2017 WI APP 81

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No.: 2016AP434

Complete Title of Case:

HEADSTART BUILDING, LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

NATIONAL CENTERS FOR LEARNING EXCELLENCE, INC. F/K/A WAUKESHA COUNTY PROJECT HEADSTART INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

Opinion Filed:	November 8, 2017
Submitted on Briefs:	January 25, 2017

JUDGES:	Neubauer, C.J., Reilly, P.J., and Hagedorn, J.
Concurred:	Reilly, P.J.
Dissented:	

Appellant ATTORNEYS:	On behalf of the defendant-appellant-cross-respondent, the cause was submitted on the briefs of *Donald J. Murn* and *Michelle E. Martin* of *Axley Brynelson, LLP* of Waukesha.
Respondent ATTORNEYS:	On behalf of the plaintiff-respondent-cross-appellant, the cause was submitted on the briefs of *Stephen L. Fox* of *Schmidt, Rupke, Tess-Mattner & Fox, S.C.,* of Brookfield.

2017 WI App 81

COURT OF APPEALS
DECISION
DATED AND FILED

November 8, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP434 **Cir. Ct. No. 2013CV1221**

STATE OF WISCONSIN **IN COURT OF APPEALS**

HEADSTART BUILDING, LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

NATIONAL CENTERS FOR LEARNING EXCELLENCE, INC. F/K/A WAUKESHA COUNTY PROJECT HEADSTART INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Reversed and cause remanded with directions*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 HAGEDORN, J. This dispute arises out of an option-to-purchase provision in a lease between Headstart Building, LLC (Headstart), the lessor, and

National Centers for Learning Excellence, Inc. (National), the lessee. In the event the option was exercised, the purchase price was to be based on the fair market value reflected in appraisals of the property. Specifically, the agreement required each party to commission an appraisal, and the purchase price would be determined by a formula based on the average of the two appraisals so long as they were within five percent of one another. If the difference was greater than five percent, the agreement called for the two appraisers to collectively choose a third individual to conduct an independent appraisal. That "Appraised Value," according to the agreement, became the contractually binding purchase price on which the formula was based.

¶2 This case comes before our court because National attempted to exercise its option, and the two appraisers were nowhere close to each other—in large part because they appraised different interests. Headstart's appraiser considered the terms of National's lease and estimated the value of the leased fee interest in the property. National's appraiser considered the value of the property without the current lease—a fee simple interest. No third appraisal was conducted as specified in the agreement. Instead, Headstart filed suit seeking to compel National to purchase the property at the price determined by Headstart's appraiser. National responded with a counterclaim seeking a declaratory judgment to resolve whether the appraisals should be based on the leased fee interest or fee simple interest.

¶3 Following a trial, the circuit court dismissed Headstart's claims—its ruling partially resting on the conclusion that there was no meeting of the minds regarding the proper appraisal methodology. Following supplemental briefing, the court reaffirmed its conclusion that there was no meeting of the minds and declared the option itself void. Therefore, the court determined that a declaratory

judgment ruling regarding the proper appraisal methodology was unnecessary, and it dismissed National's counterclaim. National appeals from the circuit court's order declaring the option void.

¶4 The sole issue on appeal is whether the option is enforceable. Because the option specified a method to determine the purchase price with reasonable certainty, we conclude that the circuit court erred by declaring the option void and remand for consideration of National's now resurrected and unaddressed counterclaim for declaratory judgment on the proper interpretation of the option agreement.

BACKGROUND

¶5 Headstart owns real property in Waukesha; it leased that property to National in an agreement signed by the parties on April 20, 2002.[1] Section 19(a) of the lease provides that National "shall have the option to purchase … the Premises at any time during" the lease. Exhibit B of the lease agreement provides the means to determine the purchase price should the option be exercised.

¶6 According to Exhibit B, the purchase price will be the "Appraised Value" multiplied by a percentage depending on the year of the lease. If the option were exercised in the first five years of the lease, the price would be higher than the "Appraised Value."[2] Thereafter, the purchase price would be simply the "Appraised Value." The exhibit defines "Appraised Value" as follows:

[1] The lease has been modified several times, but the modifications are not material to this appeal.

[2] Exhibit B provided that the "Appraised Value" would be multiplied as follows:

(continued)

> In the event Tenant shall elect to exercise Tenant's option to purchase the Premises, Landlord and Tenant shall each choose an appraiser to appraise the Premises which appraisals must be completed within forty five (45) days of the date Tenant notifies Landlord that it intends to exercise its option to purchase. In the event the fair market value of the Premises in the two appraisals differs by no more than five percent (5%), the Appraised Value shall be the average of the two appraisals. In the event the appraised value of the Premises in the two appraisals differs by more than five (5%) percent, the two appraisers shall agree upon a third appraiser and the result of such third appraisal shall be the Appraised Value.

In December 2012, National sent a letter to Headstart indicating its intent to exercise the option.

¶7 Pursuant to the terms of the option, the parties commissioned their respective appraisals. Headstart's appraisal assessed the value of the leased fee interest, meaning that the appraisal included the value of the specific terms of National's lease on the property. This appraisal valued the property at $6,880,000. National offered its own commissioned appraisal—one which considered the fair market rental value of the property rather than the value of National's existing lease. National's appraiser determined the value of the fee simple interest was

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> If the option to purchase is exercised during the first year of the Lease Term: Appraised Value (as hereinafter defined) x 105%
>
> If the option to purchase is exercised during the second year of the Lease Term: Appraised Value x 104%
>
> If the option to purchase is exercised during the third year of the Least Term: Appraised Value x 103%
>
> If the option to purchase is exercised during the fourth year of the Lease Term: Appraised Value x 102%
>
> If the option to purchase is exercised during the fifth year of the Lease Term: Appraised Value x 101%[.]

$4,075,000. The predominant reason for this significant difference was the divergent valuation methods used.[3]

¶8 After receiving National's appraisal, Headstart responded with a letter on March 7, 2013, asserting that the appraisal was "hopelessly defective" and purported to give National an ultimatum: obtain a new appraisal assessing the leased fee interest or National must purchase the property at Headstart's chosen price of $6.88 million. National responded with a letter on March 18 "withdrawing" its offer to purchase the property. The parties agree that the two appraisers never chose a third appraiser to resolve the conflict.

¶9 Following this, Headstart filed a complaint requesting specific performance of the option (at its appraised price of $6.88 million) and damages based on National's alleged breach of the option and bad faith. National filed a counterclaim for a declaratory judgment, averring that "because the Lease and Option do not state the method of appraisal, the Court needs to declare the method of appraisal so that the parties know their rights and responsibilities going forward."

¶10 During a two-day bench trial, the circuit court received the testimony of multiple witnesses, including the appraisers. The trial and associated briefing

[3] The record contains two additional appraisals, one prepared for PNC Bank prior to National's exercise of the option and another prepared for National subsequent to its original appraisal. Interestingly, National's second appraisal assesses the leased fee interest as well, valuing the property at $6,325,000. While this amount is still approximately eight percent lower than Headstart's appraisal, it reinforces the conclusion that the measurement of different interests is the most significant reason for the drastically lower value reflected in National's first appraisal. The parties do not suggest, however, that these additional appraisals have any bearing on whether the option is enforceable.

centered on two questions: whether National breached the option agreement and whether the appraisers should take the existing lease into account or not. Following trial, the court dismissed all of Headstart's claims, concluding that National did not breach the option. The court first rejected Headstart's bad faith claim because it found that National did not attempt to rig the appraisal or do anything "underhanded." The court also rejected Headstart's claim for specific performance because the prescribed process in the option—a third appraisal—was not followed. The court further suggested it was rejecting Headstart's claim on the grounds that there was no meeting of the minds regarding the proper appraisal methodology.

¶11 At the conclusion of the court's oral ruling from the bench, the parties pressed the court for the implications of the decision on National's declaratory judgment claim, which had not yet been addressed. Following a brief debate between the parties, the court delayed ruling on the declaratory judgment and asked the parties to submit supplemental briefing. Following the briefing, the court reiterated its conclusion that there was no meeting of the minds regarding the option agreement, and thus the option itself was stricken from the lease. Hence, the court found that any decision regarding the proper appraisal methodology was "unnecessary" because the option was no longer enforceable. The court therefore declined to issue declaratory relief regarding the meaning of the option and entered an order declaring that the lease agreement "no longer contains the option

to purchase set forth at Paragraph 19(a)." National appeals from the circuit court's denial of declaratory relief and decision to void the option.[4]

DISCUSSION

¶12 On appeal, Headstart agrees with the circuit court that there was no meeting of the minds, and thus the option was unenforceable. It argues that the option provided no way to determine the value of the property because it failed to specify whether National's lease should be considered or not. We hold that the circuit court erred in concluding that the contract here is insufficiently definite. Under the option, the price is capable of being determined with reasonable certainty, and is therefore enforceable, for two related reasons. First, the option calls for appraisals of the fair market value of the property, and the law is clear that a price term based on the appraised or fair market value is sufficiently definite. Second, the option provides a means to resolve any dispute that may arise between the two appraisers—namely, the average price of the two appraisals if less than five percent apart, and a separate appraisal by a third appraiser if the appraisals are more than five percent apart. Thus, the price is capable of being determined with reasonable certainty. Because the option is enforceable, National's declaratory judgment counterclaim remains to be adjudicated. Accordingly, we remand for consideration of this claim.

[4] Headstart also argued that it was entitled to attorney fees, but the court denied Headstart's request. Headstart cross-appeals from the court's order denying its request for fees. Because we reverse the circuit court's order on which Headstart bases its fee request, we need not address the claim for attorney fees.

¶13 The parties have not asked us to determine or provided us with briefing regarding whether the contract should be read to require valuation of the leased fee or fee simple interest in the property. That said, it is difficult to appreciate this question without an understanding of why the different methodological approaches resulted in such drastic differences, particularly because the agreement states the appraisals were all to be of the "fair market value" of the property. A leased fee interest (favored by Headstart) values the property based on the actual lease encumbering the property, while a fee simple interest (favored by National) assumes market rent rather than actual rent. *See* ***Walgreen Co. v. City of Madison***, 2008 WI 80, ¶¶26-27, 311 Wis. 2d 158, 752 N.W.2d 687. Thus, the leased-fee approach takes into account the future expected revenues of an existing lease rather than what an unencumbered property would lease for based on the current market. This means that where an existing lease reflects the market value of rent, the appraised value of a leased fee interest and fee simple interest should be the same. ***Id.***, ¶27. Where contract rents are above market levels, the leased fee interest will likely be higher than the fee simple interest, and vice versa.[5] ***Id.***

¶14 At trial, Headstart argued that the leased fee interest was the correct approach because a fee simple interest assumes no current lease exists when one

[5] One might wonder why actual rents could diverge so heavily from market rents. National suggests that its rent payments were above market because they were just one component of an overall deal with Headstart, one that included the option to purchase. While this court is not making any findings regarding National's lease payments vis-à-vis the market, it is true that the rent payments here are undoubtedly part of a larger agreement between the parties. Parties can reasonably allocate and pay for risk and competitive advantage in all sorts of ways, including by contracting for lease payments that are beyond or below what a lessor could secure on the open market.

clearly does.[6] National, on the other hand, maintained at trial that the fee simple approach was appropriate because it would become an owner-occupier of the building, and thus was not purchasing a leasehold interest at all—in other words, it would not be receiving rent payments from itself following purchase. Both approaches purport to assess the fair market value of the property per the agreement.

¶15 Concluding that there was no meeting of the minds, the circuit court ruled that the failure of the parties to agree which method is appropriate rendered the option to purchase too indefinite to constitute an agreement. Whether a written contract is sufficiently definite to be enforceable is generally a question of law. *See* ***Metropolitan Ventures, LLC v. GEA Assocs.***, 2004 WI App 189, ¶11, 276 Wis. 2d 625, 688 N.W.2d 722. However, when the contract language is ambiguous, the meaning of words in a contract may be a fact question. ***Lemke v. Larsen Co.***, 35 Wis. 2d 427, 431, 151 N.W.2d 17 (1967). Headstart suggests that is the case here and that the circuit court's decision should be reviewed under the well-known clearly erroneous standard of review. We disagree. As explained further below, the language of the agreement unambiguously specifies a means of determining the price. Therefore, our review is de novo.

¶16 An enforceable "contract must be definite as to the parties' basic commitments and obligations." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 178, 557 N.W.2d 67 (1996). Accordingly,

[6] After its claims were dismissed, Headstart alternatively maintained that the option was void because there was no meeting of the minds.

vagueness or indefiniteness concerning an essential term prevents the creation of an enforceable contract. ***Id.***

¶17 Price is an essential term for a contract for the sale of real estate; a contract is void unless the price is sufficiently "certain or capable of being ascertained from the agreement itself." *See* ***Goebel v. National Exchangors, Inc.***, 88 Wis. 2d 596, 615, 277 N.W.2d 755 (1979) (citation omitted); *see also* 77 AM. JUR. 2D *Vendor and Purchaser* § 8 (2007) (explaining that a contract is void unless the price is "sufficiently definite or capable of being ascertained from the parties' contract"). However, courts do not require absolute certainty as to the price, only *reasonable* certainty. *See* 77 AM. JUR. 2D *Vendor and Purchaser* § 8 (2007). Our supreme court has explained that the requirement of a definite price term does not mean "the exact amount in figures must be stated in the agreement; however, where that is not the case, the price must, by the terms of the agreement, be capable of being definitely ascertained." ***Goebel***, 88 Wis. 2d at 615 (citation omitted); *see also* 17A AM. JUR. 2D *Contracts* § 191 (2016) ("Although the parties to a contract need not agree to a specific price, they must agree to some ascertainable and practicable method to arrive at that price to have a binding contract of sale." (footnotes omitted)). Said another way, although the contract does not specify a price, it is enforceable if it specifies "the manner by which the price is to be ascertained or can be determined." *See* ***Goerke Motor Co. v. Lonergan***, 236 Wis. 544, 548, 295 N.W. 671 (1941); *see also* ***Portnoy v. Brown***, 243 A.2d 444, 446 (Pa. 1968) (explaining that "the law recognizes in the area of enforceability of contracts the maxim, '*id certum est quod certum reddi potest*' (that is certain which can be made certain)"). This applies to option agreements as well, which

> have generally been held or recognized to be sufficiently definite as to price to justify their enforcement if either a specific price is provided for in the agreement or a practicable mode is provided by which the price can be determined … without any new expression by the parties themselves.

2 A.L.R.3d 701 § 3 (1965).

¶18 Thus, "[t]he general rule is that an option to the lessee to purchase need not specify the price," and "it is sufficient if it provides that the price shall be fixed by appraisement." ***Goerke***, 236 Wis. at 548; *see also* ***Schreck v. T & C Sanderson Farms, Inc.***, 37 P.3d 510, 512 (Colo. App. 2001) (holding that an option and right of first refusal which set the price at the "appraised value" was sufficiently definite to enforce). Relatedly, contracts setting a price as the "fair market value" (or something similar) are, as a rule, found to be sufficiently definite. *See, e.g.*, 92 C.J.S. *Vendor and Purchaser* § 38 (Sept. 2017 update) (collecting cases) (explaining that "[r]eal estate contracts that specify that the price is to be measured by the fair market value or reasonable value of the property involved are generally held to contain a sufficiently certain price in order to constitute an enforceable obligation"); ***Goodwest Rubber Corp. v. Munoz***, 170 Cal. App. 3d 919, 921, 216 Cal. Rptr. 604, 605 (Ct. App. 1985) (holding that a term setting price at "fair market value" was sufficiently definite to enforce and observing that "[t]he modern trend of the law is to favor the enforcement of contracts, to lean against their unenforceability because of uncertainty, and to carry out the intentions of the parties if this can feasibly be done"); ***Miller v. Bloomberg***, 324 N.E.2d 207, 208 (Ill. Ct. App. 1975) (observing that courts have generally upheld price terms "where a contract specifies that the price is to be measured by the 'fair market value', 'reasonable value' or 'current market value'"); ***Portnoy***, 243 A.2d at 448 (holding that a lease option setting the price at

"current market value at the end of the final term" was sufficiently definite to enforce).

¶19 Although courts often use the terms "mutual assent" or a "meeting of the minds," we do not require a literal meeting of the minds. *See* ***Management Comput. Servs., Inc.***, 206 Wis. 2d at 178 (citation omitted). The definiteness requirement "does not mean that parties must subjectively agree to the same interpretation at the time of contracting." ***Id.***; *see also* ***Colfax Envelope Corp. v. Local No. 458-3M***, 20 F.3d 750, 752 (7th Cir. 1994) (observing that "a literal meeting of the minds is not required for an enforceable contract, which is fortunate, since courts are not renowned as mind readers"). The question in determining enforceability is not whether the parties have accounted for all contingencies in the contract. Indeed, "[m]ost contract disputes arise because the parties did not foresee and provide for some contingency that has now materialized … yet such disputes are treated as disputes over contractual meaning, not as grounds for rescinding the contract." ***Colfax***, 20 F.3d at 752. Thus, in determining definiteness, our focus is not on whether Headstart and National agreed to an appraisal methodology. Rather, we look to the words the parties used in the contract to determine whether the price term is sufficiently definite. *See* ***Management Comput. Servs., Inc.***, 206 Wis. 2d at 178.

¶20 Consistent with the general rule that contracts setting the price by fair market value and appraisement are enforceable, several jurisdictions outside of Wisconsin have decided cases with closely analogous facts, and all suggest that the kind of process agreed to here—appraisement and a mechanism for resolving disagreement between appraisers—is sufficiently definite and enforceable. In ***LaMore Restaurant Group v. Akers***, 748 N.W.2d 756, 759 (S.D. 2008), the parties agreed to a lease with an option to purchase. The option provided that the

value would be set by an appraiser chosen by the parties. ***Id.*** "[I]f either party disagreed with the first appraisal, they could then get another appraisal from [a] … certified appraiser of their choice." ***Id.*** If the two appraisals were within seven percent of each other, the two appraisers were to negotiate an agreed-upon price, and if that failed, the price would be the average of the two. ***Id.*** If the first two appraisals were greater than seven percent apart, the parties agreed to collectively choose a third appraiser who would "work with" the first chosen appraisal to determine the final purchase price. ***Id.*** The South Dakota Supreme Court held that although the method was "flawed" because there was no guarantee that the appraisers would agree, the price was sufficiently definite to enforce the option. ***Id.*** at 763-64. The court reasoned that "[t]he price term is sufficiently definite because both parties specifically agreed to pay or accept whatever price could be agreed upon by the appraisers." ***Id.*** The decision accepted the notion that appraisal based on the fair market value was a sufficiently definite methodology to determine price and that the process for any disagreement over the fair market value would lead to a sufficient definite price. ***Id.***

¶21 Similarly, in ***Marder's Nurseries, Inc. v. Hopping***, 171 A.D.2d 63, 66 (N.Y. App. Div. 1991), the New York Supreme Court Appellate Division held that a price to be set by an appraisal process requiring a third appraisal where the first two could not agree was sufficiently definite. The parties were to choose two appraisers who were to "diligently proceed to agree on the fair market value" for the property. ***Id.*** In the event the two appraisers could not agree, the appraisers were to select a third appraiser, and the price "would then be fixed in accordance with 'the decision of any two of such appraisers.'" ***Id.*** The court recognized and approved the principle that a contract setting the purchase price through appraisement of the fair market value of the property is sufficiently definite. ***Id.*** at

72. However, the court acknowledged the very real possibility that the process outlined by the contract would not lead to an agreed-upon price. Nevertheless, the court concluded that "[m]easured against the standard of 'reasonable' certainty, the present contract, whose terms obviously are not 'absolutely' certain, must be considered valid and enforceable." ***Id.*** at 69. It explained that "a contract should not be canceled solely on the ground that the parties, having stipulated that the purchase price was to be determined by a group of appraisers, failed to foresee all possible obstacles or hindrances which might arise during the course of the appraisal procedure." ***Id.*** at 71-72.

¶22 We find the reasoning in these cases persuasive and similarly conclude that the option in this case was definite enough to enforce. The price term is simple and straightforward. The parties agreed to each select an appraiser to prepare an appraisal of the property's fair market value. If the two appraisals were within five percent of each other, then the "Appraised Value" would be the average of the two. In the event of a more significant disagreement—like the multimillion dollar difference between the appraisals here—the parties provided a means to resolve such disputes: a third appraisal conducted by a third appraiser chosen by the first two appraisers. Thus, the parties agreed to a contract that will provide a definitive, definite price for the property. The option is enforceable.

¶23 That brings us to the question of remedy. The parties did not brief before us or request our determination on the substantive question of which appraisal method is proper under the option. Rather, National requests that we remand for a determination on this matter. We grant this request.

¶24 The circuit court was well aware that the issue of which appraisal methodology is proper under these circumstances is a question of first impression

in Wisconsin.[7] The court did not, however, interpret the contract, nor did it hold that a declaration of the contract's meaning was otherwise unwarranted. Rather, the court held that the failure of the parties' representatives to have subjectively considered or agreed to a particular appraisal method rendered the option provision void altogether. Thus, the court deemed any declaration or adjudication of rights on a now-voided option clause unnecessary. Because we hold that the option clause as written is enforceable, National's declaratory judgment counterclaim is revived and awaits a decision.[8]

[7] Regarding the appropriate interest to value, both sides can (and did) muster supporting authorities. Some courts conclude that the fair market value must include the value of the current lease on the property. *See, e.g.*, ***Petula Assocs., Ltd. v. Doloco Packaging Corp.***, 240 F.3d 499, 503-04 (5th Cir. 2001) (applying Texas law and construing the term "fair market value" to mean the leased fee "[a]bsent explicit language indicating that the lease should or should not be included in determining fair market value"); ***TCC Enters. v. Estate of Erny***, 717 P.2d 936, 936-37 (Ariz. Ct. App. 1986) (interpreting a term specifying that the appraiser "ascertain [the property's] value as of the date of the option" as meaning "current market value" and concluding the appraiser should value the leased fee). Other courts conclude that it is the fee simple interest that must be valued. *See, e.g.*, ***Summit Indus. Equip. v. Koll/Wells Bay Area***, 230 Cal. Rptr. 565, 570-71 (Cal. Ct. App. 1986), *abrogated on other grounds by* ***Advanced Micro Devices, Inc. v. Intel Corp.***, 885 P.2d 994, 1002 (Cal. 1994) (observing that when the landlord's and tenant's interests will merge upon the tenant's purchase of the property, case law holds that "the property should be valued as though unencumbered by the lease" and concluding that arbitrators "reasonably found that the original contracting parties intended a merger in this case"); ***Taylor v. Fusco Mgmt. Co.***, 593 So. 2d 1045, 1046-47 (Fla. 1992) (concluding as a matter of law that "in the absence of any specific language to the contrary in the lease … the market value of leased property at the time a lessee exercises an option to purchase the property should be computed as if the property were unencumbered by the lease"); ***Palm Pavilion of Clearwater, Inc. v. Thompson***, 458 So. 2d 893, 894 (Fla. Dist. Ct. App. 1984) (holding that lease-option language requiring the appraisers to "determine the fair market value" of the "property" clearly and unambiguously meant that the appraisers must value the fee simple interest).

[8] With regard to Headstart's claims, although the circuit court partially relied on its incorrect conclusion that the option was unenforceable, it also held that Headstart did not follow the option. Headstart does not appeal the dismissal of its claims or challenge the circuit court's conclusion that the option was not followed. Therefore, our reversal of the circuit court's decision holding the option unenforceable provides no basis to resurrect Headstart's breach of contract claims.

CONCLUSION

¶25 The task before us in this case is to decide whether the process agreed to in the option agreement to determine fair market value will lead to a definite price—or to be more precise, a reasonably certain price. It will. In light of the clear mechanism for determining a reasonably certain price, we conclude that the option is sufficiently definite and enforceable. Therefore, we reverse the circuit court's order denying National's counterclaim and voiding the option and remand the case to the circuit court to address the now resurrected counterclaim.

By the Court.—Order reversed and cause remanded with directions

¶26 REILLY, P.J. (*concurring*). I agree with the holding set forth in the majority opinion: "We hold that the circuit court erred in concluding that the contract here is insufficiently definite. Under the option, the price is capable of being determined with reasonable certainty, and is therefore enforceable" as "the option calls for appraisals of the fair market value of the property" and "provides a means to resolve any dispute that may arise between the two appraisers—namely, … a separate appraisal by a third appraiser." Majority, ¶12.

¶27 I do not join in the remainder of the majority opinion which ignores its holding and travels a road which ends with a remand to the circuit court to determine the "appraisal method" to use. *See* majority, ¶23. The fact that an encumbrance (the lease) exists on the property raises no question of law, nor is it a matter of "first impression." *See* majority, ¶24. The presence of an encumbrance does not change the "method" of determining the "fair market value of the Premises." Appraisers everyday take into account encumbrances (i.e., easements, long-term leases, mineral rights, zoning regulations and restrictions, subdivision restrictions, etc.) in determining "fair market value," defined as what a willing buyer would pay a willing seller in an arms-length transaction. *See* ***State ex rel. Mitchell Aero, Inc. v. Board of Review***, 74 Wis. 2d 268, 277, 246 N.W.2d 521 (1976).

¶28 The determination of the "fair market value of the Premises" requires expert opinion.[1] It is error for us to tell the circuit court to tell the expert how to do his or her job. Headstart and National baited the majority to declare a "method" that is a "fair" value applicable to their individual wishes. The majority's remedy for having taken the bait is to stick the hook into the circuit court's mouth.

¶29 Headstart and National are sophisticated commercial business owners who contractually agreed upon a dispute resolution method. We should apply our holding in paragraph twelve and mandate that Headstart and National have each of their appraisers choose a third appraiser who will determine the "fair market value of the Premises."

[1] The exception being the anomaly under Wisconsin law that an owner of an asset may give an opinion as to the asset's fair market value. *See* ***Mayberry v. Volkswagen of Am., Inc.***, 278 Wis. 2d 39, 63, 692 N.W.2d 226 (2005); ***Mueller v. Harry Kaufmann Motorcars, Inc.***, 2015 WI App 8, ¶37, 359 Wis. 2d 597, 859 N.W.2d 451 (2014); ***Arneson v. Arneson***, 120 Wis. 2d 236, 252, 355 N.W.2d 16 (Ct. App. 1984).