



Risk, Resilience and Reputation

Green technology – The key to climate change mitigation in the corporate world?

Transparency is the cornerstone of effective accountability, and climate change reporting is becoming mandatory in many jurisdictions around the world, including the UK. These changes in the regulatory landscape are amplified by recent messaging from some of the world's largest asset managers that companies which do not take meaningful action to reduce their contribution to climate change risk being cut off from future investments and/or funding opportunities. It is not surprising, therefore, that in recent years we have seen a surge in "green technology", designed not only to improve a business's efficiency, but to assist with monitoring, managing and reducing carbon emissions.

In this article, we consider emerging green technologies, and some of the potential associated litigation risks for those who opt to use them.



What is green technology?



Green technology ("Green Tech") is technology with the intended purpose of mitigating or reversing the effects of human activity on the environment. Solar energy and electric vehicles are examples of Green Tech. These technologies fall into a number of categories:

- **Internet of Things ("IoT")** – IoT refers to everyday physical technologies such as smartphones, thermostats and refrigerators that can be connected and effectively "talk" to one another. We have seen IoT increasingly used as part of green solutions. For example, Walmart uses IoT sensors to monitor energy consumption in its stores. Using a solution called "Demand Response", Walmart is able to reduce energy consumption instore for a specified time and can then bring the level back up to normal operating levels when demand requires¹.
- **Artificial Intelligence ("AI")** – in addition to IoT, businesses are increasingly installing AI technologies in office buildings or warehouses to improve efficiency. Data generated by these technologies can be analysed and used to predict trends in energy consumption in buildings. The AI can then control that energy consumption to reach and maintain optimum efficiency, potentially reducing emissions.
- **Cloud Computing** – Physical hardware can require significant energy for example in the use of cooling systems. In addition, businesses which host data and applications on-site often deploy hardware with capacity which exceeds day-to-day requirements, to allow for expansion or manage surges in demand. Instead, data can be stored 'in the cloud' on a virtual machine that does not require such significant infrastructure and can be limited to the capacity actually required, consequently reducing energy consumption.

¹ [How Walmart Leverages IoT to Keep Your Ice Cream Frozen](#)



Green Tech and mandatory reporting

At the Green Horizon Summit in November 2020, it was announced that climate risk reporting will become mandatory for large companies and financial institutions in the UK. This will come into effect for some companies as early as 2021, using guidelines from the Task Force on Climate-related Financial Disclosures. These disclosure obligations will initially be implemented on a "comply or explain" basis but are expected to become increasingly mandatory from 2022 for some entities.

The increased focus on transparency comes not only from the fast-evolving regulatory landscape. The CEO of BlackRock, Larry Fink, has indicated that BlackRock will be asking companies in which it invests to disclose a plan for how their business models will be compatible with a net zero economy. Furthermore, in a separate letter to clients, Fink made the potential consequences clear for companies that fail to take appropriate steps to manage their climate change exposure, namely that BlackRock *"will not only use our vote against management for our index portfolio-held shares, we will also flag these holdings for potential exit in our discretionary active portfolios because we believe they would present a risk to our clients' returns"*². Other asset managers have made statements to similar effect. The direction of travel is clear.



What are the potential liability risks for the providers of Green Tech?

As the expectation on companies to monitor and disclose their emissions more diligently increases, it is likely that we will see a greater uptake in Green Tech to assist with managing the transition to net zero. As failure to meet net zero objectives can have a significant impact on a business, the consequences of technology failure can increase significantly.

It is not difficult to imagine scenarios where failure of Green Tech could result in consequences which go beyond the types of losses which would ordinarily be recoverable in a claim for damages. For example, a company may engage a Green Tech service provider to assist it in meeting environmental standards, such as a data centre operator using Green Tech to control the temperature within a building, thus managing energy consumption and minimising emissions. What happens if the technology controlling the temperature within the building fails, such that the data centre operator consumes more energy than anticipated and exceeds its emissions targets? It may seek recompense from the service provider for breach of contract for failure to meet service levels. However, whilst standard contractual remedies such as liquidated damages and service credits may be sufficient to compensate general business losses (such as increased energy costs), they could fall significantly short if the consequence for the company is a failure to meet emissions targets resulting in failure to secure investment opportunities or loss of existing investment. In an extreme case, there could be a significant impact on market capitalisation.

Could a company "pass on" the consequences of its failure to meet environmental standards to a Green Tech service provider? In such a situation there will be a number of considerations required to determine liability on the part of the service provider and the measure of damages which it may be required to pay:

Causation

- The company will need to establish that the acts or omissions of the Green Tech service provider caused it to breach its mandatory (or committed) reporting requirements. Was it reasonable for it to rely on the Green Tech to achieve those aims? It may still be required to demonstrate that it has mitigated the risks by other means and was not solely dependent on its service provider.
- If the Green Tech is a form of AI which has been subject to modification by the company or is dependent on data input by the company or generated from other IT systems deployed by the company, questions may be raised about the integrity of such modifications or data and whether they have any impact on the Green Tech service provider's liability.
- Similarly, if the Green Tech service provider is deploying within its technologies AI produced by another service provider, there may be further issues of liability to consider (although they may be more of a concern for the service provider than the company). (CMS have previously considered some of these issues [here](#).)

Remoteness and Reputational Risk

- The remoteness of any loss caused will also need to be considered. If the company is dropped by its asset manager as a result of failing to meet its environmental targets or disclosure obligations, can the resultant losses properly be claimed from the Green Tech service provider or are these categories of loss too remote to be recoverable?
- In addition if, as a result of failing to meet its disclosure obligations, the company finds itself subject to significant negative press due to the perceived decline in its environmental standards, or even regulatory fines and/or penalties, which in turn result in a reduction in its share price, could the Green Tech service provider also be liable for any of the damage caused in this respect? What if the combination of loss of investment and negative press resulted in the company dropping out of the FTSE 100 as a result of this reduction in its market capitalisation? How remote is too remote?
- Reputationally, the company could, further, face allegations of greenwashing i.e. claims that it was giving the false impression that it was meeting certain environmental standards.



What precautions should businesses using Green Tech, and Green Tech service providers, consider taking?

To date, we have not seen any examples of this type of claim. However, given the heavy focus on environmental standards and the potential high stakes consequences of failing to meet such standards, it would not be at all surprising if such claims were to be advanced in the not so distant future.

A Green Tech service provider offering solutions of the type considered in this article should carefully consider the basis on which it will contract for provision of those services and ensure the contract contains appropriately worded limitations and exclusions of liability. It will wish to set out clearly worded customer responsibilities to ensure that the users of its services take all responsible steps to meet environmental standards and do not rely entirely on the Green Tech deployed. If other service providers are involved or the Green Tech is dependent on AI technologies produced by third parties, it may wish to ensure that appropriate indemnities are in place.

Conversely, a company making use of Green Tech to meet environmental standards will wish to ensure that exclusions of liability are as narrow as possible and that it is best placed to pass on as much risk to the service provider as possible.



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