumer see it as an indicator of origin? There may be some, as the evidence indicates, that identify 16PF with IPAT. However, identification with IPAT tells one little as this identification by some is inevitable owing to the copyright that IPAT has in relation to the questionnaire. That IPAT owns and exercises the copyright does not mean that the relevant, average consumer will see 16PF as a trade mark, as an indicator of origin, rather than as a characteristic of the goods and services.

21) In *MacLean-Fogg Co v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case T-339/05 the CFI stated:

“26 Article 7(1)(c) of Regulation No 40/94 provides that ‘trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or of rendering of the service, or other characteristics of the goods or service’ are not to be registered. Furthermore, Article 7(2) of Regulation No 40/94 provides that Article 7(1) ‘shall apply notwithstanding that the grounds of non-registrability obtain in only part of the Community’.

27 According to case-law, Article 7(1)(c) of Regulation No 40/94 prevents the signs or indications referred to therein from being reserved to one

undertaking alone because they have been registered as trade marks. That provision thus pursues an aim in the public interest, which requires that such signs or indications may be freely used by all (Case C-191/01 P *OHIM v Wrigley* [2003] ECR I-12447, paragraph 31; Case T-219/00 *Ellos v OHIM (ELLOS)* [2002] ECR II-753, paragraph 27; Case T-348/02 *Quick v OHIM (Quick)* [2003] ECR II-5071, paragraph 27; and Case T-316/03 *Münchener Rückversicherungs-Gesellschaft v OHIM (MunichFinancialServices)* [2005] ECR II-1951, paragraph 25; see also, by analogy, *Windsurfing Chiemsee*, cited in paragraph 13 above, paragraph 25; *Koninklijke KPN Nederland*, cited in paragraph 13 above, paragraphs 54 and 95; and *Campina Melkunie*, cited in paragraph 13 above, paragraph 35).

28 Furthermore, signs or indications which may serve, in trade, to designate characteristics of the goods or service in respect of which registration is sought are, by virtue of Article 7(1)(c) of Regulation No 40/94, regarded as incapable of performing the essential function of a trade mark, namely that of identifying the commercial origin of the goods or service, thus enabling the consumer who acquired the goods or service designated by the mark to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition (*OHIM v Wrigley*, cited in paragraph 27 above, paragraph 30, and *ELLOS*, cited in paragraph 27 above, paragraph 28).

29 Consequently, for a sign to fall within the scope of the prohibition in that provision, it must suggest a sufficiently direct and concrete link to the goods or services in question to enable the public concerned immediately, and without further thought, to perceive a description of the goods and services in question or of one of their characteristics (Case T-106/00 *Streamserve v OHIM (STREAMSERVE)* [2002] ECR II-723, paragraph 40, upheld on appeal by order of 5 February 2004 in Case C-150/02 P *Streamserve v OHIM* [2004] ECR I-1461; and *PAPERLAB*, cited in paragraph 25 above, paragraph 25).....

32 The assessment of the descriptiveness of a sign may only be assessed, first, in relation to the understanding of the sign by the relevant public and, second, in relation to the goods or services concerned (*EUROCOOL*, cited in paragraph 13 above, paragraph 38, and *MunichFinancialServices*, cited in paragraph 27 above, paragraph 26)."

22) I do not consider that 16PF will identify the goods and services of one particular undertaking, I consider that 16PF will be seen as a characteristic of the goods and service ie relating to a system of analysis of personality by 16 factors. **Consequently, registration of the trade mark 16PF would be contrary to section 3(1)(c) of the Act.**

23) In *Koninklijke KPN Nederland NV v Benelux Merkenbureau* Case C-363/99 the ECJ stated:

“86. In particular, a word mark which is descriptive of characteristics of goods or services for the purposes of Article 3(1)(c) of the Directive is, on that account, necessarily devoid of any distinctive character with regard to the same goods or services within the meaning of Article 3(1)(b) of the Directive. A mark may none the less be devoid of any distinctive character in relation to goods or services for reasons other than the fact that it may be descriptive.”

Consequently, registration of the trade mark 16PF would be contrary to section 3(1)(b) of the Act.

24) Mr Saunders considered that his strongest case lay with section 3(1)(c). I am of the same view. Taking the facts of this particular case, if Psytech cannot succeed under this ground I cannot see that it can succeed under section 3(1)(d), **Consequently, I do not consider it necessary to make a finding under section 3(1)(d) of the Act.**

16PF5

25) 16PF5 has to be considered as a trade mark in its entirety, the final numeral has to be considered. The evidence does not support that this trade mark is exclusively a sign or indication which designates a characteristic of the goods and services the subject of the application. Equally it is not exclusively a sign or indication that has become customary in the trade. **The grounds of opposition under sections 3(1)(c) and (d) must be dismissed.**

26) In *Develey Holding GmbH & Co Beteiligungs KG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM)* Case C-238/06 P the ECJ stated:

“79. According to consistent case-law, the distinctive character of a trade mark within the meaning of Article 7(1)(b) of Regulation No 40/94 means that the mark in question makes it possible to identify the product in respect of which registration is applied for as originating from a particular undertaking, and thus to distinguish that product from those of other undertakings (Joined Cases C-473/01 P and C-474/01 P *Procter & Gamble v OHIM* [2004] ECR I-5173, paragraph 32, and Case C-64/02 P *OHIM v Erpo Möbelwerk* [2004] ECR I-10031, paragraph 42). That distinctive character must be assessed, first, by reference to the products or services in respect of which registration has been applied for and, second, by reference to the perception of the relevant public (*Procter & Gamble v OHIM*, paragraph 33, and Case C-24/05 P *Storck v OHIM* [2006] ECR I-5677, paragraph 23).”

The CFI in *Rewe Zentral AG v Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM) Case T-79/00* described the issue in a clear and practical manner:

“26. The signs referred to in Article 7(1)(b) of Regulation No 40/94 are signs which are regarded as incapable of performing the essential function of a trade mark, namely that of identifying the origin of the goods or services, thus enabling the consumer who acquired them to repeat the experience, if it proves to be positive, or to avoid it, if it proves to be negative, on the occasion of a subsequent acquisition.”

27) I consider that the relevant, average consumer will identify the 16PF element of the trade mark, taking into account the nature of the goods and services. The final numeral will then be seen, in my view, as a variant of goods and services relating to the analysis of personality by reference to 16 factors. I do not consider that this will have the effect of identifying the goods and services as originating from a particular undertaking. Nor do I consider that the use of 16PF5 would, without education, lead the average, relevant consumer to repeat the purchase of the goods and services or to avoid them. In my view the relevant, average consumer will be looking for some other indication of origin eg the name of a publisher.

28) The trade mark 16PF5 is devoid of any distinctive character and its registration would be contrary to section 3(1)(b) of the Act.

Acquired distinctiveness

29) Mr Edenborough submitted that if I was against him in relation to section 3(1) of the Act, IPAT has shown that the trade marks have acquired distinctiveness and so can benefit from the proviso.

30) In *Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber and Franz Attenberger* Joined Cases C-108/97 and C-109/97 the ECJ stated:

“51. In assessing the distinctive character of a mark in respect of which registration has been applied for, the following may also be taken into account: the market share held by the mark; how intensive, geographically widespread and long-standing use of the mark has been; the amount invested by the undertaking in promoting the mark; the proportion of the relevant class of persons who, because of the mark, identify goods as originating from a particular undertaking; and statements from chambers of commerce and industry or other trade and professional associations.

52. If, on the basis of those factors, the competent authority finds that the relevant class of persons, or at least a significant proportion thereof,

identify goods as originating from a particular undertaking because of the trade mark, it must hold that the requirement for registering the mark laid down in Article 3(3) of the Directive is satisfied. However, the circumstances in which that requirement may be regarded as satisfied cannot be shown to exist solely by reference to general, abstract data such as predetermined percentages.”

The judgment of the ECJ in *Bovemij Verzekeringen NV v Benelux-Merkenbureau* Case C-108/05 has established that a reputation in one area will not be enough to establish distinctiveness.

31) The use indicated only relates to questionnaires and manuals. There is no distinction drawn between the two trade marks. Turnover figures are given by Mr Slaughter and Dr McHenry. In absolute terms the figures do not appear to be particularly high. As there is no indication of market share it is impossible to place the figures in a meaningful context. Mr Slaughter states that between 1990 and 1995 £100,000 was spent on advertising and promotional activities. There is a lack of evidence in relation to the nature of the advertising and promotional activities. Mr Edenborough submitted that I should take into account, for promotional purposes, the amount expended on development of the PF15 product by Psytech. Promotion and advertising is about putting a brand before the public, having an effect on the public consciousness. I cannot see how the development of the product has an effect on public consciousness and so have an effect on the perception of the trade marks. Dr McHenry’s sales figures refer to England rather than the United Kingdom. I have assumed, in favour of IPAT, that this is an unfortunate error and that he meant the United Kingdom. Mr Edenborough also considered that weight should be given to the letter from Mr Bateson (paragraph lxxv of the evidence summary). Mr Bateson is certainly not the average, relevant consumer. The letter, also, simply reflects his view. If the letter does have any weight in the proceedings it is that of a fledgling wren’s feather.

32) Mr Edenborough pointed to the prominent use of 16PF on publications. It is normal for the title of a publication to be prominent, this does not make it a trade mark or mean that it will be seen as such. It will be seen as a title. The publications bear the name of the publisher, the publisher is normally the indicator of origin. I note that there has been some late use of the ® symbol next to 16PF.

33) In *Bach and Bach Flower Remedies Trade Marks* Morrit LJ stated at paragraph 49

“First, use of a mark does not prove that the mark is distinctive. Increased use, of itself, does not do so either. The use and increased use must be in a distinctive sense to have any materiality.”

With publications bearing the name of a publisher and/or licensee and 16PF being a clearly identified descriptor, I am unconvinced that the use of 16PF has had materiality.

34) The effect of use is dependent upon the nature of the trade mark. The “worse” the trade mark the stronger the use has to be. I consider that 16PF is a sign that will for the average, relevant consumer take an awful lot of work in order for it to be seen as a trade mark. **I certainly do not consider that the evidence as presented establishes that 16PF or 16PF5 have acquired distinctive character through use.**

35) Both applications are to be refused.

Costs

36) Psytech having been successful is entitled to a contribution towards its cost. I award costs on the following basis:

Opposition fee x 2	£400
Notices of opposition	£300
Considering the counterstatements	£200
Preparing and filing evidence	£1,000
Considering evidence of IPAT	£500
Preparation and attendance at hearing	£1,000
TOTAL	£3,400

I order Institute For Personality & Ability Testing Inc to pay Psytech International Limited the sum of £3,400. This sum is to be paid within seven days of the expiry of the appeal period or within seven days of the final determination of this case if any appeal against this decision is unsuccessful.

Dated this 26 day of September 2008

**David Landau
For the Registrar
the Comptroller-General**

Annex

Witness statement of Laurence Paltiel

i) Mr Laurence Paltiel gives evidence on behalf of Psytech. Mr Paltiel is the managing director of Psytech. He has been a chartered occupational psychologist since 1986. He holds a masters degree in occupational psychology and is a member of the occupational division of the British Psychological Society (BPS). He has served on the BPS's main committee and chaired a number of sub-committees, including the assessment standards committee. Mr Paltiel is a founding member of the United Kingdom Association of Business Psychologists.

ii) Exhibits relating to the Fifteen Factor Questionnaire/15FQ+ are to found at LP-1 and LP-2, this is psychometric test published by Psytech. Mr Paltiel states that this test is heavily based upon "Cattell's 16PF model".

iii) Exhibited at LP-3 are copies of pages from *The Adult Personality Inventory Manual* by Samuel E Krug. These pages include the following, at page 2:

"The Questionnaire was developed to measure a set of traits that were first identified by Raymond B. Cattell and his associates and described in a series of publications that began more than three decades ago (Cattell, 1950, 1951, 1956, 1957, 1973). These traits were conceptualized by Cattell as representing the elementary traits of human personality. He argued that these traits could be combined in predictable ways to analyze and predict more complex forms of behavior, just as chemical elements can be mixed in predictable ways to form various compounds.

These trait scales were subsequently incorporated into a set of tests that includes the 16 Personality Factor Questionnaire (first published in 1949), the IPAT Anxiety Scale (1957), the High School Personality Questionnaire (1958), the Children's Personality Questionnaire (1959), the Neuroticism Scale Questionnaire (1961), the Early School Personality Questionnaire (1966), the Clinical Analysis Questionnaire (1970), and the Child Anxiety Scale (1978)."

at page 47:

"Following the criteria defined above, 454 new items were constructed. Each item was reviewed by a panel of experts, all of whom were familiar with test construction, in general, and the trait scales of the 16PF, in particular. As a result of their review, items were modified to improve clarity and some were dropped because of obvious redundancies. This stage of analysis resulted in a reduced pool of 395 items.

The revised Questionnaire was administered to 168 women and 113 men along with Form A of the 16PF. The sample consisted of approximately one-third high

school students, one-third college students, and one-third unselected adults. Both inventories were completed in a single testing period, about two hours long.”

This is a publication from the United States of America and bears copyright dates of 1952 and 1984.

iv) Exhibited at LP-4 are pages downloaded from computerpsychologist.com on 21 March 2005. There are two references to measuring 16 core human personality traits.

v) Exhibited at LP-5 are copies of pages from the 1991 edition of IPAT's *Administrator's Manual for the 16PF®*. Included in the exhibit is a bibliography listing the following publications:

The 16 PF: Personality in depth (1989) by HB Cattell.

16PF research bibliography: 1971 – 1976 (1977) by MA Hussong, JL Sherman and GR Ferris.

Tabular supplement no 1 to the 16PF handbook (1970) by IPAT staff.

A guide to the clinical use of the 16PF (1976) by S Karson and JW O'Dell.

Interpreting 16PF profile patterns (1981) by SE Krug.

A large-scale cross-validation of second-order personality structure as determined by the 16PF (1986) by SE Krug and EF Johns.

With the exception of the last publication all of the above publications, and *The Adult Personality Inventory Manual*, emanate from Champaign Illinois and would appear to have been published by IPAT (a statement in *The Adult Personality Inventory Manual* states that it was published by IPAT).

vi) Included in the exhibit is a page headed *16PF®5 Questionnaire*, upon this page there are references to 16PF Qualifying and 16PF Conversion. In the exhibit the following, inter alia, is written:

“The *Sixteen Personality Factor Questionnaire* (16PF) is an objectively scorable test devised by basic research in psychology to give the most complete coverage of personality possible in a brief time.”

“Using this text, readers can develop an understanding of the ways in which Raymond B. Cattell's primary personality traits, as measured by the 16PF, are manifested in human behaviour.”

Mr Paltiel considers that the following is of significance to his case:

“The 16PF: Personality in Depth provides users with an intensive clinical perspective on the 16 PF. Drawing upon interactions with 905 examinees, most of whom were seen in clinical settings, the author conducted research in which

she systematically observed links between the examinees' scores on 16PF and her professional observations of their behavior. This collection of data spanned a period of six years, and incorporated examinees' reactions to feedback about their 16PF results as well as other clinically relevant knowledge such as client history and interactions with family and coworkers. From her research, Dr Cattell has associated certain regularities of thinking, feeling, and behavior with each factor, and has reported her findings in the new 16PF resource work."

"The personality factors measured by the 16PF are not just unique to the test, but instead, rest within the context of a general theory of personality. Nearly 10 years of empirical, factor-analytic research preceded the first commercial publication of the test in 1949. Since this time, five major revisions of items and many additional improvements, such as supplementary validity scales, have been incorporated into the 16PF."

vii) Mr Paltiel states that the status of what he calls Cattell's 16PF theory as an important psychological theory, from which a number of psychometric tests are derived, means that it has a key rôle to play amongst academics and in the education of students and professionals. Mr Paltiel states that a search on the PsycholInfo database, which he describes as the definitive source of published research for psychologists, reveals a number of articles discussing Cattell's 16PF theory. Exhibited at LP-6 are copies of pages from PsycholInfo, downloaded on 1 May 2003, showing abstracts from six articles:

A journal article by SV Golubkov from 2002, the abstract includes the following: "The paper discusses the so-called clinical (deductive) and scientific (inductive) approaches to elaborating personality theories as well as integrative attempts of trait theorists to find "the golden mean" between objectivity and universal structure of personality, among which the basic models are the 16PF, the PEN and the B5."

A journal article by Heather E Cattell from December 1993, the abstract includes the following: "The Big Five factors, discussed by Goldberg are said to line up fairly well with Cattell's 2nd-order Sixteen Personality Factor Questionnaire (16PF) traits."

A journal article by HJ Eysenck from 1991, the abstract includes the following: "14 criteria (both taxonomic and causal) are put forward and an attempt is made to apply them to 3 major systems, namely Sixteen Personality Factor Questionnaire (16PF) theory...."

A journal article by B Merson and RL Gorsuch from October 1988, the abstract includes the following: "Many researchers support a 5- to 8- factor personality theory; Cattell urges a 16-factor system."

A chapter from a book, the chapter is written by AH Ismail and the book was published in 1987, the abstract includes the following: “our study investigated the relationship between physical fitness and trait personality (16PF) variables at second and third factor analytic solutions”.

A journal article by WJ Wright from 1985, the abstract includes the following: “Evaluated the usefulness of a standardized multivariate model based on the Sixteen Personality Factor Questionnaire (16PF) for describing and comparing the personalities of historical figures, using analyses by 5 Reformation historians of Martin Luther, Philip Melancthon, Landgrave Philip of Hesse, and Elector John Frederick of Saxony. Profiles of the 4 leaders are presented, and the application of the model and R.B. Cattell’s (1977) personality theory to historical problems are discussed.”

viii) A copy of an article entitled *Personality Models* downloaded from riskpsychology.net on 21 March 2005 is also included in exhibit LP-6. This article includes a section headed *Cattell’s Model of Personality*, which includes the following:

“Developed in 1950, Cattell’s 16PF (sixteen – personality – factor) model was one of the earliest trait theories that tried to find the underlying mechanisms behind personality...However, the problem with Cattell’s theory is that no one has been able to replicate his research and arrive at the same 16 factors. Therefore, the 16PF is not widely used.”

ix) Exhibited at LP-7 are copies of pages from the *Concise Encyclopedia of Psychology*. There is no indication of the date of the publication, however, the extract includes a reference to BF Skinner without giving a date of his death, so I infer that it was published before 1990. The extract includes the following reference:

“The 16PF QUESTIONNAIRE

The Sixteen Personality Factor Questionnaire, known simply as the 16PF, is a major technological outgrowth of the research on self-report data that Raymond B. Cattell directed over a period of more than 30 years. The research on which the 16PF is based proceeded by (1) establishing, by factor analytic means, independent dimensions of personality within behavior-rating data; (2) writing self-report items to represent these dimensions; and (3) factoring to determine factors among the responses to these items.

Several forms of the 16PF have been produced over the last 30 years – some for different language culture groups (German, French, Japanese, Spanish, etc.), some for poor readers, and so forth.....”

x) Mr Paltiel states that a study of Cattell’s 16PF theory is central to almost all psychology courses. In relation to the last statement he exhibits material from

courses at the universities of Durham, Exeter, Leicester, Glasgow and Strathclyde. The material from the first three universities emanates from 1998-1999, 2003 and 1999-2000 respectively; the material from the last two universities is undated.

Durham University:

“TRAIT APPROACHES. Cattell 16PF: Eysenck EPQ: Five Factor Theory (NEO-PI).”

Exeter University:

“Cattell’s Sixteen Personality Factor Model (16PF)”

Raymond Cattell considered that an individual’s behaviour is a function of personality, combined with environmental factors.....

.....Cattell (1971) gathered lists of adjectives, descriptions of behaviour in real life and items from other personality tests, and through a process of factor analysis, identified 16 factors that he believes are basic personality dimensions.Cattell developed the Sixteen Personality Factor (16PF) questionnaire..... By using the 100 item 16PF questionnaire a personality profile can be established.....

NB: Any good text book will contain details of Cattell’s factors, and so I will not list them here.”

University of Leicester (from a one page work sheet on Raymond Cattell and personality trait theory):

“.....These were used to construct the 16PF (personality factors) questionnaire.”

University of Glasgow, a PowerPoint® presentation made by Mr Paltiel headed Cattell, inter alia the following appears: “16PF test devised; possible to use this test to produce personality profiles of both individuals and of occupational groups”.

Strathclyde University, a presentation made by Mr Paltiel, included in this is what appears to be copy of a slide which includes the following:

“Trait theories of personality

- Eysenck
- Cattell – 16PF
- Costa & McCrae – Five Factor Model”

xi) Mr Paltiel states that until two or three years previously, he is writing in August 2006, a test which dated back to 1956, and which was known as 16PF Industrial, was widely distributed by a company called The Test Agency Limited. Mr Paltiel states that The Test Agency Limited has no connection with IPAT or its licensees. Exhibited at LP-13 is a copy of a letter dated 19 August 1999 from ASE, which Mr Paltiel states was at the time IPAT's licensee for the distribution of the 16PF test in the United Kingdom. The letter is addressed to Assessment Systems Limited. The body of the letter consists of the following:

"Thank you for your letter dated 5th August 1999. I would like to confirm to you that ASE is the only company in the UK licensed by IPAT to distribute the 16PF, whether it be the UK or US version except for an IPI industrial version distributed by The Test Agency. It is our intention to uphold this legal position and therefore we shall be working with our legal representatives to that effect."

A copy of The Test Agency's questionnaire is exhibited at LP-14. This is headed *Employee Attitude Series 16 P.F. Industrial Edition*. The front page states that it was prepared by Raymond B Cattell of the University of Illinois and The Test Agency is described as the sole United Kingdom distributors and licensees. Inside the questionnaire there is a copyright notice, which advises that the copyright, from 1961, is owned by Industrial Psychology, Inc of New York. A page is headed "OCCUPATIONAL 16PF". Included in the exhibit is a manual in which the following appears:

"The Industrial 16PF (Personality Factor) Questionnaire and its two associated short questionnaires CPF and NPF are part of the Factored Aptitude Series. This is a battery of psychological tests and instruments produced by Industrial Psychology Inc, which between them over the aptitudes and personality factors required to learn and perform most jobs up to middle managerial level. The series can be used in selection, placement, counselling and research.....

.....The 16PF, CPF and NPF have been developed by Dr Raymond B. Cattell and his associates. Their work began in the 1940s with the isolation of basic factors of personality by questionnaire rating and objective testing methods.....

.....Since the early 1950s a great deal of research has been performed into how 16PF, CPF and NPF results correlate with job performance and with various personality traits and aptitudes."

xii) Mr Paltiel states that "to be able to assess people using IPAT's 16PF test.... it is necessary to pass a course which includes learning about Cattell's 16PF theory, as well as the administration of IPAT's 16PF test." Mr Paltiel states that in the United Kingdom scores of independent psychologists have been providing training accredited by the British Psychological Society (BPS) in the use of

various forms of the 16PF test and Cattell's 16PF theory for decades. The BPS introduced a "competence-based qualification process" under which training providers (who have to be chartered psychologists) have to show their competence. Once approved, training courses can be advertised as being 'BPS Approved'. Mr Paltiel states that in 2003 there were over 40 independent chartered psychologists who had been accredited by the BPS to independently accredit competence in the use of IPAT's 16PF test. Mr Paltiel states that the large majority of these people were independent of IPAT or its various licensees. Mr Paltiel exhibits at LP-15 a letter dated 8 November 2001 to him from the BPS with a list of the names of 27 chartered psychologists, he states that this shows the names of those who have been verified by the BPS as assessors of IPAT's 16PF test. The letter is headed 16PF. The letter then goes on to state: "[f]ollowing is list of names as discussed". A list of names then follows. The letter ends by advising that all of those listed are chartered psychologists. The letter does not advise what was discussed or why the names have been listed.

xiii) Mr Paltiel states that he has been delivering training which includes training in relation to both Cattell's 16PF theory and IPAT's 16PF test for over twenty years, initially through Psyconsult and currently through Psytech. Mr Paltiel states that Psytech has trained more people in the last 5 years in the United Kingdom than IPAT or any of its licensees in the United Kingdom. There is no indication if this statement refers to training in general or training in relation to the 16PF test specifically. Mr Paltiel states that he would estimate that half of the people who have passed courses which included training in relation to the administration of IPAT's 16PF test have been run by people with no connection with IPAT or any of its licensees.

xiv) Exhibited at LP-16 are copies of pages from *The Guidance and Assessment Review* and its successor publication, *The Selection Development Review*, published by the BPS. Included in this exhibit are notifications of training courses on testing being run by Saville & Holdsworth Ltd, Independent Assessment Research Centre, Team Focus Ltd, ASE, Resource, The Test Agency Limited, Stuart Robertson and Associates, Psytech International Ltd, PASS, A&DC, MT, A&B, MT, OPS, PCL and OTL in relation to 16PF and/or 16PF5 (there is no key to identify the full names of the last 8 undertakings). Mr Paltiel states that Saville & Holdsworth Ltd and Team Focus Ltd have no connection with IPAT.

xv) Exhibited at LP-17 are copies of advertisements in *People Management* and *Personnel Today* from 1998 to 2001 from various undertakings which give training in relation to 16PF and 16PF5: Psytech, Stuart Robertson and Associates, OTL, Occupational Psychology Services Ltd, ASE, OTL and The Test Agency.

xvi) Exhibited at LP-18 are copies of advertisements which refer to 16PF and 16PF5 from *The Psychologist* from 1997 to 2001. These advertisements were placed by Psytech, Occupational Psychology Services Ltd and Team Focus Ltd.

Included in the extracts, from June 1998, is an advertisement for what appears to be software. The advertisement refers to OPQ® and 16PF, it advises that OPQ® is a registered trade mark of Saville & Holdsworth Ltd.

xvii) Mr Paltiel states that until recently a number of undertakings, which had nothing to do with IPAT, were offering training that included training in the administration of IPAT's 16PF test. He states that IPAT exercised no quality control over this training, which was conducted "under the umbrella of the BPS". Mr Paltiel states that this training by unauthorised third parties was widely recognised by IPAT, which allowed individuals who had taken any of this training to purchase its 16PF test and related materials.

xviii) Mr Paltiel states that recently IPAT has attempted to restrict the number of people who can offer training in its 16PF test. This has been done by saying that only those individuals who have been authorised by IPAT to provide this training can qualify individuals to receive test materials from IPAT. Mr Paltiel states that this has not prevented companies like Psytech from providing training, which includes training in the administration of IPAT's 16PF test and the successful completion of which qualifies "delegates" to receive IPAT's 16PF test materials. Mr Paltiel states that this is possible because although IPAT has sought to introduce very strict controls in the United Kingdom, in the rest of Europe most publishers simply require evidence of suitable qualifications in psychology before they will supply materials related to IPAT's 16PF test. Mr Paltiel states that he is registered with distributors in Belgium and the Netherlands and regularly receives materials in relation to IPAT's 16PF test from these sources, which he can then distribute to people that he trains.

xix) Mr Paltiel states that there are a number of software programs available from third parties which generate reports based on IPAT's 16PF test. Exhibited at LP-19 are copies of advertisements from CIM Test Publishers, Quester Assessment Systems Ltd and Stuart Robertson & Associates advertising such software. Exhibit LP-20 contains copies of examples of reports generated by such software in relation to IPAT's 16PF test. These reports are generated by software distributed by Quester, Psyconsult, The Test Agency Limited, Selby MillsSmith, Psytech and CIM Test Publishers.

xx) Mr Paltiel states that is not the first or only attempt by IPAT or its licensees to register the 16PF as a trade mark. Exhibited at LP-21 is printout for United Kingdom trade mark application no 2039496 for the trade mark 16PF; the application was made on 2 October 1995 and refused on 13 October 1997. Exhibited at LP-22 is a printout of the results of a trade mark search; this shows a Community trade mark registration for 16PF, withdrawn applications for the trade marks 16PF and 16PF5 and the two applications the subject of these consolidated oppositions. Mr Paltiel states that in the case of the two applications with the status withdrawn, progress stopped when IPAT failed to

respond to oppositions filed by Psytech. Mr Paltiel states that Psytech has filed an application for the invalidation of the Community trade mark.

xxi) Mr Paltiel states that a number of written observations were submitted to the Community trade mark office in relation to IPAT's trade mark; exhibited at LP-23 are copies of these letters. The letters are from Tract Business Services Ltd, Association of Business Psychologists, Claire Ballard, Mariner 7 of New Zealand, Andrew M Sidebottom, Rawling associates, the BPS and Dr Barry Cripps Associates & Partner.

I note the following from the letters:

Dr Coaley of Tract Business Services Ltd writes:

"1. The concepts and constructs embodied within the 16PF have been widely known and referred to within the domain of general psychology in the UK for more than 30 years. Academic, teaching, research and more general discussions in the fields of personality and individual differences frequently cite the 16PF and the related investigations of R.B. Cattell, and have done so for nearly 50 years. The majority of handbooks relating to personality assessment or personnel/work psychology have referred to the 16PF."

Ms Claire Ballard, a chartered occupational psychologist, writes:

"The term 16PF is an abbreviation of 16 Personality Factors. If you open even the most basic introductory textbook on Psychology and turn to chapters concerning Personality, you will find reference to the work of Raymond B Cattell and his research into various traits or factors of human temperament. As his research culminated in the "discovery" of 16 traits, the body of work has become known as 16PF.....

.....Nonetheless, the term "16PF" predates the development of the questionnaire and, therefore, has significantly greater connotations than the questionnaire alone."

Professor Paul Barrett writes for Mariner 7:

"Cattell **was** and **is** the "16PF" – and vice-versa. This became the world benchmark test for trait measurement of personality, and a fully-fledged theory of personality in its own right – appearing in many textbooks of personality theory published over the intervening years."

K B Rawling, a chartered occupational psychologist, of Rawling associates, writes:

"16PF is a generic term for an assessment method and model of personality which is well-known and widely-used by psychologists and other professionals.

The first version of the 16PF was published more than 50 years ago, and the terms '16PF' and '16PF factors' have been used for many decades in academic publications and discussions. IPAT themselves have published books that do not appear to explicitly attribute the 16PF to IPAT, eg Krug S E (1981) 'Interpreting 16PF profile patterns' (Champaign, Illinois, Institute for Personality and Ability Testing)."

Mr David M Nelson writes for the BPS:

"Above all, the time has long passed when British psychologists and other users of personality tests automatically linked the term '16pf' with IPAT."

xxii) Mr Paltiel states that during the continuing invalidation proceedings before the Community trade mark office a number of letters have been sent to the office. Copies of these letters are exhibited at LP-24. The letters are from Dr Coaley, Stuart Robertson, of Stuart Robertson & Associates and Roy Childs of Team Focus Limited.

Mr Robertson writes:

"During my time as an academic the term 16PF was synonymous with the theory of personality developed by Raymond Cattell. 16PF was in effect a questionnaire expression of the theory in relation to the adult population, but it was the outcome of a piece of research which became a model for the development of personality theory."

Mr Childs writes:

"I would argue that the 16PF has become a model of personality which has been in the public domain for many years. My reasons for this are as follows:

- It is part of all Psychology syllabuses that address personality and individual differences.
- It is referred to in many reference and text books.
- It grew out of Ray Cattell's research which was funded by public money.
- It is a marker for other instruments.
- We all need to continually expand and extend this area of research and part of that involves developing ways of measuring the 16PF model of personality."

xxiii) Mr Paltiel states that as part of the invalidation proceedings before the Community trade mark office "a relatively informal survey was devised and implemented by Professor Paul Barrett". The survey asked two questions. Each question related to the same eight acronyms/abbreviations: JTI, MBTI, OPQ, 16PF, EPQ, NEO, STAXI and DISC. The first question asked which of the

following acronyms was recognised and the second with whom or with what the acronyms were associated. Out of 107 respondents 104 recognised 16PF. There were many different responses to the second question. Mr Paltiel considers that it is of significance that 68% of respondents associated 16PF with the name Cattell or with or with 16 personality factors or both and that only 10% with IPAT or the test publisher OPP.

xxiv) The problems with surveys are notorious (see for instance the comments of Arden LJ in *esure Insurance Limited v Direct Line Insurance Plc* [2008] EWCA Civ 842⁷). The basis parameters for the conduct of a survey were set out in the head note of *Imperial Group plc & Another v. Philip Morris Limited & Another* [1984] RPC 293:

“If a survey is to have validity (a) the interviewees must be selected so as to represent a relevant cross-section of the public, (b) the size must be statistically significant, (c) it must be conducted fairly, (d) all the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of the persons involved, (e) the totality of the answers given must be disclosed and made available to the defendant, (f) the questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been put, (h) the exact answers and not some abbreviated form must be recorded, (i) the instructions to the interviewers as to how to carry out the survey must be disclosed and (j) where the answers are coded for computer input, the coding instructions must be disclosed.”

In this case none of the completed surveys have been filed. The sample was chosen from delegates to Psytech’s training courses, it is difficult to see how this can be considered to be a representative sample of the average, relevant consumer. Owing to the absence of completed surveys it is also impossible to identify the nature and background of the respondents. In the absence of their names it is also impossible to have them cross-examined in relation to what they meant. Professor Barrett did not advise those to whom he sent the questionnaire that the responses were to be used in legal proceedings. In the conduct of

⁷ 63. Secondly, consumer surveys are costly to produce. They can, moreover, sometimes be based on the wrong questions and thus produce irrelevant or unhelpful responses or for some other reason, as in this case, be of no evidential value. There is much to be said for the practice initiated by the late Pumfrey J (as he then was) in *O2 Ltd v Hutchison 3G Ltd* [2005] ETMR 61, and subsequently followed by Rimer J in *U K Channel Management Ltd v E!Entertainment Television Inc* [2008] FSR 5. Under this practice, case management directions are given at an interim stage requiring the parties to seek the directions of the court as to the scope or methodology of any proposed consumer survey that the parties may desire to put in evidence at trial. Those directions can then be given in advance of the trial (see, for example, the further proceedings in the *U K Channel Management* case given by Lewison J, [2007] EWHC 2339 (Ch)).

surveys it is standard practice to advise respondents that their replies are to be used in legal proceedings and to ask if they would be willing to complete a witness statement.

xxv) The failure to supply copies of the completed survey fatally undermines the validity of the survey results. Neither I nor IPAT have the faintest notion of what the respondents actually wrote. We cannot analyse, interpret nor question the responses. We are supposed to view the survey purely through the prism of Professor Barrett's interpretation of it. It is also to be noted that the survey evidence has not been adduced by way of a witness statement by Professor Barrett. The survey also begs questions as to what the respondents mean by associate?

Witness statement of Dr Robert Edward McHenry

xxvi) Dr McHenry is the chairman of IPAT and of OPP Limited. OPP bought all of the share capital of IPAT in January 2003 and so IPAT is a wholly owned subsidiary of OPP. Dr McHenry has worked in the field of psychology for at least 35 years. He has a doctorate in experimental psychology from the University of Oxford and is an associate fellow of the BPS. He is also a chartered occupational psychologist. Dr McHenry has been a member of the BPS for over 35 years and during the previous 8 years has, at various times, been a member of its council and held the office of chair of the BPS division of occupational psychology. He is a founder member of the Association of Business Psychologists. Dr McHenry holds a stipendiary position as tutor and lecturer in experimental psychology at Oriel College.

xxvii) OPP is involved in the provision of, and training in the use of, psychometric tests, ability tests and aptitude tests. OPP supplies and works with a number of major companies in the United Kingdom and elsewhere, as well as with public sector and non-profit making organisations.

xxviii) Dr McHenry states that IPAT has been in the personality assessment business for more than 55 years, since it was founded by Dr Raymond Cattell. Dr McHenry states that the 16PF test is the exclusive property of IPAT.

xxix) Dr McHenry states that throughout his career he has been aware of the 16PF test as a specific test created by Dr Cattell and published by IPAT. He states that the test has been made available either by IPAT itself or by licensees since the beginning. Dr McHenry states that he has always been aware that legitimate training in the administration and evaluation of the 16PF test originated with IPAT itself or a licensee.

xxx) Exhibited at RM1 is a copy of an agreement made on 10 October 1978 (although signed on 12 and 31 December 1978) between IPAT and Dr Cattell in

which he grants all of his rights, inter alia, in the Sixteen Personality Factor Questionnaire to IPAT.

xxxi) Dr McHenry states that a substantial number of personality tests have been developed and published. He states that the leading publishers in the field included the SHL Group, Swets and Zeitlinger, IPAT, The Psychological Corporation, NCS Pearson and OPP Ltd. Dr McHenry states that all of these organisations compete to provide tests for the organisational, clinical and educational fields. Their tests measure general intelligence, special skills and aptitudes, personality and work and career interests. Exhibited at RM2 are copies of pages from *Tests A Comprehensive Reference for Assessments in Psychology, Education, and Business, Test Critiques Volume IV* and *The Ninth Mental Measurements Yearbook*. These pages show a large number of “psychometric instruments, personality questionnaires and the like”. The pages from *Test Critiques Volume IV* comprise a critique, written by Dr Brent Edward Wholeben, of the Sixteen Personality Factor Questionnaire. Dr Wholeben writes:

“The Sixteen Personality Factor Questionnaire (16PF) is an objective test of 16 multidimensional personality attributes arranged in omnibus form. In general, it provides normed references to each of these attributes (the primary scales).....

.....The 16PF assesses a total of 16 indices, or attributes, of the human personality to convey a map of the individual’s “personality sphere” as originally intended by Cattell.....

.....Subsequent editions of the 16PF, including the construction of seemingly parallel forms (possibly better referred to as extended, repeated measurement forms), were published in 1956-1957, 1961-1962, and 1967-69. A total of five forms now exist: Forms A, B, C, D, and W. Recently (1985), Form E has been renormed for highly diverse populations, including prison inmates, culturally disadvantaged, physical rehabilitation clients, and limited schizophrenic patients. The norms and interpretive data for the use of the remaining forms (A-D) are based on updated validity and reliability studies conducted in 1970 (Forms A-B) and 1972 (Forms C-D). Normative data comparisons are based on the demographic characteristics of gender and age for senior high school, college, and more general populations, but age corrections can be applied when widely age-ranging populations are being compared.....

.....According to Lanyon and Goodstein (1982), the quantity of references for the 16PF is second only to the MMPI. Of over 2,000 research citations that exist today concerning the formal application of the 16PF as a personality assessment instrument (e.g., Buros, 1978; Institute for Personality and Ability Testing, Inc., 1977, 1979, 1985a; Mitchell, 1985), the major thrust of the application has recently been in terms of career guidance, vocational exploration, and occupational testing. Of the seven machine (computer) generated reports that

are based entirely on the 16PF, three are linked directly to career, vocational, and/or occupational assessment: 16PF Narrative Scoring Report, Personal Career Development Profile, and Law Enforcement Assessment and Development Report.....

.....For example, the publisher has made available video cassettes for substituting a visual testing in American sign language for the Form A version.....

.....The administration of the 16PF is straightforward and simple, requiring little or no training on the part of the examiner. Subjects respond individually and directly to each item in the test booklet by marking the appropriate blank on the answer form.For this reason, the examiner could be a secretary or other untrained staff person.....

.....The administrator's manual (Institute for Personality and Ability Testing, Inc., 1979) is equally straightforward and simple to follow. Step-by-step instructions are presented (pp. 14-15) for direct use by the examiner.....

.....These weighted or unweighted sums then compared to the desired normative score tables in the particular tabular supplement (Institute for Personality and Ability Testing, Inc., 1970, 1972, 1985b).....

.....The various technical reports available from the publisher (Cattell, Eber, & Tatsuoka, 1970; Institute for Personality and Ability Testing, Inc., 1970, 1972, 1979, 1985b) divide their validity assessment.....”

xxxii) Dr McHenry states that between £500,000 and £1 million is spent every five years in checking, developing and re-calibrating the tests.

xxxiii) Exhibited at RM3 are copies of pages from *Psychological Testing* by Anne Anastasi and Susana Urbina. Mr McHenry states that this exhibit also includes an extract from *Psychological Testing Principles & Applications* but this is not included in this exhibit (see paragraph xxxv below).

xxxiv) Exhibited at RM5 is a copy of the United Kingdom edition of the 16PF5 administrator's manual written by Mary T Russell and Darcie L Karol. The first page of the manual advises that the copyright (1994) is owned by IPAT and that 16PF is a registered trade mark of IPAT.

xxxv) Exhibited at RM6 are copies of pages from *Psychological Testing Principles & Applications* by Kevin R Murphy and Charles O Davidshofer (see above re exhibit RM3). These pages include commentary upon the Sixteen Personality Factor Questionnaire:

“Better known as the 16PF, the Sixteen Personality Factor Questionnaire was developed by Raymond Cattell and first published commercially in 1949 by the Institute for Personality and Ability Testing, Inc.....

.....The end result was a personality test built by factor-analytic methods containing 16 factors generally independent of one another that was potentially capable of describing all aspects of normal personality functioning.....

...Since its initial development, the 16PF has undergone four revisions (1956, 1962, 1968, and 1993).....These items are grouped into 16 primary factor scales representing the dimensions of personality initially identified by Cattell.....These older scale names made interpretation difficult and likely contributed to the lower usage of the 16PF among clinicians.....

Administering and scoring the 16PF requires little special training.....

Having well-developed norms for high school, college, and adult populations, the 16PF has been used in a wide variety of both research and clinical settings.....”

xxxvi) Exhibited at RM7 are examples of 16PF5 test materials, most of which were published in the United Kingdom by ASE. In the *16PF Fifth Edition Administrator’s Manual*, 16PF is followed on two occasions by the ® symbol, these examples emanate from 2002 or later. The other material does not identify 16PF or 16PF5 as a trade mark.

xxxvii) Dr McHenry states that since its inception 16PF test products and services, as defined in the specifications of goods and services of the applications, have only been available in the United Kingdom, and in other “significant countries of the world” from IPAT or an authorised distributor. He states that the tests can only be conducted by persons who have completed appropriate training and will only be sold to such persons; those who receive this training must have “a particular standard of knowledge in the relevant field of psychology”. Dr McHenry states that training “under the 16PF brand” is only available from IPAT. He states that others may claim to offer training but the training they offer is not 16PF training nor will it permit the party to purchase or operate the test.

xxxviii) Dr McHenry states that there is a history of conflict between IPAT and Psytech. In 1999 The Test Agency and Psytech International Limited launched a series of advertisements in the United Kingdom trade press previewing “a so called “all new” 16PF Industrial test”. Dr McHenry states that Mr Paltiel is the owner and sole director of Psytech. Psytech’s test was launched some time around March 2000 and sold by both companies for around 18 months. Dr McHenry states that the test product they marketed, 16PFi or Industrial 16PF, claimed to be a modern presentation of the original 16PF Industrial test of Dr Cattell. Dr McHenry states that Psytech was not entitled to use the name 16PFi

or Industrial 16PF to describe its tests and, subsequently, following an objection from IPAT, both The Test Agency and Psytech ceased providing any publications or services under the trade mark 16PF, 16PFi or Industrial 16PF.

xxxix) Dr McHenry states that Psytech removed all references to 16PFi and to the Industrial 16PF from its United Kingdom website and its product range. Exhibited at RM8 are pages downloaded from Psytech's website in which the following appears:

"A modern UK alternative to the 16PF the 15FQ™ measures 15 of the 16 original adult personality factors originally proposed by Raymond Cattell. It is the ideal comprehensive personality assessment questionnaire designed to have all the advantages of the 16PF yet avoids problems associated with low reliability associated with some of the 16PF version 4 scales and poor cross cultural transferability of many of the items."

There are further references to 16PF. Dr McHenry states the Psytech's website has been changed to remove the statement "A Modern Alternative to the 16PF". Dr McHenry states that The Test Agency withdrew an application to register the 16PF Industrial logo as a Community trade mark.

xl) Dr McHenry states that he met Mr Paltiel at a trade show in Harrogate when IPAT's Community trade mark application was still pending. Mr Paltiel told him that he had noticed a trade mark application by IPAT to register 16PF and that he was starting a campaign to make hostile observations in relation to the trade mark application. Dr McHenry states the Mr Paltiel told him that he had written, or was writing, to 500 people in the United Kingdom and Europe to invite them to challenge IPAT's rights to the trade mark and would provide them with details as to how to do this.

xli) After the meeting Dr McHenry saw one of the versions of the e-mail, a copy of it is produced at RM9. The e-mail includes the following:

"It is my view that 16PF represents a well established model of personality that is solidly entrenched in the Psychology literature and the public domain. It is simply wrong to claim that it operates as a badge of origin for the goods and services of one company.....If registered IPAT will effectively gain ownership of the term and control use over its use. They will be in a position to remove all competitive training in 16PF, all alternative supply of 16PF, software interpreting 16PF and may even be able to control published research and academic teaching which references the 16PF model."

Mr Paltiel then goes on to advise the recipients as to how to lodge observations with the Community trade mark office.

xlii) Dr McHenry states that Mr Paltiel did not file copies of all the observations that were received by the Community trade mark office but only those which he considers to support his case. Exhibited at RM10 are copies of observations which were filed in support of the application. These emanate from Dr McHenry, Ms Wendy Lord (who previously worked for IPAT's United Kingdom distributor), Ms Katarina Forssén (whose company is a licensee of IPAT in Sweden and Norway), Professor Klaus A Schneewind (he is a licensed author of the German 16PF and 16PF-R), Colonel Eleftherios Kehagiathakis of the Hellenic Air Force, Lisa Cramp (previously managing director of the Meridian region for the SHL group), Ms Anne Biggs of ASE (a supplier of IPAT's questionnaire in the United Kingdom), Dr R A Edenborough of KPMG Search & Selection (Dr Edenborough receives an acknowledgement for his contribution to the *16PF Data Supplement 1995*), Dr S F Blinkhorn of PRD, Giannoula Rakia of the University of Athens, Mr Jaime Pereña of TEA Ediciones SA (TEA publishes the Spanish version of 16PF), Mr António Menezes Rocha of Cegoc (Cegoc is the user and representative of the test in Portugal), Mr Jacopo Tarantino of OS Organizzazioni Speciali Srl (which is the publisher of the Italian versions of 16PF), Mr Ian Florance of OnlyConnect Ltd (Mr Florance was previously an employee of ASE), Mr Hans Gerhardt of Erhvervtest A/S (Erhvervstest A/S is the Danish licensee of IPAT), Mr Nikolaos Stathopoulos of ISON (ISON is IPAT's Greek licensee), Dr G Jürgen Hogrefe of Hogrefe & Huber (Hogrefe & Huber are the German publishers for IPAT), Peter Saville (Mr Saville was at one time employed by NFER which was the United Kingdom licensee of IPAT), Professor Neil Anderson of the University of Amsterdam, Dr Brian Baxter, chairman of the Association of Business Psychologists.

xliii) In his letter, Dr Baxter states that he wishes to withdraw the observations filed by Mr St Ather purporting to represent the views of the Association of Business Psychologists. Dr McHenry states that the Association of Business Psychologists is a breakaway organisation from the BPS and represents less than 10% of the profession in the United Kingdom, with 250 members.

xliv) Exhibit RM10 also includes an affidavit made by Mr James Carl Slaughter in support of the Community trade mark application. Mr Slaughter, at the time of writing, was the president of IPAT. Mr Slaughter states that the 16PF tests were "authored" by Dr Raymond Cattell and are protected by copyright. Mr Slaughter refers to the assignment of rights from Dr Cattell to IPAT, which has been referred to above. Mr Slaughter states that 16PF refers to the tests and not to the theories of Dr Cattell which are behind them. In 1993 Raymond, Karen and Heather Cattell developed the 16PF Fifth Edition test, which is also the subject of copyright. The products and services offered in relation to the 16PF test were originally offered by Raymond Cattell through the company he formed, IPAT. This company was formed in 1949 to market, distribute and support the tests and services developed by Dr Cattell. In the United Kingdom and a number of other countries IPAT has granted licences in relation to goods and services supplied in relation to 16PF, 16PF4, 16PF5 and 16PF Industrial. Mr Slaughter states that no

United Kingdom trade mark application for 16PF has been refused on which a full response to the examiner's objections has been filed. He states that United Kingdom trade mark applications have been abandoned due to the balance between costs and commercial benefit. Mr Slaughter states that both IPAT and its distributors actively promote and market the goods offered under 16PF throughout the European Union. He states that the turnover in the United Kingdom during the years 1990 to 1995 was in excess of £2million. He states that expenditure on advertising and other promotional activities in that time exceeded £100,000. The 16PF Industrial test was developed in 1956; Dr Raymond Cattell and IPAT entered into an agreement with Industrial Psychology, Inc of Chicago. A copy of the memorandum of agreement is exhibited; Industrial Psychology, Inc and IPAT agreed to act jointly as the exclusive agents for the authors in matters concerning the tests. The memorandum of agreement, in both agreement 1 and 2, states:

"4. Industrial Psychology, Inc and the Institute for Personality and Ability Testing shall jointly act as the exclusive agents for the authors in matters concerning these tests. Such matters will include re-sale distribution to other publishers and representatives, foreign translation, licensing and publication, etc. Such matters will be stated in writing and signed in agreement by both publishers."

Agreement 2, which deals with tests arising from basis research, states:

..... "Each publisher may make available its own edition of the test in terms of format, and sale or profit on the forms, except for the author royalty, will be separate for each publisher."

Under Appendix 1 to Agreement 2 it was agreed that Industrial Edition of the 16 Personality Factor Questionnaire (16PF) should come under the terms of the memorandum of agreement. Dr Raymond Cattell's rights under the agreement were transferred to IPAT in 1978.

xlv) Mr Slaughter states that in 1989 Industrial Psychology, Inc was bought by Mr Graham Morgan, owner of The Test Agency. He states that it appears that Mr Morgan believed that the 1956 agreement extended to acts performed by The Test Agency and others with whom they chose to work. Working with Mr Paltiel, The Test Agency revised the 16PF Industrial test of 1956 and published the revised test in the United Kingdom in 1999, which they referred to as 16PF Industrial, 16PFi or Industrial 16PF. The revised format was also offered through Psytech, as The Test Agency believed that the 1956 agreement allowed it to give Psytech a licence. IPAT requested The Test Agency to stop this use of IPAT's "trade mark" and copyright works. IPAT subsequently threatened legal action against The Test Agency and Psytech. Mr Slaughter states that The Test Agency initially thought that there were actions were authorised as a result of the 1956 agreement. He states that The Test Agency has now accepted the agreement does not extend to acts of The Test Agency as it is not a party to the

agreement and that as the 1999 tests were not prepared by Dr Raymond Cattell or under his authority no one is allowed, under the 1956 agreement, to publish the 1999 test. Mr Slaughter states that as a result of the threat of legal action, the 1999 test has been withdrawn from the market, revised and renamed. The unauthorised use of 16PF by The Test Agency has, consequently, stopped.

xlvi) Exhibited to RM10 is material relating to the development and nature of the 16PF test. In a copy of pages from *The Corsini Encyclopedia of Psychology and Behavioral Science Vol 4* S E Krug writes:

“The primary scales of the test, which are designated by alphanumeric symbols are as follows: A – Warmth, B – Reasoning, C – Emotional Stability, E- Dominance, F- Liveliness, G – Rule-Consciousness, H – Social Boldness, I – Sensitivity, L – Vigilance, M – Abstractedness, N – Privatness, O – Apprehension, Q1 – Openness to Change, Q2 – Self-reliance, Q3 – Perfectionism, Q4 – Tension. The five global factors (Extroversion, Anxiety, Tough-mindedness, Independence, Self-control) assess features similar to those described as the “big five” in contemporary personality research. Besides the primary scales and global factors, the 16PF can be scored for approximately 100 criteria that derive from years of research on 16PF applications in clinical, counselling and organizational psychology.”

xlvii) Exhibited at RM11 is a draft statutory declaration made by Dr McHenry in relation to the proceedings before the Community trade marks office. Dr McHenry states that although the declaration has not been formalised he stands by it and requests that it be taken into account in these proceedings. I have taken note of the declaration but I consider that the appropriate course of action would have been for him to have had the declaration formalised for consideration in these proceedings. In its current state the best view that I can take of it is to consider it hearsay evidence. The draft bears a year, 2002, but no date. Dr McHenry states that OPP is neither a distributor nor licensee of IPAT. However, OPP purchased the entire share capital of IPAT in January 2003. Some parts of the unsigned declaration do appear in his witness statement and much of what is said is reproduced in other evidence. I note that in the unsigned declaration Dr McHenry states that the Association of Business Psychologists represents less than 5% of the profession and that Mr Paltiel is a founder member of the association.

xlviii) Included in the unsigned declaration are, inter alia, pages from *Personnel Selection: Adding Value through People* (Third Edition) by Mark Cook. A paragraph headed 16PF begins:

“Cattell’s 16PF measures 16 personality *source traits*, derived from factor analysis..... The current fifth edition of the 16PF, 16PF5, has good internal and re-test reliability, as well as good American and British norms.....”

Copies of pages from *International Review of Professional Issues in Selection and Assessment* by Mike Smith and Valerie Sutherland includes a test review of "Sixteen Personality Factor Form C [16PF]. It includes the following:

"The 16PF is a purely empirical test, proceeding almost solely through factor analysis. The structure of the test reflects Cattell's factor analytic perspective, particularly with respect to his preference for correlated rather than independent factors....."

An extract from *Psychological Testing and Assessment* by Lewis R Aiken includes the following:

"In addition to the 16 primary factors, the 16PF can be scored, by hand or computer, on three Validity Indices and five Global Scores...."

xlix) Dr McHenry, in his witness statement, states that the BPS does not provide any form of accreditation or verification of training and that it does not endorse any statement that an individual or organisation is permitted to train others in relation to a particular instrument. He states that to apply for a certificate of competence in psychometric training a person approaches an assessor whose methods of assessing competence are approved by the BPS. The display of competence may have involved 16PF tests or may not have. Dr McHenry states that for an assessor to be able to judge competence in relation to 16PF tests the assessor would need to have had access to and to have been trained in 16PF tests and hence to have had a connection as customer or trainee of IPAT or one of its licensees.

l) Dr McHenry states that the gaining of competence in psychometric tests does not entitle a person to purchase the 16PF test. He states that the extent to which the right to use, train or approve persons to use the tests is limited as shown in the copy of the NFER Nelson/ASR licence, exhibited at RM13. He does not identify a specific part of the licence but I assume that he is referring to paragraph 4.8:

".....TESTS shall be sold by LICENSEE only to qualified professionals according to the guidelines of the American Psychological Association or an equivalent professional psychological association in the DISTRIBUTION TERRITORY. Any organizations or persons who purchases TESTS from LICENSEE for resale must agree to the above restriction, or forfeit their privilege to purchase for resale."

li) Exhibited at RM14 are copies of pages from *The Psychologist* of March 1996. The sub-heading reads:

"The Society's Steering Committee on Test Standards (SCTS) clarifies the position regarding access to psychometric tests and the requirements for use."

Dr McHenry highlights the following parts of the article:

“An issue that has been raised with the SCTS is the provision of such assessment by psychologists independent of the test publishers who supply a test. While this has been a disappointment to some who have written to the SCTS, the position here is quite clearly that crucial relationship between the publisher and the user or, in this case, the assessor. Through licence and copyright, the publishers have the right to control access to test materials which to the best of our understanding also includes access through training provided by those independent of the publishers. Thus, while a person may well meet the Society’s verification requirements for assessing against the Society’s standards, this does not guarantee that the assessor can pass on rights of access to test material on behalf of the test publisher. The Society’s role is to develop and monitor professional standards and other factors come into play where the test market is concerned...

.....Should there then be further conditions required by the test publishers before rights of access to tests are granted? In the case of Level B tests, the answer may well be ‘yes’ once a person’s qualifications and experience have been taken into account.”

lii) Dr McHenry states that IPAT, through its exclusive United Kingdom distributor NFER-Nelson (also known as ASE), has always controlled access to the 16PF test.

Dr McHenry comments upon exhibits LP17 and LP18 to the statement of Mr Paltiel, which show advertisements placed by organisations in relation to training in the 16PF test. He states that the advertisers fall into two broad categories. There are those like Stuart Robertson & Associates or OTL who were licensed by NFER-Nelson or ASE and two “persistent violators”: Psytech and The Test Agency, who were not licensed. Dr McHenry states that for a period The Test Agency was able to support its training by giving training access to the American version of the 16PF test that had either been imported through unofficial channels or obtained for resale.

liii) Dr McHenry states that it took IPAT, a small company with limited resources, some time to identify the unauthorised sources of the 16PF test. He states that Psytech must have obtained the tests from Swets and Zeitlinger, the distributor in the Netherlands and Belgium. Swets and Zeitlinger is no longer a distributor but at one time it sold a Dutch version of the 16PF test. It could also obtain the American version which could be used by psychologists for citizens of the United States who were working in the low countries. Dr McHenry states that Swets and Zeitlinger sold to qualified psychologists only. He states that Mr Paltiel claims that he still obtains the test from this source, however, this cannot be the case as IPAT has not supplied the test to Swets and Zeitlinger since February 2000. Dr McHenry states that if Mr Paltiel obtains tests on his own behalf, which he

passes on to the people that he trains then he is in breach of the terms and conditions of the sale of the product.

liv) Dr McHenry states that The Test Agency obtained the American version of the 16PF test through a third party in the United States. The third party purchased that test without notifying IPAT that it intended to export it to the United Kingdom. The Test Agency set up an unofficial training network and even offered training itself. Dr McHenry states that the American version of the test is different to the United Kingdom version of the tests as the tests take account of cultural variations. He states that this product was not appropriate for use in the United Kingdom. Exhibited at RM15 is a copy of a letter from The Test Agency, which was bought in 2003 by the Hogrefe Group. The letter advises that since its purchase of The Test Agency the Hogrefe Group has stopped the importation and distribution of the 16PF test from the United States. The Test Agency no longer presents itself as a distributor of 16PF materials and services.

lv) Dr McHenry states that Mr Paltiel indicates that software is available which generates reports based on the 16PF test. He states that, apart from products available from IPAT's licensees, he is unaware of any independent software product for scoring the 16PF test.

lvi) Dr McHenry comments upon the letter received exhibited by Mr Paltiel from Mr David Nelson of the BPS. Exhibited at RM27 is a copy of the royal charter and rules of the BPS. Dr McHenry states that he is an advisor to the disciplinary committee of the BPS. The object of the BPS is to promote the advancement and diffusion of the knowledge of psychology. He states that Mr Nelson cannot speak on behalf of the 3,000 members of the BPS. Dr McHenry states that the BPS does not represent psychologists. He states that there was no discussion within the BPS in relation to coming to a view on the Community trade mark application, nor was any decision taken by the BPS to send an observation. Consequently, he submits that the letter should be given the weight appropriate to the views of one individual.

lvii) Exhibited at RM19 is a copy of part of the *Review of Personality Assessment Instruments (Level B) for Use in Occupational Settings* (2nd edition), this is a publication of the BPS. The part exhibited included a review of "The Sixteen Personality Factor Questionnaire (fifth edition) (16PF5)". It records the publisher as being IPAT and that the only recognised distributor of the test in the United Kingdom and the Republic of Ireland is ASE. It states that the test is only supplied to registered users who have undergone training by ASE. It is stated that the test measures the 16 primary personality factors. The following is stated:

"The 16PF originated as a research measure, seeking to confirm Cattell's factorial model, but could also be used for a range of practical purposes, including clinical, counselling, and industrial/organisational assessment."

Also included in the exhibit is a review of “Industrial 16PF (16Pfi)”. It records the publisher as The Test Agency Ltd and the distributor as The Test Agency Ltd and Psytech International; the authors are designated as Raymond B Cattell and Associates.

lviii) Dr McHenry states that Mr Ken Rawlings has worked as a trainer for Mr Paltiel and that a commercial link exists between them. Dr McHenry states that Professor Barrett has jointly written a number of academic articles with Mr Paltiel. Dr McHenry states that Ms Ballard is mistaken when she states that the term 16PF pre-dates the development of the questionnaire, he can find no reference to that term from the work of Dr Cattell and his colleagues that was published before the test was first published. In relation to the observation of Dr Coaley, Dr McHenry states that 16PF is not a theory of personality and never has been.

lix) Exhibited at RM25 are observations made by Professor Barrett in relation to the invalidation action before the Community trade mark office. In his observations he states, inter alia:

“During this period I published one of the two definitive psychometric analyses of the 16PF implemented within the UK during the 1980s [Barrett, P., and Kline, P. (1982) An item and radial parcel factor analysis of the 16PF Questionnaire.....

...Another larger review paper of personality assessment questionnaires, in which the 16PF was included, was published in 1993....

.....close reading of the wider scientific literature leads one to conclude that while his [Professor Claridge] statement possessed some validity in the 1950s through to perhaps 1977, since then time has revealed that indeed 16 personality factors have become the definite and **definitive** number associated with Cattellian personality theory defined using questionnaire data. It is perhaps instructive to quote from chapter 20 entitled “Personality: Multivariate Systems Theory and Research” by Barry Smith, in the Handbook of Multivariate Experimental Psychology, 2nd Edition, edited by John Nesselrode and Raymond Cattell (1988), Plenum Press...page 695, 2nd column, 2nd para..

Quote #1: *“The search for basis dimensions began with a list of 4000 trait variables that Allport and Odbert (1936) found in the dictionary. Elimination of similar terms narrowed the number to 182, and correlational techniques identified 40 clusters (Cattell, 1946), later increased to 45 (Cattell, 1949, 1950: Cattell and Saunders, 1950), and these 16 have constituted the core dimensional set upon which much of the subsequent research has been based. That research has expanded the domain to 23 factors in normal populations (Cattell, 1972, Delhees, 1972)”.....*

.....the Cattellian personality trait system remains known widely as a 16 primary trait system with the 16PF as the vehicle by which the main normal personality trait factors may be assessed.....

.....**quote #3:** *“These are the 15 factors regularly found in personality questionnaire testing up till the last edition of the 16PF test (Cattell et al, 1970).....*

.....**quote #4:** *“However ,as we showed in our chapter describing the results and methods of Cattell and his colleagues in addition to the 16 factors measured by his personality test, 7 further factors have been found by more accurate rotation to simple structure in the normal adult domain as well as a number of pathological factors identified by careful items factorings of the MMPI...*

.....**quote #6**.....*Suffice it to say that on the basis of many different studies he [Dr Cattell] arrived at the conclusion that there were 16 major personality factors, to many of which he gave newly coined names...*

..In 1990, in a chapter authored by Cattell himself, entitled “Advances in Cattellian Personality Theory”, in the Handbook of Personality, Theory and Research, edited by Lawrence Pervin (Guilford Press), he writes on page 102, 2nd column, last 8 lines from the bottom.....

Quote #7: *“One of the first tasks in a course on personality should be to learn the names and natures of these 16PF source traits. If psychology students balk at this, one might remind them that medical students learn hundreds of new names, that chemists know over 100 elements, and that astronomers have discovered a nameless number of new galaxies”.....*

.....*Moreover Catellian psychology provides one of the few models that actively seeks to integrate the roles of personality and intelligence within the same psychometric instrument.”*

By 1995, the 16PF is synonymous with the normal personality factors which are defined within Cattellian psychology. This is in Cattell's own writings, not a web link, reference, or ad-hoc slip of the tongue by an untrained individual.

20. In Paul Kline's (2000) Handbook of Psychological Testing (Routledge)...

.....*The difficulty was overcome by Cattell and his colleagues (Cattell, 1957) who essentially produced sixteen factors from ratings of all trait terms – factors embracing the semantic personality sphere. Cattell (e.g. 1981) still argues that these factors account or much of the normal personality variance...*

.....25. With Cattell's work, the distinction between the theory and the measures is far less clear. Cattell's way of working was entirely atheoretical at

its outset. That is, he used a particular mathematical methodology (factor analysis) to inductively derive the components (factors) that would later become the basis for Cattellian Personality theory and the 16PF as published in 1949.....

.....27. I agree with Professor Claridge here insofar as the term 16PF is rarely associated with Cattell's theory in such an explicit manner. That is, there is no 16PF theory. But, an association does exist between the 16PF, Cattell's personality factors, and Cattell's Trait theory such that in practice the 16PF has come to become almost synonymous with Cattellian Personality Theory.....

.....34. The problem here is that scientists like myself and Professor Claridge can easily make these distinctions between a theory and a test, because we adopt a level of precision in our language and terminology that preserves an almost technical meaning to these terms. However, for many users, practitioners, students, and indeed many applied organizational psychologists, this precision and meaning evades them, resulting in what we now have even in some textbooks, which is the virtual equivalence between the term 16PF and Cattell's personality theory. This is because very little attention is paid to Cattell's full panoply of researches in this area – instead being mainly confined to the creation of the 16PF primary trait factors in the 16PF test.....

....39. So, while I agree that Cattell never had in mind a fixed number of traits when he began analysing the 4000 trait terms, by the time he had finished this initial work in the late 1950s, he was already working with just 16 primary traits in questionnaire data. This number has not changed for over 50 years, with the test name in this time becoming synonymous with the number of factors and synonymous with his trait theory approach to personality.

lx) In relation to the survey evidence of Professor Barrett, Dr McHenry states that Professor Barrett was the director of research and development for Psytech from 1 September 2003 to 30 March 2004. His CV also shows that he is a consultant and scientific adviser to Psytech. Exhibited at RM27 is a witness statement by Mr John Arthur Samuels, who is a self-employed market and social research consultant. Owing to my own comments re the survey evidence I do not intend to dwell upon the what Mr Samuels states. However, I note that he states:

“My overall conclusion is that the survey is deeply flawed and fails the crucial tests of *reliability* and *validity*. I believe that it would be dangerous to draw conclusions from its results and that it should be disregarded completely.”

Exhibited at RM23 and RM24 are copies of a statutory declaration and a witness statement made by Professor Gordon Claridge in relation to invalidity proceedings before the Community trade mark office brought by Psytech against IPAT's registration of the trade mark 16PF. Professor Claridge is Emeritus Professor of Abnormal Psychology in the Oxford University Department of

Experimental Psychology and Emeritus Fellow of Magdalen College where, until he retired, he was tutorial fellow in psychology.

lxi) Professor Claridge became familiar with Dr Raymond Cattell's contributions to personality measurement, including the 16PF test, while working as a clinical psychologist. Whilst working in Glasgow between 1964 and 1974 the 16PF test was among the psychometric instruments used to assess psychiatric clients and formed part of the teaching about test procedures for trainee clinical psychologists. Professor Claridge states that although he has only occasionally included the 16PF test in his research studies he is familiar with it and with the work of Dr Cattell from which it developed.

lxii) Professor Claridge states that Dr Cattell devoted his entire career to questions about personality structure, his aim being to establish a taxonomy of individual differences, based on the quantitative analysis of self-reported and observational data; in essence, to discover the definitive number and nature of traits that could describe and classify human personality variation. Dr Cattell is best known for the 16PF questionnaires, intended to measure 16 source traits (fifteen personality and one ability). Professor Claridge states that it would be wrong to assume that the figure 16 referred to a definite number of traits in Dr Cattell's system of personality description. Frequently, in his writings, Dr Cattell refers to varying numbers of possible traits, a fact reflected in his construction of questionnaires to measure between 8 and 28 source traits. These differences in observed traits partly represent differences in statistical methodology, behaviours sampled and subject population, especially with regard to age. They also mirror the complexity of human personality.

lxiii) Professor Claridge states that he has rarely, if ever, seen 16PF used to denote a theory of personality. He states that he is not aware of any other questionnaires or instruments based on the 16PF. Professor Claridge does not believe that 16PF extends more widely than its reference to Dr Cattell's psychometric tests of that name. A distinction must be drawn between theory and practical application, in the form of assessment that might arise from the theory. Professor Claridge states that references to Dr Cattell's work would certainly form part of many university courses in individual differences; courses that cover the practical use of personality tests would probably make students familiar with the item content and administration of the 16PF test. Professor Claridge states that there is no evidence in Dr Cattell's writings that there was a fixed 16PF model that dictated the form of other tests generated by his work, the opposite is the case. Professor Claridge states that some writers may have loosely and incorrectly referred to 16PF as Dr Cattell's theory of personality, however, the latter began to be developed earlier than the test and was never predicated on the idea of 16 factors as the definitive description of personality structure.

lxiv) Professor Claridge states that the number of traits defining personality structure was an open question in Dr Cattell's work; 16 seems to have been the best guess at the time, sufficient for him to develop the 16PF as a test to measure the traits that he considered important. Exhibited with Professor Claridge's witness statement is a copy of a paper by Professor Barrett and Paul Kline; I note the opening paragraph of the article:

"The 16PF Questionnaire (Cattell *et al.*, 1970) is perhaps one of the most widely used psychometric instruments for the measurement of personality. The questionnaire was the outcome of Cattell's researches in the late 1940s and early 1950s, attempting to encompass the 'sphere' of personality initially defined by ratings. Howarth (1976) provides an excellent account of the detailed procedure adopted by Cattell in reducing 1800 dictionary terms relating to temperament to the 400 or so questionnaire items used in Forms A, B, C and D of the standardized questionnaire. Recently Cattell and Delhees (1973) have extended the number of factors to be found in the 16PF to 23, the supplemental scale information and augmented items provided by DeVoogd and Cattell (1973)."

lxv) Dr McHenry states that the 16PF has been in the market for at least 50 years. The 16PF5 test was introduced in 1991. The test has always been marketed by IPAT or its licensees. Sales figures for the 16PF and 16PF5 for the years 1993 to 2005 are exhibited at RM 29. The figures for "England" are as follows (in \$):

1993	194,041	1994	214,982	1995	438,694
1996	447,524	1997	604,529	1998	529,112
1999	461,594	2000	496,494	2001	472,747
2002	513,653	2003	587,729	2004	502,012
2005	281,581				

lxvi) Exhibited at RM30 is a "to whom it may concern" letter from the group chief executive of SHL, Mr John Bateson. Mr Bateson states that his company is a global company specialising in "objective people assessment". SHL is one of the largest companies in the sector, employing more than 250 psychologists. IPAT is a competitor in the United Kingdom and Europe. Mr Bateson states that he is familiar with the 16PF personality test because it is a product sold throughout Europe by IPAT. He writes that the term 16PF is associated in his mind with a personality questionnaire and not with a psychological model or theory of personality. He writes that he associates the term with IPAT and no other company.

lxvii) Mr Paltiel submitted a second witness statement that generally either reiterates the points made in his first statement or is a critique of the evidence of

IPAT, and so is not evidence of fact. However, I note the following from Mr Paltiel's statement.

Ixviii) Mr Paltiel denies that he told Dr McHenry that he would be writing to 500 people in the United Kingdom and Europe inviting them to challenge the Community trade mark application. Mr Paltiel states that he did not tell Dr McHenry that he was going to write to anyone, in fact, Mr Paltiel sent his e-mail relating to this matter to 78 e-mail addresses.

Ixix) Neither the letter from Mr St Ather nor that of Dr Baxter represents the views of the Association of Business Psychologists, they both represent personal views. Exhibited at LP-29 is a copy of an e-mail from the vice chair of the Association of Business Psychologists which advises that the association does not have a policy on the matter of the trade mark registration of 16PF.

Ixx) Mr Paltiel states that he understands that Dr McHenry has lobbied "fairly aggressively" for a retraction of the letter from the BPS, however, no retraction has been forthcoming. He exhibits at LP-30 a page from the BPS website that states that it has over 36,000 members. Taking into account the aims that are expressed on the page he cannot see that the contents of the letter are ultra vires.

Ixxi) Mr Paltiel states that The Test Agency Limited agreed to relinquish its rights to use 16PF Industrial and a settlement agreement was signed between, inter alia, IPAT, The Test Agency Limited and Industrial Psychology Inc. He states that the "new" 16PF Industrial test was changed and re-branded under the name 15FQ+ and continues to be sold under that name.

Ixxii) Mr Paltiel exhibits at LP-31 a copy of Professor Barrett's supplementary observations in relation to the proceedings before the Community trade marks office. Professor Barret explains that he only worked for Psytech for a short amount of time and then became an independent scientific adviser for which he is paid a "small retainer". Much of what he says is a comment on and critique of the evidence of IPAT, and not evidence of fact. He puts must emphasis on Ms Heather Birkett Cattell's statement:

"The 16 PF (Sixteen Personality Factor Questionnaire) purports to measure the full complement of temperament traits rather than just a few of them."

Professor Barrett spends some time commenting on his survey and on the comments of Mr Samuels; I have dealt with the failings of the survey above and will not go into this matter again.

Ixxiii) Dr McHenry submitted a second witness statement. Dr McHenry states that OPP was not a distributor or licensee of IPAT when IPAT applied to register 16PF as a Community trade mark. He states that OPP was a competitor of

IPAT. Dr McHenry states that Mr Slaughter asked him to support the 16PF application in 15 July 2002. He states that while preparing his evidence on behalf of IPAT he began to develop an interest in a possible purchase of IPAT. In October 2002 he appointed an agent to make enquiries about IPAT and carry out a due diligence check. The agent had a due diligence conference with IPAT on 22 October 2002 and with Dr McHenry on 6 November 2002. Serious negotiations on the purchase of IPAT began on 18 November 2002. Dr McHenry states that he had finished drafting his witness statement before October 2002. He states that his evidence, in the form of an unsigned witness statement, was filed on 24 June 2004. Dr McHenry states that he gave evidence in good faith.

lxxiv) Exhibited at RM31 is a copy of a distribution agreement between IPAT and NEFR Nelson/ASE. This should have been included as an exhibit to his first witness statement but was omitted in error.

lxxv) Mr Paltiel filed a third witness statement. This statement adds little to the considerations that I have to make. I note that Mr Paltiel considers that it “seems to be incredibly coincidental that Dr McHenry was involved in the prosecution of IPAT’s mark as an, “independent” expert witness and that very shortly after Dr McHenry’s company acquired IPAT.”