AFFIRM; Opinion Filed January 26, 2024

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-22-00721-CV

MULTI-HOUSING TAX CREDIT PARTNERS XXXI, Appellant
V.
WHITE SETTLEMENT SENIOR LIVING, LLC, Appellee

On Appeal from the 68th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-22-04532

MEMORANDUM OPINION

Before Justices Carlyle, Smith, and Kennedy
Opinion by Justice Kennedy

Multi-Housing Tax Credit Partners XXXI ("MHT") appeals the trial court's order confirming an arbitration award in favor of appellee White Settlement Senior Living, LLC ("WSSL"). WSSL is the general partner and MHT is the limited partner of Oak Timbers-White Settlement, L.P. ("Partnership"), which was formed in 2001 to construct, own, operate, and sell an affordable housing property in White Settlement, Texas. The governing document, the Limited Partnership Agreement ("LPA") includes an Option Provision for WSSL to purchase MHT's interest in the partnership and an Arbitration Provision.

In six issues on appeal, MHT urges the arbitrator erred by concluding the Option Provision was an enforceable contract and by awarding WSSL specific performance, damages, and attorney's fees and costs. We affirm. Because all dispositive issues are settled in law, we issue this memorandum opinion. *See* TEX. R. APP. P. 47.2(a), 47.4.

FACTUAL AND PROCEDURAL BACKGROUND

As described by the LPA, the Partnership was formed to participate in the low-income housing tax credit ("LIHTC") program, which is set forth in 26 U.S.C. § 42.[1] The Partnership was organized to construct, own, operate, and sell the residential units in the housing property so as to qualify for federal tax credits under Section 42. WSSL, as general partner, operated and managed the Partnership and the housing property. In exchange for capital funding contributions, MHT received the federal tax credits allocated to the Partnership.

The LPA also contained an Option Provision, which provided WSSL the option to purchase MHT's interest in the Partnership and set forth the terms and requirements for the exercise of the option. In the years prior to the date when the option ripened, the parties discussed the sale of MHT's interest to WSSL, with the majority of offers to sell and buy being based on a hypothetical sale of the housing

[1] Under Section 42, owners of qualified low-income housing projects receive federal tax credits, and charge rents that are restricted to amounts that are affordable for low-income tenants.

property to a third party, or "sale value methodology." No agreement was reached before the beginning date of the option term, January 1, 2021.

On January 5, 2021, within the option term of six months, WSSL notified MHT of its election to exercise the option. In the notice, WSSL proposed to use Samuel T. Gill of The Gill Group as the agreed upon appraiser and stated that, according to the terms of the Option Provision, the option price would be "based on the Partnership's continued ownership of the Property, as well as certain discounts . . . (*i.e.*, a discounted cash flow appraisal)." On January 12, MHT responded that it did not agree with WSSL's stated valuation methodology and urged the sale value methodology that had been used in prior negotiations was required by the terms of the LPA. MHT further stated that until WSSL agreed to use the sale value methodology and provided information regarding Gill's qualifications, it would not agree to the use of Gill and The Gill Group as the appraiser.

On January 28, WSSL notified MHT that, based on the disagreement regarding valuation methodology and other alleged breaches by MHT, disputes existed between the two parties. The LPA provided that in the event of a dispute between the Partners that could not be settled by the parties within fifteen days after a Partner gave written notice of the existence of a dispute, any partner could submit such dispute for arbitration. On February 12, MHT replied with a letter denying that a dispute as defined in the LPA existed and that further discussions and exchanges of information would have to take place before a dispute could arise. That same

month, WSSL applied to refinance a loan on the housing property seeking to obtain a lower interest rate and correspondingly lower interest payments. Under the LPA, MHT's consent was required to refinance or otherwise modify the terms of any mortgage of the Partnership. Ultimately, the parties did not reach an agreement to refinance the mortgage, and no refinancing took place.

On March 8, WSSL filed its complaint in arbitration, demanding arbitration of the correct interpretation of the Option Provision to determine the option price, MHT's alleged breaches of the LPA and its implied covenant of good faith and fair dealing, and the damages resulting from those breaches. Both parties moved for summary judgment on all competing claims. In October, the arbitrator entered an order granting WSSL summary judgment on its declaratory judgment claim regarding the methodology for calculating the option price and denying all other relief requested in both summary-judgment motions. The following month, the arbitrator signed an order amending the previous order only by striking a paragraph discussing the valuation terms in the LPA.

In January 2022, the arbitrator conducted a hearing on the parties' remaining issues: (1) the option price; (2) whether either party breached the LPA; (3) whether MHT breached the implied covenant of good faith and fair dealing; (4) whether WSSL breached any fiduciary duties owed to MHT; and (5) whether any damages resulted from such breaches, if any. On March 14, the arbitrator signed an interim award in WSSL's favor on its claims for declaratory judgment and breach of

contract, in which he ordered MHT to transfer its interest in the Partnership to WSSL at an option price of $83,000 and to pay $222 per day in damages to WSSL beginning the closing date of May 5, 2021, through the date the interest is transferred to WSSL and dismissed MHT's counterclaims with prejudice. That award indicated that further proceedings were necessary to determine attorney's fees. On April 21, the arbitrator signed a final award, which, in addition to including 157 findings of fact and conclusions of law, ordered that WSSL recover $454,931 in reasonable and necessary attorney's fees from MHT.

On April 25, WSSL filed a petition to confirm the arbitration award. On June 23, MHT filed a competing motion to vacate the arbitration award. After conducting a hearing on June 24, the trial court signed an order dated the same day, confirming the arbitration award, transferring MHT's interest to WSSL, and requiring MHT to post a security in the amount of $946,737.36 before taking any further action with respect to the trial court's order, including filing an appeal. This appeal followed.

DISCUSSION

I. Standard and Scope of Review

As an initial matter, we address the scope of review on appeal because MHT urges that the parties contracted to expand the scope of review of the arbitration award. WSSL disputes that any expanded judicial review applies to the arbitration award.

The arbitration award here is subject to both the federal and Texas arbitration acts ("FAA" and "TAA," respectively). *See* 9 U.S.C. § 2; TEX. CIV. PRAC. & REM. CODE § 171.001. Generally, we review a trial court's decision to confirm an arbitration award de novo based on a review of the entire record. *See Graham-Rutledge & Co., Inc. v. Nadia Corp.*, 281 S.W.3d 683, 687 (Tex. App.—Dallas 2009, no pet.). Because federal and Texas law favor arbitration, judicial review of an arbitration award is extraordinarily narrow. *See Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016) (noting "Texas law favors arbitration"); *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 826 (Tex. App.—Dallas 2009, no pet.) (noting that because "[j]udicial review of an arbitration award adds expense and delay and thereby diminishes the benefit of arbitration as an efficient, economical system for resolving disputes[,] . . . our review of the arbitration award is 'extraordinarily narrow.'").

The United States Supreme Court rejected the notion that the parties to an arbitration agreement might supplement the narrow statutory review standards available as a procedural matter under the FAA. *See Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578, 585–86 (2008). The Supreme Court's opinion left open the question of whether state arbitration laws like the TAA might be available to provide for the contractually expanded review notwithstanding the FAA's broad reach and preemptive force. *Id.* at 590. After *Hall Street*, the Texas Supreme Court held that parties proceeding under the TAA may in fact agree to expand the scope of

judicial review by constraining the arbitrator's authority to commit errors of law of a type that would be remedial in an ordinary appeal. *See Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87, 97 & 101 (Tex. 2011) cert. denied, 565 U.S. 963 (2011) (contract did not specify whether state or federal law applied).[2]

In *Nafta Traders*, Nafta appealed a trial court's order confirming an arbitration award. *See id.* at 88. At the trial court, Nafta had unsuccessfully moved for vacatur under the FAA, the TAA, the common law, and a provision in the arbitration section of the contract that stated: "The arbitrator does not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law." *See id.* Nafta argued, in part, that by agreeing to these limits on the arbitrator's authority the parties had in effect agreed to expand the narrow scope of judicial review otherwise provided by the TAA. *See id.* As noted above, the supreme court agreed that the TAA permits parties to agree to expanded review. *See id.* at 101. More specifically, the supreme court agreed that the parties had agreed to expanded review when they "agreed to limit an arbitrator's power to that of a judge, whose decisions are reviewable on appeal, and the complaint is that the arbitrator's decision exceeds his powers." *See id.* at 93.

[2] Further, the *Nafta Traders* court held that even where both the FAA and TAA applied, as it does here, "the FAA does not preempt state law that allows parties to agree to a greater review of arbitration awards," so that it was not necessary for the parties to choose the TAA to govern their agreement or to choose not to be governed by the FAA. *See Nafta Traders*, 339 S.W.3d at 101.

MHT urges that the parties here agreed to expand the scope of review by including the following language in the LPA:

> Notwithstanding the applicable provisions of Texas law the parties agree that the decision of the arbitrator and the findings of fact and conclusions of law shall be reviewable on appeal upon the same grounds and standards of review as if said decision and supporting findings of fact and conclusions of law were entered by a court with subject matter and present jurisdiction.

In keeping with this position, at the trial court, MHT moved for vacatur of the arbitration award on the ground that the arbitrator had exceeded his authority and urged the language requiring the arbitrator "to decide the controversy as though the arbitrator were a judge in Texas court of law" indicated the parties had agreed to limit the arbitrator's power to that of a judge, citing *Nafta Traders* and the TAA. *See* CIV. PRAC. & REM. § 171.0088(a)(3)(A) ("On application of a party, the court shall vacate an award if . . . the arbitrators exceeded their powers; . . . .").

WSSL denies that the parties agreed to expand the scope of judicial review of the arbitration award, urging that to do so, they must have expressed "clear agreement to limit the [arbitrator's] authority and expand the scope of judicial review." *See Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 432 (Tex. 2017). WSSL contends that the LPA did not restrict the arbitrator's "authority to render a decision which contains a reversible error of state or federal law" as the agreement did in *Nafta Traders*, but that instead it only required the arbitrator to:

> apply Texas law with respect to procedure and Texas law with respect to Partnership law as though the Arbitrator was bound by applicable statutes and precedents and case law, including the admissibility of evidence, and shall endeavor to decide the controversy as though the arbitrator were a judge in a Texas court of law.

We disagree with WSSL and agree with MHT.

We conclude that the foregoing language relied upon by MHT constitutes a clear agreement to limit the arbitrator's authority and power to that of a judge, whose decisions are "reviewable on appeal," and to expand the scope of judicial review. *See Forest Oil Corp.*, 518 S.W.3d at 432; *Nafta Traders*, 339 S.W.3d at 91, 97, 101. We also agree that the language providing that the arbitrator "shall endeavor to decide the controversy as though the arbitrator were a judge in a Texas court of law" also restricts the authority and power to that of a judge. Finally, we note that by seeking to vacate the arbitrator's award on the basis that the arbitrator had exceeded his power, MHT has preserved the complaint on appeal that the arbitrator exceeded his powers by making rulings outside the power of a judge. *See* CIV. PRAC. & REM. § 171.088(a)(3)(A); *Nafta Traders*, 339 S.W.3d at 101.

We acknowledge that an arbitration award may not be susceptible to full judicial review merely because the parties have agreed to such a review. *Nafta Traders*, 339 S.W.3d at 101. Indeed, a court must have a sufficient record of the arbitral proceedings, and complaints must have been preserved, all as if the award were a court judgment on appeal. *See id.* Here, as in *Nafta Traders*, the parties submitted a record of the arbitration proceeding, including a transcript of the

evidence offered and MHT attacked the award on several legal grounds and challenged the sufficiency of the evidence. *See id.* at 102. Thus, we conclude that a sufficient record of the proceedings has been preserved and we now address whether all complaints were preserved.

When ruling on motions to confirm, alter, or vacate an arbitration award based on reversible error, the trial court serves an appellate function. *Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 719 (Tex. App.—Dallas 2012, pet. denied) (citing *Nafta Traders*, 339 S.W.3d at 101 n.79). As such, our rules for preserving complaints for appeal will also apply to our review of arbitration awards and generally require a party to present a complaint to the arbitrator by timely request, objection, or motion with sufficient specificity as a prerequisite to judicial review. *See* TEX. R. APP. P. 33.1(a)(1); *Nafta Traders*, 339 S.W.3d at 101 n.80.

Our rules on preservation of error conserve judicial resources, promote fairness among litigants, and further the goal of accuracy in judicial decision-making. *See Quinn*, 360 S.W.3d at 719 (citing *In re B.L.D.*, 113 S.W.3d 340, 350 (Tex. 2003)). And these considerations are equally important in the review of an arbitration award. *See id.* (citing *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 998 (5th Cir. 1995), *abrogated on other grounds by Hall St. Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008)) (noting arbitrators would rarely be apprised of the issues before them if a party were allowed to withhold objections until its appearance in court)); *Kendall Builders, Inc., v. Chesson*, 149 S.W.3d 796,

804–06 (Tex. App.—Austin 2004, pet. denied) (evident partiality complaint based on nondisclosure waived by proceeding with arbitration despite knowledge of facts giving rise to complaint)). As noted by the Ninth Circuit, a party should not be able to sit idle through an arbitration and then, after an adverse result, collaterally attack that procedure on grounds never presented to the arbitrator. *See id.* (citing *Marino v. Writers Guild of Am. East, Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993)).

Accordingly, all complaints must be preserved as if the arbitration award were a court judgment on appeal. *See id.* (citing *Nafta Traders*, 339 S.W.3d at 101). Therefore, before addressing the merits of each of MHT's complaints, we will first determine whether the alleged error has been properly preserved for appellate review.

II. The Option Provision Was Enforceably Definite

In its third issue, MHT asserts that the arbitrator erred "because the option provision contained an agreement to agree, and because no agreement occurred, the option was indefinite and unenforceable." We construe this issue to challenge the arbitrator's implied conclusion that the Option Provision was an enforceable contract.

An arbitration hearing is similar to a trial before the court sitting without a jury. *Quinn*, 360 S.W.3d at 720. When a party challenges a trial court's findings of fact on legal or factual sufficiency grounds, we review the trial court's findings under the same sufficiency of the evidence standards used when determining if sufficient

evidence exists to support jury findings. *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). When a party challenges a trial court's conclusions of law, we review the challenged conclusions de novo. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). The trial court's conclusions of law are not subject to challenge for lack of factual sufficiency, but we may review the legal conclusions drawn from the facts to determine their correctness. *Id.*; *Walker v. Anderson*, 232 S.W.3d 899, 908 (Tex. App.—Dallas 2007, no pet.) (trial court's conclusions of law are independently evaluated to determine whether trial court correctly drew legal conclusions from facts). We are not bound by the trial court's legal conclusions, but conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.).

In reviewing the legal sufficiency of the evidence, we consider the evidence in the light most favorable to the award, disregarding all contrary evidence that a reasonable factfinding arbitrator could have disbelieved. *See AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008). If there is more than a scintilla of evidence to support a finding, we must uphold it. *See City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). Our review of the factual sufficiency of the evidence requires us to examine all of the evidence and determine whether the evidence supporting the challenged finding is so weak or so contrary to the overwhelming weight of the

evidence that it is clearly wrong or unjust. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998).

An option contract has two components: (1) an underlying contract that is not binding until accepted and (2) a covenant to hold open to the optionee the opportunity to accept. *See N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598, 606 (Tex. 2016) (per curiam). When the optionee gives notice or otherwise complies with the terms and conditions of the option—regardless of the existence of consideration for the option—a bilateral executory contract is formed, one party having the duty to convey and the other the duty to pay. *See Hott v. Pearcy/Christon, Inc.*, 663 S.W.2d 851, 854 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

To be enforceable, a contract must address all of its essential and material terms with "a reasonable degree of certainty and definiteness." *See Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 237 (Tex. 2016) (quoting *Pace Corp. v. Jackson*, 284 S.W.2d 340, 345 (Tex. 1955)). "It is well settled law that when an agreement leaves material matters open for future adjustment and agreement that never occur, it is not binding upon the parties and merely constitutes an agreement to agree." *See id.* (quoting *Fort Worth Indep. Sch. Dist. v. City of Fort Worth*, 22 S.W.3d 831, 846 (Tex. 2000)). If an agreement to make a future agreement is not sufficiently definite as to all of the future agreement's essential and material terms, the agreement to agree "is nugatory." *See id.* (quoting *Radford v. McNeny*, 104 S.W.2d 472, 474–75 (Tex. 1937)). Thus, to be enforceable, an agreement to agree, like any other contract,

"must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations." *See id.* (quoting *Radford*, 104 S.W.2d at 475).

Conversely, "[a]greements to enter into future contracts are enforceable if they contain all material terms." *See Fischer*, 479 S.W.3d at 238 (quoting *McCalla,* 416 S.W.3d at 418. When an "agreement to enter into a future contract already contains all the material terms of the future contract," courts can determine and enforce the parties' obligations, and concerns about indefiniteness and reasonable certainty do not arise. *Id.* So an agreement that contains all of its essential terms is not unenforceable merely because the parties anticipate some future agreement. *See McCalla v. Baker's Campground, Inc.*, 416 S.W.3d 416, 418 (Tex. 2013).

MHT urges that the Option Provision's use of "fair market value" and "alternative price" left the terms of the purchase price and appraiser open to further negotiation such that the Option Provision was unenforceably indefinite. WSSL responds that neither the use of "fair market value" nor specifying use of undetermined but mutually agreeable appraiser rendered the Option Provision unenforceable.

The LPA provides for WSSL's option to purchase MHT's interest with certain terms including the term of the option, how WSSL may exercise the option, the closing date of the sale of MHT's interest, and the purchase price. "The purchase price of the Limited Partner's Interest in the Partnership, as increased as provided in Paragraph 8. 1. D hereof shall be equal to the greater of:"

(1) Fair Market Value. The fair market value of the Limited Partner's Interest (net of liabilities referred to in Paragraph 8.1.D) as determined by appraisal conducted by a member of the Appraisal Institute with not less than ten years['] experience appraising Low Income housing projects and agreed upon by the Partners (the appraiser will be instructed to value the Limited Partner's Interest assuming continued use of the Property for Low Income Housing, and to assume that the monthly rental income from the Property will be equal to the lesser of (i) the average monthly rental income of the twelve complete calendar months immediately preceding the month in which the Co-General Partner gives notice of its election to exercise the Option, or (ii) the maximum monthly rental income that the Property would produce based on the gross rents chargeable for rent-restricted units pursuant to Section 42(g)(2) of the Code as of the date on which the General Partner gives notice of its election to exercise the Option); or

(2) Alternative Price. A price equal to the sum of: (i) all taxes ("Tax Liability") which shall be due and owing by the Limited Partner to any taxing authority, including but not limited to the Internal Revenue Service, or its equivalent, and the State or its state of residence, arising out of the Limited Partner's sale of its Interest in the Partnership to the Co-General Partner, (ii) the present value, using a discount rate of 11%, of all anticipated Tax Credits the Limited Partner has not yet received, and (iii) $100.00.

Accordingly, the Option Provision included a formula to determine the purchase price, limiting the purchase price to the greater of the mutually agreed upon appraiser's calculations, including assumption guidelines for same, or a definite sum of taxes owing, present value of anticipated tax credits not yet received by limited partner, and $100.00. In reaching this conclusion, we reject MHT's argument that this case is similar to that of *Playoff Corp v. Blackwell*, in which the parties entered into an employment contract that promised the employee 25% of a portion of the company's fair market value upon his termination but did not agree, however, on

how the company's fair market value would be determined, instead agreeing that it would be determined based on a specific formula that the parties would have to agree to in the future after "later negotiations." *See Playoff Corp. v. Blackwell*, 300 S.W.3d 451, 458 (Tex. App.—Fort Worth 2009, pet. denied) (holding without an agreed method of calculating fair market value, agreement was unenforceably indefinite as a matter of law).

Additionally, we conclude the provision's inclusion of "an appraiser . . . agreed upon by the Partners" does not render the Option Provision unenforceably indefinite. Instead, we agree with other courts that have held that when parties to an agreement specify that a third person is to fix the price, the contract is not unenforceable for lack of definiteness. *See Penwell v. Barrett*, 724 S.W.2d 902, 905 (Tex. App.—San Antonio 1987, no writ) (holding that parties' agreement that "the purchase price [of 2.981–acre tract] would be that value given the property by an appraiser" was sufficiently definite to be enforced in breach of contract action) (citing 1 A. CORBIN, CONTRACTS, § 98 (1963)); *see also Seabourne v. Seabourne*, 493 S.W.3d 222, 230 n.9 (Tex. App.—Texarkana 2016, no pet.) (holding that agreement to pay college tuition established by university children attended enforceable by breach of contract action).

As part of its third issue, MHT argues the arbitrator "erred by declaring the Option price based on the Gill valuations because they were not admissible evidence." MHT specifically challenges whether the arbitrator could consider the

value determinations made by Samuel T. Gill or Janice Gill because neither were designated as an expert.[3] As support, MHT cites an opinion in which the supreme court held that a witness who will be giving opinion evidence about a property's fair market value must be disclosed and designated as an expert witness. *See Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 852 (Tex. 2011) (citing TEX. R. EVID. 702, TEX. R. CIV. P. 195.1–.4)).

We review a trial court's ruling on the admissibility of evidence, including a ruling on the reliability of expert testimony, for an abuse of discretion. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 20 15). A trial court has extensive discretion in evidentiary rulings, and we will uphold decisions within the zone of reasonable disagreement. *Diamond Offshore Servs., Ltd. v. Williams*, 542 S.W.3d 539, 545 (Tex. 2018).

The record contains the Gill Group's reports, which the arbitrator admitted over MHT's hearsay and foundation objections, as well as the transcript of Gill's deposition. The record does not include any designation of Gill or Janice Gill as an expert. However, the record includes testimony from WSSL's designated expert David Rogers, director of valuation for litigation services at Creative Planning, certified public accountant, and certified valuation analyst. Rogers testified that the approach used by Gill, a discounted cash flow method, was a reasonable way of

[3] In one of his findings, the arbitrator noted that an addendum to the initial appraisal was originally signed by Gill and later signed by "Janice F. Gill, MAI, after Ms. Gill reviewed the Appraisal Addendum and found it acceptable."

valuing a limited partner's interest, that it was consistent with industry practice to then apply a marketability discount, and that the rate used by the Gill Group was reasonable. When questioned as to the specific value the Gill Group found of $83,000, Rogers testified that the value was "somewhat reasonable" because he found the approach and inputs to be reasonable and that some discretion was afforded among appraisers. MHT raises no objections on appeal to either Rogers' qualifications or his testimony. No rule prohibits experts from using other experts' opinions to formulate new opinions based on their own expertise. *See Gharda USA*, 464 S.W.3d at 352. "In fact, Texas Rule of Evidence 703 and our prior cases contemplate exactly such an arrangement." *See id.* (citing TEX. R. EVID. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of, reviewed, or personally observed.")). Accordingly, we cannot conclude the arbitrator abused his discretion by admitting the Gill Group's reports and basing the Option price on the amount reflected in those reports and supported by Rogers' testimony.

We overrule MHT's third issue.

III. WSSL Complied with the Option Provision

Having concluded the Option Provision is enforceably definite to form a contract, we now address MHT's first issue, in which it argues that the arbitrator's award should be vacated because WSSL did not comply with the Option Provision.

MHT urges that the parties never agreed upon an appraiser, the appraiser WSSL selected was not a member of MAI, WSSL did not purchase MHT's interest by the closing date set forth by the Option Provision, and no mutually agreed upon instructions were provided to the appraiser. As part of its breach of contract claim against MHT, WSSL was required to establish its performance. *See S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018) (citing *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018) (a breach of contract action requires proof of four elements: (1) formation of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) "the plaintiff sustained damages as a result of the breach")). Therefore, we construe this issue to challenge the sufficiency of the evidence to support the arbitrator's findings that there was "no evidence that [WSSL] ha[d] not performed" under the Option Provision in support of his conclusion that MHT breached the Option Provision of the LPA because:

> [MHT] has prevented [WSSL] from acquiring the limited partner interest pursuant to the Option by refusing to participate in the appraisal process or agree to any appraiser to calculate the Option Price unless the appraiser agrees to calculate the fair market value of the Property, after which the parties can purportedly determine the value of the limited partner interest based on a hypothetical sale or refinancing transaction, which does not comply with the LPA. This is a breach of the LPA.
>
> Moreover, [MHT's] refusal to agree to any appraiser that calculates the fair market value of [MHT's] limited partner interest as opposed to the Property only, was unreasonable, in further breach of the LPA.

The Option Provision provided the following terms and conditions: time period during which WSSL could elect to exercise the option, method by which WSSL could elect to exercise the option—written notice to MHT within option period, purchase price, increase in purchase price calculated using WSSL's assumption of MHT's liabilities as limited partner, closing of the sale of the interest (including date and agreement form), and prohibitions against purchase causing dissolution of partnership and against any brokerage fee. MHT's complaints regarding any failure to agree upon an appraiser, the appraiser's membership of MAI, and any failure to provide mutually agreed upon instructions to the appraiser all relate to the terms and conditions of the purchase price, in particular the calculation of the fair market value of MHT's interest.

MHT argues that WSSL failed to perform because the parties never agreed on an appraiser or an appraisal as required by the Option Provision. The Option Provision requires that the fair market value of MHT's interest be "determined by appraisal conducted by a member of the Appraisal Institute with not less than ten years['] experience appraising Low Income housing projects and agreed upon by the Partners." MHT relies on a decision from a federal district court applying Virginia state law to support its argument. In that case, the option language was similar to the language contained in the LPA and the court concluded that one of the general partner's contractual requirements was to "not exercise the Purchase Option unless both parties agreed on the appraiser whose appraisal would set the purchase price"

for the limited partner's interest. *See Multi-Housing Tax Credit Partners XXX v. Alexander Dairy Assocs., LLC*, No. 3:20CV612, 2021 WL 2711468, at *5 (E.D. Va. July 1, 2021). The court further concluded that the general partner breached that obligation by purporting to exercise the purchase option when the limited partner did not agree to the appraisal. *See id.*

WSSL responds that it performed its obligation by proposing an appraiser to value MHT's interest in accordance with the LPA. WSSL further distinguishes *Alexander Dairy*, noting "in that case, the parties agreed on a specific scope of appraisal to be performed to calculate the fair market value of the limited partner interests under the purchase option, after which the general partner: (1) unilaterally changed the originally agreed upon scope of appraisal; (2) obtained an appraisal using the general partner's new scope; (3) used an appraiser that was not agreed to by the limited partner, and who did not meet the qualifications under the applicable agreement; and (4) unilaterally closed upon the option pursuant to the appraisal, thereby claiming to have exited the limited partner based upon the price calculated by the resulting appraisal." WSSL concedes that it did "ultimately proceed to unilaterally obtain the Gill Appraisal, . . . [but it] did not unilaterally exit [MHT] from the Partnership. Instead, [WSSL] maintained the status quo and allowed the Arbitration to proceed until a final, conclusive, and binding determination of the parties' dispute was rendered through the Award."

We agree with WSSL that it sufficiently performed its obligations under the LPA. WSSL elected to exercise the option within the required period and did so with written notice to MHT. As for failing to agree on an appraiser or appraisal, in its written notice to exercise the option, the evidence reflects that WSSL requested MHT agree to Samuel T. Gill of the Gill Group as the agreed upon appraiser, but MHT's response was that it would not "make a determination as to whether Mr. Gill is an agreeable appraiser" until WSSL agreed to limit the scope and methodology of the appraisal to the sale value methodology that had been used in prior negotiations. Thus, MHT withheld its consent to any appraiser or appraisal unless and until WSSL agreed to the methodology MHT urged was required by the LPA. The evidence also reflects that MHT did not offer any appraisal or propose any appraiser for WSSL to consider in return. An optionor may "not commit any act or omit to perform any duty" that would cause the optionee not to exercise the option. *See Elliott v. Lewis*, No. 05-91-01216-CV, 1994 WL 709333, at *5 (Tex. App.—Dallas Dec. 16, 1994, no writ) (citing *Colligan v. Smith*, 366 S.W.2d 816, 820 (Tex. Civ. App.—Fort Worth 1963, writ ref'd n.r.e.)). We conclude the evidence reflecting MHT's refusal to even consider Gill or the Gill appraisal hampered WSSL's ability to comply with the LPA's requirements of an agreed upon appraiser, purchase of MHT's interest by the closing date set forth by the Option Provision, and mutually agreed upon instructions to the appraiser.

We overrule MHT's first issue.

IV. No Error in Basing Option Price on Gill's Appraisal

In its second issue, MHT contends that the arbitrator erred in setting the option price based on the value reached by WSSL's appraiser, Gill.

A. Gill's Methodology

In support of this issue, MHT argues Gill's value was based on a methodology not required by the Option Provision, contrary to the parties' pre-option exercise negotiations, and not supported by industry custom. More particularly, what MHT challenges is the arbitrator's conclusion that the valuation should take into consideration that the Partnership will continue to own the Property, rather than a hypothetical sale of the Property and the amount MHT would receive from the sale. As noted above, the arbitrator granted WSSL summary judgment on its declaratory judgment claim regarding the methodology for calculating the option price. WSSL moved for, and obtained, a declaration that the option price was to be calculated "based on a going concern valuation of the limited partner's interest, assuming continued use of the property for low-income housing."[4] Accordingly, we conclude MHT's argument challenges the arbitrator's decision to grant WSSL summary

[4] MHT argues that in amending that order, the arbitrator took out the language defining "going concern," which MHT urges makes it unclear whether the arbitrator agreed with MHT that a hypothetical sale of property must be included in calculation. To the extent MHT argues the issue was carried to trial, we disagree. The amended order describes the justiciable issue decided by the order as "between the Parties regarding the proper method to value [MHT's] interest upon the exercise of the Option by [WSSL]" and describes the competing methodologies. "[WSSL] argues the proper method of valuation is of the limited partner's fractional interest in the Partnership as a going concern that will continue to own and operate the property while [MHT] argues the valuation must be based upon a hypothetical sale of the apartment complex." The amended order then concludes WSSL was entitled to summary judgment. Therefore, the arbitrator necessarily rejected MHT's argument the valuation must include a hypothetical sale of the property.

judgment on the proper method of valuation of the limited partnership interest upon WSSL's exercise of the option.

We review summary judgments de novo, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Mosaic Baybrook One, L.P. v. Simien*, 674 S.W.3d 234, 252 (Tex. 2023). WSSL moved for summary judgment, seeking, among other things, a declaration that the option price does not contemplate a hypothetical sale of the Property. In support of its motion, WSSL relied on the language of the Option,[5] arguing the LPA requires an appraiser to value MHT's interest "assuming continued use of the Property for Low Income Housing," such that the methodology and scope of appraisal is of a going concern. WSSL also argued that because the option price is to be calculated based on the fair market value of MHT's interest, "it

[5] WSSL's argument largely relied on the purchase price as provided in Paragraph 8.1.C of the LPA:

> Fair Market Value. The fair market value of the Limited Partner's Interest (net of liabilities referred to in Paragraph 8.1.D) as determined by appraisal conducted by a member of the Appraisal Institute with not less than ten years['] experience appraising Low Income housing projects and agreed upon by the Partners (the appraiser will be instructed to value the Limited Partner's Interest assuming continued use of the Property for Low Income Housing, and to assume that the monthly rental income from the Property will be equal to the lesser of (i) the average monthly rental income of the twelve complete calendar months immediately preceding the month in which the Co-General Partner gives notice of its election to exercise the Option, or (ii) the maximum monthly rental income that the Property would produce based on the gross rents chargeable for rent-restricted units pursuant to Section 42(g)(2) of the Code as of the date on which the General Partner gives notice of its election to exercise the Option); or
>
> Alternative Price. A price equal to the sum of: (i) all taxes ("Tax Liability") which shall be due and owing by the Limited Partner to any taxing authority, including but not limited to the Internal Revenue Service, or its equivalent, and the State or its state of residence, arising out of the Limited Partner's sale of its Interest in the Partnership to the Co-General Partner, (ii) the present value, using a discount rate of 11%, of all anticipated Tax Credits the Limited Partner has not yet received, and (iii) $100.00.

is objectively understood that the value should be based on the present value of anticipated future benefits that will flow to MHT from the continued operation of the Partnership as a going concern." MHT responded to WSSL's motion, urging that a hypothetical sale of the Property should be included in a valuation because that was the methodology used in the negotiations that took place prior to WSSL's exercise of the Option and because it is "a recognized method of valuation of limited partnership interests."

Based on the arguments to the arbitrator, the parties disagreed about the meaning of the language of the Option Provision, in particular the terms "fair market value of the Limited Partner's Interest," and whether that fair market value should include consideration of a hypothetical sale of the Property. In the final arbitration award, the arbitrator concluded "clear language of the LPA . . . required . . . calculat[ing] the Option Price based on a going concern valuation of the limited partner interest." When a contract's meaning is disputed, our primary objective is to ascertain and give effect to the parties' intent as expressed in the instrument. *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 763 (Tex. 2018). We therefore presume parties intend what the words of their contract say and interpret contract language according to its plain, ordinary, and generally accepted meaning unless the instrument directs otherwise. *See id.* at 764.

A property's fair market value is what a willing buyer would pay a willing seller, neither acting under any compulsion. *Phillips v. Carlton Energy Grp., LLC*,

475 S.W.3d 265, 278 (Tex. 2015). Fair market value is generally determined either by using comparable market sales, calculating replacement cost less depreciation, or capitalizing net income—that is, profits. *See id.* As noted by WSSL, the LPA's definition of "fair market value" included the following agreed upon instructions to the appraiser to value the interest "assuming continued use of the Property for Low Income Housing" and include certain values of monthly rental income. Therefore, of the three general ways to calculate fair market value, the language of the Option Provision describes capitalizing net income and makes no mention of any hypothetical sale of the Property. We cannot conclude the arbitrator erred in his interpretation of the LPA's language or grant of summary judgment.

B. Discounts Included in Gill's Valuation

MHT also challenges the arbitrator's decision to accept Gill's value because his value included a discount for "lack of control" or "lack of marketability" and argues the use of such a discount in the valuation of its interest was not permitted by the language of the Option Provision. However, nothing in the LPA's language precludes an appraiser's consideration of such a discount. Additionally, the record includes testimony from WSSL's expert Rogers. Rogers testified that the approach used by Gill, a discounted cash flow method, was a reasonable way of valuing a limited partner's interest, that it was consistent with industry practice to then apply a marketability discount, and that the rate used by the Gill Group was reasonable. As noted by the arbitrator in an unchallenged finding, Rogers' expert testimony and

opinions were unrebutted. *See Tex. Champps Americana, Inc. v. Comerica Bank*, 643 S.W.3d 738, 747 (Tex. App.—Dallas 2022, pet. denied) ("Unchallenged findings of fact are binding on the parties and the appellate court."). Thus, to the extent MHT challenges the sufficiency of the evidence to support the arbitrator's acceptance of Gill's value on the basis of its inclusion of a discount for marketability or lack of control, we cannot agree with MHT.

C. MHT's Waiver of Its Right to Participate in the Appraisal Process

As part of its second issue, MHT argues the arbitrator erred by concluding MHT "effectively waived" its right to participate in the appraisal process by not agreeing to WSSL's discounted cash flow methodology or offering its own appraisal, and that this waiver allowed him to uphold the Gill value.[6] Thus, MHT challenges the arbitrator's following conclusions:

> Here, the parties negotiated for an Option that ceded exercise of judgment and discretion to an appraisal process and appraiser. [MHT] is not permitted to, first, reject the appraisal process outright (as it did initially); second, come to the arbitration without offering any appraisal that value the limited partner interact as a going concern, as required by the Option and LPA; then, third, contend that the only appraisal of record under the parties' Option and LPA cannot be enforced because its in-house attorney, Sussman, believes errors exist in the appraisal. Instead, the Gill Appraisal should be given effect and should not be altered or reconsidered.
>
> As such, [MHT] has effectively waived its right to participate in the appraisal process by failing to (i) suggest an alternate appraiser, or (ii)

[6] MHT also argues that the arbitrator reached the erroneous conclusion that this waiver constituted a breach of the implied covenant of good faith and fair dealing. We note, however, that the arbitrator did not include such a conclusion and instead expressly concluded in his final award that, "The implied covenant of good faith and fair dealing is not applicable under the facts of this case." Accordingly, we need not address this argument further.

> supply its own appraisal of its limited partner interest in the Partnership as a going concern, assuming continued use of the Property as low-income housing.

MHT argues that "waiver requires 'full knowledge of all material facts,'" quoting another appellate court discussing the affirmative defense of waiver. *See Tex. Workers' Comp. Ins. Facility v. Pers. Servs., Inc.*, 895 S.W.2d 889, 894 (Tex. App.—Austin 1995, no writ). WSSL responds that the arbitrator properly based its conclusion on yet another appellate court's decision. *See II Deerfield Ltd. P'ship v. Henry Bldg., Inc.*, 41 S.W.3d 259, 265 (Tex. App.—San Antonio 2001, pet. denied) ("It is elementary that one who prevents or makes impossible the performance of a condition precedent upon which his liability under a contract is made to depend cannot avail himself of its nonperformance."). We agree with WSSL.

Indeed, although the arbitrator concluded MHT "effectively waived" its right to participate in the appraisal process, that statement was in support of the conclusion that MHT had prevented or made impossible the parties' agreement on an appraiser and thus could not avail itself of the parties' nonperformance. *See Sharifi v. Steen Auto., LLC*, 370 S.W.3d 126, 146 (Tex. App.—Dallas 2012, no pet.) (quoting *II Deerfield*, 41 S.W.3d at 265). Accordingly, we cannot conclude the arbitrator erred in reaching the challenged conclusions.

We overrule MHT's second issue.

V. WSSL Was Entitled to Remedy of Specific Performance

In its fourth issue, MHT urges that WSSL was not entitled to the equitable remedy of specific performance. MHT argues that WSSL did not comply with the terms of the Option Provision and thus was not entitled to specific performance. MHT further assert that even if WSSL complied with those terms, specific performance should not have been granted because WSSL did not have clean hands.[7] We construe the issue to challenge the final award of specific performance, ordering MHT to "assign and transfer its limited partner interest in the Partnership to [WSSL] . . . no later than 14 days following entry of a Final Award in this proceeding, at the Option Price of $83,000."

Specific performance is the remedy of requiring exact performance of a contract in the specific form in which it was made. *Levetz v. Sutton*, 404 S.W.3d 798, 805 (Tex. App.—Dallas 2013, pet. denied) (citing BLACK'S LAW DICTIONARY 1138 (6th ed. 1990)). The equitable remedy of specific performance may be awarded upon a showing of breach of contract. *Id.* (citing *Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 535 (Tex. App.—Dallas 2007, pet. denied)). Specific

[7] Additionally, MHT urges that the actions WSSL took that constitute "unclean hands" support a conclusion that WSSL breached its fiduciary duties to MHT such that the arbitrator's ruling against MHT on that ground was error. To the extent MHT seeks to challenge the sufficiency of the evidence to support the findings in support of the arbitrator's ruling against MHT's claim for breach of fiduciary duty, we note, as previously in this opinion, that the arbitrator's award includes findings that there was no evidence the parties had special relationship so as to establish fiduciary duty and instead that, "Both sides are sophisticated business entities represented by numerous attorneys and experts in the field. The industry involved here is one where sharp dealing is the norm and no expectation arises that good faith and fair dealing is the standard when it comes to compliance with contractual obligations." Accordingly, we need not address this challenge further.

performance is an alternative remedy to damages. *See id.* (citing *Paciwest, Inc. v. Warner Alan Props.*, *LLC,* 266 S.W.3d 559, 575 (Tex. App.—Fort Worth 2008, pet. denied)). A party seeking specific performance must plead and prove (1) compliance with the contract including tender of performance unless excused by the defendant's breach or repudiation and (2) the readiness, willingness, and ability to perform at relevant times. *Id.* (citing *DiGiuseppe v. Lawler*, 269 S.W.3d 588, 593–94, 601 (Tex. 2008); *17090 Parkway, Ltd. v. McDavid*, 80 S.W.3d 252, 258 (Tex. App.—Dallas 2002, pet. denied)). Therefore, our analysis turns on whether the evidence establishes a breach of contract or other conditions upon which an award for specific performance might be properly predicated. *See id.*

Earlier in this opinion we concluded WSSL complied with the Option Provision and that the arbitrator did not err in concluding that MHT had prevented or made impossible the parties' agreement on an appraiser and thus could not avail itself of the parties' nonperformance. *See Sharifi*, 370 S.W.3d at 146. Moreover, the arbitration record includes unrebutted testimony and evidence that WSSL, before the close of the option period, had set aside $100,000 to pay MHT, which exceeds the appraised value of $83,000 and was the amount WSSL offered in its initial notice of its election of the option as alternative to obtaining an agreed upon appraisal. Such evidence supports an implied conclusion by the arbitrator that WSSL was ready, willing, and able to perform at the relevant time. Accordingly, we further

conclude that these conclusions support the arbitrator's award of specific performance.

We overrule MHT's fourth issue.

VI. Sufficient Evidence Supports Damages Award to WSSL

In its fifth issue, MHT argues that WSSL was not entitled to damages, that WSSL failed to establish that it had been damaged by MHT's refusal to sell its interest to MHT in breach of the LPA. We construe this issue to challenge the following conclusions to support the damages award:

> Claimant presented evidence that if [MHT] exited the Partnership by May 5, 2021, the final day to close on the valid exercise of [WSSL's] Option under the LPA, [WSSL] could have refinanced the Partnership's outstanding debt at a more favorable interest rate of around 3.5%, as opposed to the current interest rate of 7.925%. . . . If [WSSL] had been able to refinance, then it could have saved approximately $80,000 per year on interest expense, entitling Claimant to the benefits of the increased cash flow. . .
>
> [WSSL] has been damaged as a result of [MHT] refusing to sell its limited partner interest to [WSSL] based upon a going concern valuation. [WSSL] has suffered damages in the amount of $80,000 per year, $6,667 per month, or $222 per day (assuming a 30-day month).

We review these legal conclusions drawn from the facts to determine their correctness. *Walker v. Anderson*, 232 S.W.3d 899, 908 (Tex. App.—Dallas 2007, no pet.) (trial court's conclusions of law are independently evaluated to determine whether trial court correctly drew legal conclusions from facts). We are not bound by the trial court's legal conclusions, but conclusions of law will be upheld on appeal

if the judgment can be sustained on any legal theory supported by the evidence. *Sheetz v. Slaughter*, 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.).

A breach of contract action requires proof of four elements: (1) formation of a valid contract; (2) performance by the plaintiff; (3) breach by the defendant; and (4) the plaintiff sustained damages as a result of the breach. *See S & S Emergency Training Sols., Inc. v. Elliott*, 564 S.W.3d 843, 847 (Tex. 2018) (citing *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479, 501 n.21 (Tex. 2018)).

The record contains evidence of the following correspondence regarding proposed refinancing of the Partnership. On May 8, 2021, after the closing date of the Option of May 5, 2021, WSSL advised MHT that it was "seeking a loan of approximately $4.6 million with a 10-year term . . . and an interest rate of 3.5 to 4%, which is significantly lower than the existing interest rate on the current debt of 7.925%" and requesting MHT's consent to do so, since the LPA required unanimous consent of the partners to refinance. WSSL further advised that it would not distribute any cash proceeds from the refinancing because "[MHT] cannot, as a matter of law, benefit from its breaches of the LPA." MHT responded by letters dated May 11 and 26, requesting further information regarding the proposed refinancing. WSSL sent an unsigned loan application on June 1. In a letter dated June 4, MHT responded that additional requested information and documents from WSSL were necessary before it would consent to the proposed refinancing transaction. At the arbitration hearing, WSSL's principal, Vaughan Mitchell,

testified that by June 1, MHT had told him they were not going to consent to refinancing the Partnership.

MHT argues that the evidence does not in fact support the arbitrator's conclusion that, but for MHT's breach of the LPA, WSSL would have refinanced the Partnership's outstanding debt. Instead, MHT urges the evidence establishes that WSSL "abandoned its efforts to refinance solely because [MHT] was still a limited partner and [WSSL] did not want it to receive a portion of the proceeds. In support of its arguments, MHT points to Mitchell's testimony that he was not prepared to refinance the Partnership unless there was a buyout of the limited partnership interest.

Mitigation is usually required in breach of contract cases. *Atrium Med. Ctr., LP v. Houston Red C LLC*, 595 S.W.3d 188, 197 n. 40 (Tex. 2020). Under mitigation principles, the long-standing law of this state requires a claimant to mitigate damages if it can do so with "trifling expense or with reasonable exertions.'" *See id.* (quoting *Great Am. Ins. Co. v. N. Austin Mun. Util. Dist. No. 1*, 908 S.W.2d 415, 426 (Tex. 1995)). However, the record evidence reflects that, because MHT remained the limited partner at the time the parties considered refinancing, the LPA required distribution of cash proceeds to it. The amount of cash proceeds would have been approximately $104,314, which was greater than the annual savings of interest calculated at $80,000.

As the finder of fact, the arbitrator could determine Mitchell's credibility and the weight to be given to his testimony. *See N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 255 n.50 (Tex. 2020) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005)) (noting fact-finders "may choose to believe one witness and disbelieve another" and that "[r]eviewing courts cannot impose their own opinions to the contrary."). From the evidence concerning a required distribution of cash proceeds and the amount of the cash proceeds WSSL would have owed to MHT under the LPA, the arbitrator could have concluded that more than "trifling expenses and reasonable exertions" would have been required for Mitchell, and thus WSSL, to refinance and that MHT's actions or inactions prevented the refinancing to support the arbitrator's conclusions that MHT's breaches caused WSSL to suffer damages in the amount of the savings it would have gained from refinancing.

We overrule MHT's fifth issue.

VII. Award of Attorney's Fees and Costs to WSSL

In its sixth issue, MHT contends WSSL was not entitled to its attorney's fees and costs, challenging the arbitrator's conclusion that WSSL was entitled to recover its attorney's fees and costs under Section 16.3 of the LPA and the Texas Uniform Declaratory Judgment Act ("UDJA"). MHT argues neither the LPA nor the UDJA support this award.

A litigant cannot recover his attorney's fees unless a statute or contract authorizes it. *See Guillory v. Dietrich*, 598 S.W.3d 284, 300 (Tex. App.—Dallas

2020, pet. denied) (citing *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006)).

Section 16.3 provides for costs and expenses for arbitration of disputes as follows:

> Except as otherwise provided herein, in the provisions related to discovery, all costs and expenses of any arbitration proceeding hereunder, excluding attorneys' fees, shall be shared equally by the parties. Each party shall bear its own attorneys' fees. Notwithstanding the foregoing, however, in the event the Arbitrator shall determine that a Partner acted without substantial justification in submitting to a dispute to arbitration, the Partner who is so determined to have acted without substantial justification shall bear all costs and expenses of the other party in the proceeding, including, but not limited to, the reasonable attorneys' fees of such other party.

MHT argues Section 16.3 provides for attorney's fees and costs against only the partner who submitted the dispute to arbitration, and that it was WSSL, not MHT that submitted the dispute. WSSL responds that both parties were required to submit to arbitration such that both submitted the dispute and therefore fees and costs could be awarded against MHT. The phrase "in submitting ***to*** a dispute ***to*** arbitration" is potentially ambiguous as to whether the parties intended that a partner could be determined to act without substantial justification in either (1) "submitting . . . a dispute ***to*** arbitration" or (2) by "submitting ***to*** . . . arbitration." (emphasis added). However, we need not determine whether the language is actually ambiguous or what the parties intended because the arbitrator also concluded the UDJA supported the award of costs and attorney's fees.

A trial court "may award costs and reasonable attorney's fees as are equitable and just" in a declaratory judgment proceeding. *See Anderton v. City of Cedar Hill*, 583 S.W.3d 188, 195 (Tex. App.—Dallas 2018, no pet.) (quoting CIV. PRAC. & REM. § 37.009). Whether it is "equitable and just" to award any portion of reasonable and necessary attorney's fees depends, not on direct proof, but on the concept of fairness, in light of all the circumstances of the case. *See id.* (citing *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162–63 (Tex. 2004)).

MHT argues that the declaratory judgment claims were duplicative of the breach of contract claims such that an award of fees is improper under the UDJA. WSSL responds, urging that its declaratory judgment claim was not duplicative, but necessary, relying on the arbitrator's conclusion that MHT's "refusal to participate in the option process unless extra-contractual terms were applied required a determination of the Parties['] rights and obligations under the LPA."

The supreme court has held that "simply repleading a claim as one for a declaratory judgment cannot serve as a basis for attorney's fees, since such a maneuver would abolish the American Rule and make fees 'available for all parties in all cases.'" *Etan Idus., Inc. v. Lehmann*, 359 S.W.3d 620 at 624 (Tex. 2011) (per curiam) (quoting *MBM Fin. Corp. v. Woodlands Operating Co.*, 292 S.W.3d 660, 669 (Tex. 2009)). When a claim for declaratory relief is merely "tacked onto" statutory or common-law claims that do not permit fees, allowing the UDJA to serve as a basis for fees "would violate the rule that specific provisions should prevail over

general ones." *Id.* (quoting *Woodlands*, 292 S.W.3d at 670). The declaratory judgment claim must do more "than merely duplicate the issues litigated" via the contract or tort claims. *Id.* (quoting *Woodlands*, 292 S.W.3d at 670).

The declaratory relief requested and obtained by WSSL was "that the Option Price is to be calculated based on a going concern valuation of the [] limited partners' interest, assuming continued use of the property for low-income housing." Thus, what WSSL sought and obtained by way of interpretation of the LPA was more than a resolution of WSSL's claim of breach—whether MHT breached by refusing to participate in the option process—but also a determination of rights and obligations of the parties under the LPA, in particular whether a dispute existed as defined by the LPA and on how to calculate the option price. *See* CIV. PRAC. & REM. § 37.004 (a), (b); *see also Mikob Props., Inc. v. Joachim*, 468 S.W.3d 587, 600 (Tex. App.—Dallas 2015, pet. denied) (holding trial court authorized to award attorney's fees under UDJA where both parties pled for declaratory relief and for recovery of attorney's fees for either prosecuting or defending a claim for declaratory relief).

In addition to urging no fees should have been awarded under the UDJA, MHT also argues the award of attorney's fees and costs was neither equitable nor just. Whether it is "equitable and just" to award any portion of reasonable and necessary attorney's fees depends, not on direct proof, but on the concept of fairness, in light of all the circumstances of the case. *See Anderton*, 583 S.W.3d at 195 (citing *Ridge Oil Co.* 148 S.W.3d at 162–63). The arbitrator expressly determined that the

award was equitable and just under the UDJA, concluding MHT's "refusal to participate in the option process unless extra-contractual terms were applied required a determination of the Parties[']rights and obligations under the LPA." Nothing in the record contradicts this conclusion. We thus conclude the arbitrator did not err in awarding attorney's fees and costs to WSSL under the UDJA.

We overrule MHT's sixth issue.

CONCLUSION

We affirm the trial court's judgment.

/Nancy Kennedy/
NANCY KENNEDY
JUSTICE

220721F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MULTI-HOUSING TAX CREDIT PARTNERS XXXI, Appellant No. 05-22-00721-CV V. WHITE SETTLEMENT SENIOR LIVING, LLC, Appellee	On Appeal from the 68th Judicial District Court, Dallas County, Texas Trial Court Cause No. DC-22-04532. Opinion delivered by Justice Kennedy. Justices Carlyle and Smith participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee WHITE SETTLEMENT SENIOR LIVING, LLC recover its costs of this appeal and the full amount of the trial court's judgment from appellant MULTI-HOUSING TAX CREDIT PARTNERS XXXI and from the cash deposit in lieu of cost bond. After all costs have been paid, the clerk of the Dallas County District Clerk's Office is directed to release the balance, if any, of the cash deposit to MULTI-HOUSING TAX CREDIT PARTNERS XXXI.

Judgment entered this 26th day of January 2024.