

| | |
|-------------------------|---|
| COMPLAINT NUMBER | 20/255 Appeal 20/015 |
| APPEAL NUMBER | 20/019 |
| ADVERTISER | Spark NZ Ltd |
| ADVERTISEMENT | Spark NZ Ltd, Television |
| DATE OF RULING | 1 December 2020 |
| OUTCOME | Appeal Declined Complaint Not Upheld |

SUMMARY

The Complaints Board ruled on 13 October 2020 that the complaint about the television advertisement for Spark which appears to show Lord Ernest Rutherford discussing the dawn of 5G was Not Upheld.

The Complainant appealed the decision. The Chairperson of the Appeal Board said the grounds on which the appeal would be considered were (d) the decision is against the weight of evidence and (e), it was in the interests of natural justice for the matter to be reheard.

The appeal application was considered by the Chairperson of the Appeal Board.

The Chairperson agreed with the decision made by the Complaints Board. The Chairperson said the manipulated footage of Lord Rutherford was unlikely to mislead consumers into thinking he was endorsing 5G technology.

The Chairperson agreed with the Complaints Board that there was no endorsement of 5G, but rather a fictional representation of support for innovation and technological advancement.

The Chairperson said there were no grounds on which the appeal could proceed, and the application was declined.

CHAIRPERSON'S RULING

The Chairperson viewed the application for appeal. She noted that there were five grounds upon which an appeal was able to proceed. These were listed at Clause 6.4 of the Second Schedule of the Advertising Standards Complaints Board Complaints Procedures and were as follows:

- (a) The proper procedures have not been followed.
- (b) There is new evidence of sufficient substance to affect the decision.
- (c) Evidence provided to the Complaints Board has been misinterpreted to the extent that it has affected the decision.
- (d) The decision is against the weight of evidence.

- (e) It is in the interests of natural justice that the matter be reheard.

The Applicant raised a number of issues in their application and they are dealt with separately below:

Differences in Complaints Boards' consumer takeout

The Chairperson noted the Complaints Board has published two Decisions on the Spark advertisement subject to this Appeal application.

Decision 20/095 recorded the consumer takeout of the advertisement as:

"The Complaints Board agreed the consumer takeout of the advertisement was 5G is one of the biggest scientific innovations in history since the time of Lord Ernest Rutherford. The Complaints Board agreed the advertisement created the impression that Lord Rutherford would have supported 5G technology."

Decision 20/255 Appeal 20/015 recorded the consumer takeout of the advertisement as:

"The Complaints Board agreed the likely consumer takeout of the advertisement, which appeared on television to a general audience, was a promotion of Spark's 5G services. The advertisement shows what the Advertiser envisages Lord Rutherford may say about the possibility of what today's innovations in technology might offer. The context for the advertisement is that Spark is a telecommunications provider and is in the process of rolling out 5G in New Zealand."

The Chairperson of the Appeal Board said any differences between Complaints Boards' decisions reflected the specific information placed before the Board. The Chairperson noted for Decision 20/095 the evidence considered by Board consisted of submissions from two separate complainants and the initial response from the Advertiser and Media. For Decision 20/255 Appeal 20/015, the Complaints Board based its deliberation on the Applicant's original complaint, the two appeal submissions, Decision 20/095 and the additional response from the Advertiser. The Chairperson said the consumer takeout and language used in the decisions reflects the issues raised in the specific evidence placed before the Board.

The Chairperson confirmed the consumer takeout that Lord Rutherford would have supported innovation and technological advancement had been recorded in both Decision 20/095 and Decision 20/255 Appeal 20/015.

Characterisation of the Lord Rutherford footage

The Chairperson noted the Applicant disagreed with the description of the footage in the Complaints Board decision as a "created scene" and disputed the Advertiser's wording that it was not an actual recording of Lord Rutherford.

The Chairperson agreed with the Complaints Board that consumers were unlikely to be confused or deceived into thinking Lord Rutherford was actually speaking the words used in the advertisement. She said while the images of Lord Rutherford were real, the combination of the visual and the manipulated verbal content of the advertisement clearly transformed the footage into the realm of fiction.

Is the advertisement an endorsement?

The Chairperson noted the Complaints Board had unanimously agreed the Advertiser had not positioned Lord Rutherford as directly endorsing 5G in general or Spark's 5G in particular. The Chairperson noted the Complaints Board's interpretation was the Advertiser had used the

footage to support its view that a champion of innovation in his own time would be likely to encourage whatever future innovations might eventuate from increased internet speeds and low latency.

The Chairperson said Spark's manipulated depiction of a deceased person using 21st Century terminology about future innovations did not reach the threshold to be an endorsement because most consumers would know the combination of the visual image of Lord Rutherford and the added voiceover was not coming from Lord Rutherford himself.

The Chairperson noted the Applicant considered the advertisement presented an endorsement of 5G technology and not specifically Spark 5G. However, the Chairperson said the context for the advertisement is that Spark is a telecommunications provider and is in the process of rolling out 5G in New Zealand.

Matters relating to permission to use footage

The Chairperson said the Complaints Board did not agree with the Applicant's view that the advertisement was an endorsement by Lord Rutherford. The Chairperson agreed with the Board and therefore there is not a requirement for the Advertiser to provide any further information on how they approached Lord Rutherford's estate about using the footage that was manipulated in the advertisement.

Appeal Ruling

The Chairperson acknowledged the time taken by the Applicant to thoroughly present their position on the issues and confirmed the Complaints Board had given significant consideration in response. The Chairperson said the Applicant's appeal submission did not raise new issues, but rather restated their initial position that the advertisement could be interpreted as actual footage by some consumers showing that Lord Rutherford endorsed 5G technology.

The Chairperson agreed with the Complaints Board decision. The Chairperson said that while the Applicant had a different consumer takeout of the advertisement and disagreed with the decision, this was not a ground for appeal.

Error of fact in Complaints Board Decision

The Chairperson noted the Applicant's concern about the inaccuracy raised in the Advertiser's response and repeated in the Complaints Board decision. The Chairperson agreed it was incorrect to say Lord Rutherford died 125 years ago, when it was in fact 83 years. While acknowledging the error, the Chairperson was of the view this discrepancy was not material to the overall takeout of the advertisement or the Complaint Board's unanimous decision that the complaint was not upheld.

Chairperson's Ruling: Appeal application **Declined** Complaint **Not Upheld**

APPENDICES

1. Description of Advertisement
 2. Complaints Board Decision
 3. Appeal Application
-

Appendix 1

DESCRIPTION OF ADVERTISEMENT

The television advertisement for Spark NZ Ltd shows what appears to be black and white footage of New Zealand scientist Lord Ernest Rutherford sitting at a desk reading from a sheet of paper. Lord Rutherford's speech has been altered using technology, so it appears he is saying "125 years ago, my research helped give rise to the first form of wireless communication. Since then, the world has witnessed unprecedented innovation. Today, machines learn, information has become currency, and we now stand at the dawn of 5G, the fifth generation of wireless technology. Just as I could only dream of the advancement of your time, I implore you now to dream of what lies ahead. New Zealanders have never needed an invitation to push things forward but consider this yours. Let's see what this thing can do." The end of the advertisement shows a coloured pixelated image revealing computer graphics imaging (CGI) of Lord Rutherford. The advertisement ends with the Spark logo, the words 5G STARTER FUND and a website address.

Appendix 2

SUMMARY OF THE COMPLAINTS BOARD DECISION

The Complaints Board did not uphold a complaint referred back to it by the Appeal Board Chairperson about a Spark television advertisement which included film footage of Lord Ernest Rutherford and references to 5G technology. This is because the Board said there were sufficient cues in the advertisement to ensure consumers were not misled that the voiceover and words were Lord Rutherford actually speaking. The Complaints Board said the Advertiser had confirmed it had received consent from Lord Rutherford's estate to use his image and the particular wording. The Board did not consider the advertisement was an endorsement by Lord Rutherford for a particular 5G service.

Summary of the Appeal

In summary, the Complainant requested the Complaints Board consider whether the advertisement breaches rule 2(b) of the Advertising Standards Code (the Code) and is misleading because the Complaints Board misinterpreted the advertisement as an illustration of 5G and the consumer takeout is that Lord Rutherford recorded the film when he was alive. The Complainant asked the Complaints Board to consider whether the advertisement breaches rule 2(f) of the Code. The Complainant summarised their main issues in respect of rule 2(f) as follows:

- a) using an endorsement from a deceased person when they have little or no association with the product,
- b) whether a person's estate has the right to put or allow the putting of words in that deceased person's mouth, having the effect of the deceased person endorsing a product,
- c) whether a person's estate can consent to having footage of the deceased person edited in a way where it is not obvious it has been edited, and

d) whether it is false or misleading advertising for a person to endorse something they have no knowledge of as though they do have knowledge of it.

Issues Raised:

- Truthful Presentation
- Use of Testimonials and Endorsements

Summary of the Advertiser's Response

The Advertiser defended the advertisement and said its purpose was a call to action for businesses to access Spark's 5G Starter Fund. The Advertiser said a reasonable consumer would know the video is a recreation and not the actual words spoken by Lord Rutherford, who died in 1937. It said a reasonable consumer would not consider that Lord Rutherford was providing an endorsement or testimonial, including in relation to 5G.

The Advertiser said the consent to use Lord Rutherford's image and the particular wording is recorded in a confidential contract with the Estate.

Relevant ASA Codes of Practice

The Chair directed the Complaints Board to consider the complaint with reference to the following codes:

ADVERTISING STANDARDS CODE

Principle 2: Truthful Presentation: Advertisements must be truthful, balanced and not misleading.

Rule 2(b) Truthful Presentation: Advertisements must not mislead or be likely to mislead, deceive or confuse consumers, abuse their trust or exploit their lack of knowledge. This includes by implication, inaccuracy, ambiguity, exaggeration, unrealistic claim, omission, false representation or otherwise. Obvious hyperbole identifiable as such is not considered to be misleading.

Rule 2(f) Use of testimonials and endorsements: Advertisements must not contain or refer to any personal testimonial unless permission to use the testimonial has been obtained and it is verifiable, genuine, current, and representative of the typical not the exceptional. Advertisements must not claim or imply endorsement by any individual, government agency, professional body or independent agency unless there is prior consent and the endorsement is current and verifiable.

Appendix 2

APPEAL APPLICATION

1. I am appealing Decision 20/255 Appeal 20/015 of the ASA Complaints Board, dated the 13th of October 2020, on complaint number 20/255 Appeal 20/015.
2. The summary of the Complaints Board Decision is:

“The Complaints Board did not uphold a complaint referred back to it by the Appeal Board Chairperson about a Spark television advertisement which included film footage of Lord Ernest Rutherford and references to 5G technology. This is because the Board said there were sufficient cues in the advertisement to ensure consumers were not misled that the voiceover and words were Lord Rutherford actually speaking. The Complaints Board said the Advertiser had confirmed it had received consent from Lord Rutherford’s estate to use his image and the particular wording. The Board did not consider the advertisement was an endorsement by Lord Rutherford for a particular 5G service.”
3. First and foremost my complaint for the second (third?) time remains unaddressed because
 - a) my complaint was about the advert being an endorsement of 5G *in general*, not a particular service. At least the advertiser in paragraph 15 of their response demonstrated they understood this (“In relation to rule 2(f), the complainant argues that Spark’s 5G Ad would be interpreted as an endorsement of 5G by Lord Rutherford ...”). The board failed to make a decision on this most important aspect of my complaint, instead they made a decision on whether the advertisement was an endorsement of Spark’s particular 5G service, which I had not raised; and,
 - b) my previous appeals expressed concern the endorsement was not verifiable and this continues to be the case. Spark claimed to have consent, but was not prepared to show the contract to the Board. The Board without further evidence then reached conclusions. In short it did not verify and was not able to verify Spark’s claims.
4. The Board decided the advert did not imply endorsement (of a particular service), and therefore it concluded consent was not relevant. However, should a decision be made that the advert did imply endorsement (of the technology) and still did not breach rule 2(f) *because verifiable consent was obtained from his estate*, then another point of my previous appeal is relevant: whether the estate had the right to give consent for the endorsement (please refer to my previous appeal for arguments against an estate having that right).
5. My grounds for appeal are
 - a) the Complaints Board failed to address my complaint, whichever grounds that falls under;
 - b) the decision that rule 2(f) has not been breached is against the weight of evidence; and
 - c) the advertiser’s evidence had inaccuracies that appear to have been accepted as fact by the Board and hence may have affected its decision and suggests bias in favour of the advertiser.

6. In this appeal, I cover:
- a) Rule 2(f)
 - b) My view as to whether the advertisement implied endorsement
 - c) Spark's stated consent from Lord Rutherford's estate
 - d) Inaccuracies in Spark's response
 - e) Rule 2(b)
 - f) Rule 2(f), in light of principle 2

Rule 2(f)

7. Rule 2(f) states "**Use of testimonials and endorsements:** ... Advertisements must not ... imply endorsement by any individual ... unless there is prior consent and the endorsement is current and verifiable."

8. [Merriam-Webster.com](https://www.merriam-webster.com) Dictionary definitions are as follows:

endorsement: the act or process of endorsing.

endorse: to recommend (something, such as a product or service) usually for financial compensation.

recommend: to present as worthy of acceptance or trial.

trial: a tryout or experiment to test quality, value, or usefulness.

("endorsement," [Merriam-Webster.com](https://www.merriam-webster.com) Dictionary,

<https://www.merriam-webster.com/dictionary/endorsement>. Accessed 8/11/2020)

9. Summarising the above definitions into a definition appropriate for this complaint, an endorsement can be 'the act or process of presenting something as worthy of acceptance or experiment to test quality, value or usefulness'
10. The definition of imply is:
1. to express indirectly;
 2. to involve or indicate by inference, association, ... rather than by direct statement; ("imply," [Merriam-Webster.com](https://www.merriam-webster.com) Dictionary, <https://www.merriam-webster.com/dictionary/imply>. Accessed 8/11/2020
11. The Complaints Board, in Decision 20/095, agreed "the advertisement created the impression that Lord Rutherford would have supported 5G technology". This clearly meets the test of being both implied and an endorsement.
12. On whether the advertisement implied an endorsement, a couple of points from the Board's decision stand out:
- a) The Board "carefully reviewed the words the Advertiser had used with Lord Rutherford's image. The Board said the statement was neutral in tone and ..."
 - b) "While the Complaints Board said the use of a famous innovator from the past in the advertisement created an implicit positive association for the Advertiser's brand, **it did not consider it was an endorsement for Spark's 5G service.**" (emphasis added)

13. The Board's statements on whether the advertisement implied an endorsement seem to contradict an earlier 'Consumer Takeout' statement in the same decision (and their previous decisions on Spark's 5G Ad):
"The Complaints Board agreed the likely consumer takeout of the advertisement, which appeared on television to a general audience, **was a promotion of Spark's 5G services.**" (20/255 Appeal 20/015, emphasis added)
14. In addition, the Consumer Takeout section in Decision 20/255 Appeal 20/015 has materially changed from the previous decisions (20/255 and 20/095). The sections in Decisions 20/255 and 20/095 were basically the same as one another:
"The Complaints Board agreed the consumer takeout of the advertisement was 5G is one of the biggest scientific innovations in history since the time of Lord Ernest Rutherford. The Complaints Board agreed **the advertisement created the impression that Lord Rutherford would have supported 5G technology.**" (Decision 20/095, underline and emphasis added)
15. Spark's view in paragraph 9 of their response can be summarised as: **the advert is promoting Spark's 5G innovation fund and consideration of the possibilities of 5G.**
16. Anyone who watched the advert will be aware Spark used Ernest Rutherford to do this promotion, and thus it is an implied endorsement by Ernest Rutherford.

My view as to whether the advertisement implied endorsement

17. My complaint was not about an endorsement of a particular 5G service (Spark's). My complaint and appeals, in this aspect, have been about Lord Rutherford's endorsement of 5G technology *in general*. This indirectly helps Spark to sell their 5G service by growing demand for 5G products and services. The Board failed to reach a decision about the advertisement implying endorsement by Lord Rutherford of 5G technology, but as noted above they decided "the advertisement created the impression that Lord Rutherford would have supported 5G technology" in Decision 20/095. This is implied endorsement.
18. Having said that, if one considers the wider context of the advert in that it is one of many of Spark's adverts featuring Rutherford's likeness to promote 5G whether it was his voice on the radio, or the LiDar point cloud depiction (that was associated with him in the television advert) appearing on billboards with Spark's logo, the words '5G', 'Starter Fund', "Let's see what this thing can do", and "spark.co.nz/5G"; then the repeated implicit positive association (and some of those specific adverts by themselves) could imply Rutherford's endorsement of Spark's specific 5G starter fund or 5G service.
19. Rutherford's mention of 5G alongside momentous events such as machines' learning and information becoming currency suggests he is speaking of 5G as a momentous event worthy of attention. Rutherford's choice of words, particularly 'the dawn of 5G', again suggests it is a momentous event when it is more akin to widening a road (speed/capacity increases).
20. Rutherford goes on to 'invite' and 'encourage' New Zealanders to use 5G technology with the lines, "New Zealanders have never needed an invitation to push things forward but consider this yours. Let's see what this thing can do." It is clear he is referring to 5G

when he says ‘this thing’. Spark agrees ‘this thing’ means 5G with their statement “... the advertisement finishes with ‘let’s see what this thing can do’ i.e. at no stage is Lord Rutherford purporting to state what 5G may be able to do in the future” (para. 33(b)). Though he is still encouraging people to use it to find out.

21. The Board also said “the advertisement did not contain an endorsement by Lord Rutherford of the Advertiser’s 5G service over any other provider.” Though the advertisement did not promote Spark’s 5G service over other 5G providers such as Vodafone, it was still an endorsement of 5G technology, which is a service Spark sells; and though competition is not necessary for it to be an endorsement, 5G is perhaps in competition with Chorus’ fibre network.

22. To be clear, my view is **the advertisement implies endorsement by an individual** (Ernest Rutherford) of 5G technology because he is speaking of 5G as a momentous technology worthy of attention and encouraging people to try it to test its quality, value, or usefulness. This matches the definition of endorsement given in paragraph 9 above. Alternate definitions of endorse are ‘to approve openly’, or ‘to express support or approval of publicly and definitely’ (“endorse,” [Merriam-Webster.com Dictionary](https://www.merriam-webster.com/dictionary/endorse), <https://www.merriam-webster.com/dictionary/endorse>. Accessed 2/11/2020). Given Rutherford is encouraging people to use 5G, a reasonable consumer would assume he approves of it and the Board said themselves “the advertisement created the impression that Lord Rutherford would have supported 5G technology”. This has to be seen as implied endorsement.

23. Given both parties and the Complaints Board seem to be of the view the advert implies endorsement it would be irrational and unreasonable, and suggest considerable bias in favour of the advertiser, for the Board to decide the advert is not an endorsement.

24. Then there is the matter of whether the advertiser had consent. I stated in the introduction and more elaborately in my previous appeals that Rutherford’s estate cannot give consent for an endorsement of something he may well not have endorsed. However if the Board decides the estate can give consent, the following section points out that consent from the estate is not verifiable.

Spark’s stated consent from Lord Rutherford’s estate

25. Given inaccuracies in the Advertiser’s response (which are discussed later), it is clear the Advertiser’s statements should be checked (not taken at face value) and if consent from Lord Rutherford’s estate is at all a factor in the Board’s decision then the Board must confirm that it really is Lord Rutherford’s estate. Though this should be confirmed in any case where the consent’s verifiability is in question, as it has been since my first appeal. As mentioned in my previous appeals it is not clear who Rutherford’s estate is or how to contact them.

26. It is odd that Spark’s response to the first complaint (20/095), used a more specific term “members of Lord Rutherford’s estate”, rather than simply saying “Lord Rutherford’s

estate”. Spark has now changed their wording to “Lord Rutherford’s estate” in their response to complaint 20/255 Appeal 20/015 without any explanation for the change in wording despite my previous appeal raising this as an issue. If it was members of the estate, did they provide evidence that they had the authority to speak on behalf of the estate as a whole?

27. On consent, Spark said “This consent is recorded in a confidential contract – as Spark’s response will be made public, it is not appropriate that Spark disclose this document ...” (para. 35)
28. Spark does not have to publish their confidential contract to verify consent. They could have:
- a) contacted the estate again asking them to provide a written statement that they consented to the endorsement in their confidential contract, along with proof that they are his estate or had authority to provide permission on behalf of the estate at the time they gave permission. If it really is his estate, then this is not a hard task because surely they have proved it before; or,
 - b) provided contact details of whoever they assume Rutherford’s estate to be, so that people can contact them to verify they gave consent for the endorsement and that they are his estate. For this option, in the interests of resolving the complaint, one would expect the Board would then seek a response from the other party to the contract verifying the endorsement and proving that they are Rutherford’s estate or had authority to provide permission on behalf of the estate at the time they gave permission.

29. Spark is right that consent does not need to be verified in every decision, but to be verifiable it has to be possible to verify it at least once. So far Spark has failed to prove consent is verifiable in any of the decisions. Indeed, its actions (e.g. changes from “members” to “the estate” and its reluctance to provide verifiable evidence) are indicative that it is unable to do so.

Inaccuracies in Spark’s response

30. I dispute Spark’s claim in 23.(c) of its response:
“While the complainant has suggested that some consumers may think that the recording was made when Lord Rutherford was still alive, there is no evidence to support this suggestion and, in Spark’s view, any such consumers should be viewed as sitting in the realm of outliers.”

31. He did make the recording while he was alive. I linked to the original footage in my previous appeal (1935 –Rutherford, [youtube.com: https://www.youtube.com/watch?v=zBHD8ksx_Sg](https://www.youtube.com/watch?v=zBHD8ksx_Sg)). The advert even has the random flicker of the paper he is holding at 0:24 in the 60” advert, which occurs at 6:10 in the Youtube video. All Spark likely did was rearrange his words in a believable way. As has been made clear by Spark’s response to complaint 20/095, it is not an actual speech of his, so the recording has been edited; however the recorded images, and possibly the voice, were of Lord Rutherford while he was alive because they used the original footage. The footage is also available at: Lord

Rutherford on the atom, British Film Institute, <http://collections-search.bfi.org.uk/web/Details/ChoiceFilmWorks/150010962>

32. Spark repeatedly relies on the premise that it was not an actual recording of Lord Rutherford (paragraphs 1, 9(a), 9(c), 9(d) of Spark's response to complaint 20/095; and 4(a), 23(a), 23(c), 28 and 30 of Spark's response to complaint 20/255 appeal 20/015). It may not have been an actual speech of his, but it certainly was an actual recording of Lord Rutherford (and a reasonable consumer who has seen the original footage would know that for certain, as opposed to just suspecting it to be real).

33. Spark misled the Complaints Board in paragraph 31 of their response by saying (about 5G) "... that was not created until 125 years following his death" despite the fact Spark knew Rutherford died in 1937 (83 years ago) as Spark stated "Lord Rutherford died in 1937 ..." (para. 23(b)), The Board repeats the erroneous 125 years indicating it was confused over straight forward factual information.

34. Spark says in paragraph 33.(c) "For completeness, we note that the Oxford English Dictionary definition of testimonial is ...". This is irrelevant. The issue is not about a testimonial but about an endorsement. This is clear from the Board's decision (20/255), my complaint, and Spark's summary of my complaint: "In relation to rule 2(f), the complainant argues that Spark's 5G Ad would be interpreted as an endorsement of 5G by Lord Rutherford ..." (para. 15 of Spark's response). Spark did not give a definition of endorsement.

Rule 2(b)

35. I accept the Complaints Board is of a different view to me in deciding the advert does not breach rule 2(b).
However, I would like to correct inaccuracies in two paragraphs of the Board's decision as to why the advertisement was not misleading. These inaccuracies were the result of inaccuracies in Spark's response

37. The Board says "At the end of the advertisement the image of Lord Rutherford morphs into coloured pixelated graphics further indicating it is a created scene ...". As the Board seems to be aware from the summary of the decision ("... a Spark television advertisement which included film footage of Lord Ernest Rutherford..." and "... the voiceover and words ..."), the advertisement **is not a created scene**, but actual footage. People who have seen the original footage would know for certain it was a real scene (as opposed to just suspecting it to be real). As Rutherford recorded a speech in that study, it could be reasonable to assume the modified recording Spark broadcasted was just another of his speeches.

38. The Complaints Board also made the comment of "... since his death 125 years ago ...". As stated earlier he died in 1937 (83 years ago); the original footage Spark used to create the advertisement was recorded in 1935. The Board said they "agreed that Lord Rutherford would not have been able to comment on what has occurred in the world since his death 125 years ago, or to comment on what technology is available today, so it was clear that this was a creative portrayal of him." The fact he was alive

just 83 years ago at a time when current advances may have been conceivable was clearly not a matter the Board had considered.

39. The members of the Complaints Board believed and repeated Spark's obvious errors. This demonstrates the trust a reasonable consumer has in Spark's statements, and how that trust can be abused.

40. The uncritical acceptance of misstatements by Spark is indicative of a bias in approach.

Rule 2(f), in light of principle 2

41. Spark expressed the view "Rule 2(f) must also be interpreted in light of principle 2. It is concerned with truthful presentation in the context of testimonials and endorsements" (para. 29). Looking at Spark's 5G Ad in light of principle 2 ("Advertisements must be truthful, balanced and not misleading"), as opposed to the actual rules: the lie perpetrated in the advert is that were Rutherford alive today he would think of 5G as hugely important and approve of it, things Spark cannot possibly be certain of. As the members of the Complaints Board have demonstrated, in their 'Is the advertisement misleading?' section, a reasonable consumer may take Spark's untruths at face value and be misled.

42. In paragraph 25 of Spark's response, they worry about an 'overly restrictive' precedent being set for the creative portrayal of any deceased person. If they had portrayed Ernest Rutherford honestly and without the lie mentioned in the previous paragraph then it would have been okay, aside from perhaps the repeated association of his image with their brand in their various adverts on Spark's 5G starter fund. Or if it was obvious his support for 5G was a joke perhaps it would have been okay, but the advertiser is misleading people by portraying his support for 5G as genuine.

43. The requirement for endorsement by a dead person to be verifiable is a sensible not 'an overly restrictive' precedent. A particularly distasteful example would be a taser company having a victim of crime say, "If I'd had a taser I would probably still be alive today." (Please note the victim is talking about any taser not a specific brand the company sells).

44. Spark in paragraph 30 of their response claimed their advert is not of the "mischief" rule 2(f) seeks to prevent. So though their words suggest they accept the advert is covered by the rule and they have breached it, they would like the complaint to not be upheld. Firstly, there is no "mischief" aspect to rule 2(f) or principle 2, and secondly it is 'mischievous' to imply endorsement from someone when the advertiser does not know they would have endorsed it

It is "mischief" using a respected dead scientist to gain support in a most unscientific way (i.e. Rutherford supports it, so you should too), as opposed to presenting evidence-based arguments.

45. Finally, the Board's acceptance of the advertiser saying they have gained consent without being able to prove it means the Board does not understand the meaning of the word 'verifiable'. The Board's decision gives the appearance that the standards do not apply if the advertiser does not want them to. This brings the Complaints Board and its processes into disrepute.