necessarily safeguarding the distinctiveness of the EU's identity but risks losing an important ally in the EU's attempt at building a genuine European polity. At the moment, it is unclear how the conundrum will be solved. But, if the question of accession was rightly not only about human rights but also about the preservation of the EU's constitutional order, the Court may not only have jeopardized its relationship to the ECtHR but ultimately also undermined rather than furthered its own constitutionalist agenda.

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THE NEW FUNDAMENTAL NORM OF RECOVERY FOR LOSSES TO EXPRESS TRUSTS

THE principles for recovering monetary relief for losses to express trusts have recently been uncertain, especially in "commercial" situations. Where trustees undertook to hold money on trust for a lender and to advance the money to a borrower after receiving security documents, the trustees no doubt breach the trust by advancing the money without first receiving the security documents. However, since *Target Holdings v Redferns* [1996] A.C. 421, it has been uncertain what measure of relief the lender-beneficiary can recover – and especially whether the measure differs according to (1) whether the form of relief claimed is a general accounting or "equitable compensation" for only particular defaults or (2) whether the circumstances are "commercial". Under the accounting doctrines as traditionally applied, trustees unable to vouch for trust assets they earlier received could not reduce their liability by showing that part or all of the loss would have been suffered even had they performed the trust correctly. The trustees were responsible for the misapplied sum regardless of causal enquiries. But, in *Target*, the House of Lords – emphasizing the commercial nature of the case – denied a lender-beneficiary's claim to recover the full sum wrongly disbursed by trustees. The significance of the case has been contested. Did *Target* change a fundamental norm of monetary relief for losses suffered through breach of trust – a norm applicable regardless of whether the form of relief claimed is a general accounting or equitable compensation for only particular defaults? Did *Target* instead leave the traditional accounting doctrines untouched, and create a new remedy of equitable compensation for breach of trust? Or did *Target* establish a "commercial" exception to traditional principles of trustee accountability, an exception limiting the quantum of relief? Indeed, was *Target* decided *per incuriam*?

In *AIB Group (U.K.) plc v Mark Redler and Co. Solicitors* [2014] UKSC 58, [2014] 3 W.L.R. 1367, the Supreme Court found that *Target* did only

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the first of these things. It established a new fundamental norm: no trustee shall be liable for a loss greater than the loss that trustee's misconduct caused, whether the relief claimed is a general accounting or equitable compensation for particular breaches of trust.

To refinance debts of the borrowers, AIB advanced £3.3 m to the defendant solicitors. Initially, the solicitors were to hold the money on trust for the lender. Once they ascertained how much the borrowers owed to Barclays (the existing lender), the solicitor-trustees were to advance enough funds to Barclays to satisfy that indebtedness. The rest of the money was then to be released to the borrowers; the security of Barclays would be discharged; and AIB would obtain a first charge over the secured asset, a home in Surrey worth £4.25 m. Through a combination of misunderstanding and the solicitors' admitted negligence, Barclays received too little to satisfy the sum owed. Too much was then released to the borrowers. Because Barclays refused to discharge its security, AIB obtained a mere second-ranking security. The value of the security later fell. The borrowers defaulted and were bankrupted. When Barclays sold the home, £1.2 m was realized: around £300,000 were paid to Barclays, the balance (£867,697) to AIB. To recoup its losses, AIB sued the solicitors for breach of trust.

Hoping that the uncertainty around *Target* could be "interpreted" in its favour, AIB claimed that the traditional doctrines of trustee accountability entitled it to recover all the money disbursed in breach of trust – that is, the full amount of the loan. At first instance and in the Court of Appeal, *Target* was held to foreclose that relief. *Target* explicitly required a comparison of what AIB's position, as beneficiary of the trust, would have been had the trust been correctly performed with what AIB's position actually was. Only if AIB had suffered loss that it would not have suffered but for the solicitor-trustees' breach could AIB recover equitable compensation in that amount. Applying those principles, the Court of Appeal held AIB entitled to £299,999 since, if the solicitors had correctly performed the trust by paying the correct amounts to Barclays and the borrowers, AIB as first mortgagee would nevertheless have suffered loss through the inadequacy of the security. AIB's renewed efforts to "interpret" *Target* away failed on a further appeal to the Supreme Court, where the reasoned judgments of Lord Toulson and Lord Reed – with both of which Lord Neuberger, Lady Hale, and Lord Wilson agreed – affirmed the *Target* decision.

AIB Group is of major importance to equitable relief in the form of an accounting ordered against trustees. The case makes no change to the law, but makes plain that a fundamental change to the law occurred in *Target*. Under the doctrines of account, a trustee must continually be able to vouch for the assets it earlier received on trust. If the trustee cannot, then the trustee is charged with the value of the particular asset, valued at

the date of judgment. Statute aside, traditionally the trustee could only be discharged of this liability by showing that:

(1) the asset was transferred to the person entitled thereto in the course of the due administration of the trust; or
(2) the asset was lost in some way not due to the trustee's default; or
(3) the asset or its monetary equivalent had been restored to the trust.

Each ground of discharge was absolute, even the second: a trustee could not reduce its liability by showing that the asset or some of its value would have been lost even had the trustee committed no breach. Yet the trustee could do precisely that when the account was surcharged for the value a neglectful trustee would have obtained for the trust but for the trustee's neglect: e.g. *Re Brogden* (1888) 38 Ch.D. 546, 567–68, 572–73 (CA). None of those defences could have applied in *Target* or *AIB Group* without a change in the law. *Target* made the change by establishing the defence of "no causation" as a *general* defence to claims to recover loss by means of *either* a common accounting *or* an accounting on the wilful default footing: Heydon, Leeming, and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed. (2015), [23–185]–[23–230]. The upshot is that, where the accounting remedy is claimed against a trustee who cannot vouch for trust assets earlier received, there is now a fourth ground of discharge. Augmenting the list above, the trustee can now escape liability by showing that:

(4) the asset or its value would have been lost even had the trustee performed the trust correctly.

And this fourth defence applies *pro tanto*.

Although neither Lord Toulson nor Lord Reed directly said the accounting principles had thus changed, they necessarily implied that had occurred. At the same time they indicated that whether a claimant proceeds by seeking a general account or equitable compensation for particular breaches of trust, there is only the one loss and one sum of relief recoverable for it. In this context, the difference between accounting and equitable compensation is a difference of procedure only. Thus, Lord Toulson accepted that accounting doctrines (e.g. as to falsification and surcharging) applied in *AIB Group*, but held that those did not allow AIB to recover equitable compensation beyond the loss AIB would not have suffered but for the trustees' breach. Lord Reed said that the same monetary relief for loss is to be awarded, irrespective of whether a claimant engages the accounting procedures of the court or claims merely in respect of a particular breach of trust. Their Lordships, with respect, rightly took this to follow from *Target* itself.

AIB Group is also significant for the Supreme Court's rejection of a doctrinal division between "commercial" and "traditional" trusts when awarding equitable compensation for breach of trust. The court could have declined to evaluate the distinction by noting the commercial features of the case and

following *Target* to hold that, whatever might be required of the defaulting trustees of a "traditional" trust, in this commercial setting, the trustees were not liable to reconstitute a trust emptied of its one asset – a money sum – by paying equitable compensation of the sum wrongly disbursed. Nevertheless, the Supreme Court did evaluate the distinction between commercial and traditional trusts and found it to have limited significance. Facts of a "commercial" character may affect the application of general equitable principles, the court saw. For example, facts showing the purpose of a commercial contract may help a court determine whether a trustee's breach has caused a compensable loss by showing what the position would have been had the trustee committed no breach. As Lord Toulson observed, that is because general principles apply variably to different facts. It is not because commercial and non-commercial trusts have different rules of relief.

The court's denial that the distinction between commercial and traditional trusts has larger significance will avoid some strange outcomes. It had sometimes been thought that *Target* established a rule that breach of a "commercial" trust cannot be remedied by ordering the trustee to reconstitute it. Such a rule would be absurd: it would preclude the reconstitution of a trust even where reconstitution is necessary before the trust can be performed, and performance of the trust is necessary to complete a larger executory transaction: *Wiggins v Lord* (1841) 4 Beav. 30, 32, 49 E.R. 248, 249.

The decision in *AIB Group* removes such doubts. *Target* neither established different rules for recovering losses suffered by commercial and traditional trusts, nor allowed the quantum of relief to differ according to whether an accounting or equitable compensation is claimed. *Target* instead established a new basic norm of relief for breach of trust: any loss that would have been suffered had the trustees correctly performed is an unrecoverable loss.

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"THE CHOICE IS CRUEL": ASSISTED SUICIDE AND CHARTER RIGHTS IN CANADA

IN a groundbreaking decision, the Supreme Court of Canada in *Carter v Canada (Attorney General)* 2015 SCC 5 has declared the criminal law measures prohibiting the provision of assistance in dying unconstitutional. In doing so, the Supreme Court unanimously overruled its previous decision (*Rodriguez v British Columbia (Attorney-General)* [1993] 3 S.C.R. 519) upholding the blanket prohibition on assisted suicide.

The facts were uncomplicated. Gloria Taylor was diagnosed with a neurodegenerative disease and did "not want to die slowly, piece by piece" or

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