IN THE SUPREME COURT OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MARY ANN S. MILNE,
Plaintiff-Appellant

and

THEODORE R. MITCHELL,
Real Party in Interest-Appellant

v.

LEE PO TIN,
Defendant-Appellee

Appeal No. 99-010
Civil Action No. 94-0419

JUDGMENT

¶ 1 Pursuant to Rule 36 of the Rules of Appellate Procedure, judgment is hereby entered.

¶ 2 IT IS HEREBY **ORDERED** and **ADJUDGED** that the decision of the trial court is **REVERSED** in part; **AFFIRMED** in part; and **REMANDED** for entry of judgment consistent with the opinion of this court.

Entered this 10th day of September, 2001.

Cris M. Kaipat, Clerk of Court

FOR PUBLICATION

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MARY ANN S. MILNE,
Plaintiff/Appellant,

and

THEODORE R. MITCHELL,
Real Party in Interest/Appellant,

v.

LEE PO TIN,
Defendant/Appellee.

OPINION

Cite as: *Milne v. Lee*, 2001 MP 16

Appeal No. 99-010
Civil Action No. 94-0419
Argued on July 25, 2000

For Mary Ann Milne:
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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, JOHN A. MANGLONA, Associate Justice, JUAN T. LIZAMA, Justice Pro Tempore.

DEMAPAN, Chief Justice:

¶1 Mary Ann Milne appeals the trial court's grant of summary judgment in favor of Lee Po Tin and the denial of her motion for summary judgment. The trial court declared that the disputed Lease Agreement, together with the January 1980 Amendment, was valid and not in violation of Article XII of the N.M.I. Constitution.[1] Her counsel, Theodore R. Mitchell, also appeals from an order of sanctions for failure to prosecute.

¶2 The appeal is timely and we have jurisdiction pursuant to N.M.I. Const. art. IV, § 3 (amended 1997). We reverse and remand that portion of the trial court's decision and order determining that the January 1980 Lease Amendment is valid and affirm the order of sanctions against Mary Ann Milne's counsel.

QUESTIONS PRESENTED AND STANDARDS OF REVIEW

¶3 I. Whether the trial court properly granted summary judgment in favor of a non-NMD by declaring that a 40-year lease does not violate Article XII, where the lease was executed on the same day as a sale of real property agreement, and was subsequently amended to require the repurchase of improvements if ownership of the land vested in any person other than the non-NMD lessee at the end of the lease period. Orders granting summary judgment are reviewed *de novo*. *Diamond Hotel Co., Ltd. v. Matsunaga*, 4 N.M.I. 213, 216 (1995).

¶4 II. Whether the trial court properly sanctioned a party's counsel to pay costs incurred in bringing a motion to dismiss for failure to prosecute. We review the appropriateness of sanctions, including those for dilatory prosecution, under the abuse of discretion standard. *Sonoda v. Villagomez*, 3 N.M.I. 535, 542 (1993) and *Chambers v. Nasco, Inc.*, 501 U.S. 32, 55, 111 S. Ct. 2123, 2138, 115 L. Ed. 2d 27 (1991). The issue of whether counsel should have been afforded a hearing prior to sanctions by a trial court is a question of law reviewed *de novo*. *Sonoda*, 3 N.M.I. at 541.

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[1] The court also held that the Agreement for Sale of Real Property violated Article XII and is therefore void ab initio. Lee did not appeal this portion of the lower court's decision.

FACTUAL AND PROCEDURAL BACKGROUND

¶5 The essential facts are undisputed. On October 5, 1979, Ernest Milne ("Ernest"), a person of Northern Marianas descent ("NMD"),[2] and Lee Po Tin ("Lee"),[3] a person not of Northern Marianas descent ("non-NMD"), executed two documents: (1) an Agreement for Sale of Real Property ("Contract"), and (2) a Lease of the same property consisting of two parcels for a term of 40 years ("Lease"). Lee paid $40,000.00 in consideration of the Lease.

¶6 On January 22, 1980, Ernest and Lee executed an agreement to amend the Lease ("Lease Amendment") by requiring Ernest to purchase the improvements in the amount equal to the fair market value of the improvement plus the fair market value of the premises, if ownership of the property was not vested in Lee by the end of the lease term. The Lease Amendment, which purports to modify § 12 of the Lease, provides that:

> If, at the expiration of the Term of this Lease as set forth in Paragraph 1 hereof, ownership of the premises shall be vested in any person other than Lessee, then and in such event all improvements remaining upon the Premises as of the date of the expiration of the Term shall be purchased by Lessor for a purchase price equal to the fair market value of such improvements plus the fair market value of the Premises as of such date; provided, however, that the purchase price shall not be less than $40,000.00. The parties agree that the foregoing provision is fair and

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[2] N.M.I. Const. art. XII, § 4 reads:

> A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

[3] Lee Po Tin is a citizen of the United Kingdom and a resident of Macau.

> equitable. The parties further agree that, in the event that they are not able to agree upon the exact amount of the purchase price, then Lessee may seek a determination thereof from any court of competent jurisdiction, and in the event that Lessee does so, Lessor shall pay all of Lessee's attorneys' fees and expenses in connection with the seeking of such a determination and with the recovery of the purchase price.

¶7 Ernest's widow, Mary Ann, inherited the subject land when he passed away and brought this action to quiet title to the land. After Lee filed an answer, Mary Ann took no additional steps to move the case forward for over three years. On April 13, 1998, Lee moved to dismiss for failure to prosecute. Subsequently, Mary Ann moved for summary judgment. Likewise, Lee filed a cross motion for summary judgment.

¶8 The trial court denied Lee's motion to dismiss but granted his cross motion for summary judgment. See *Milne v. Lee Po Tin*, Civ. No. 94-0419 (N.M.I. Super. Ct. May 19, 1999) (Decision and Order Denying Defendants' Motion to Dismiss, Denying Motion for Summary Judgment, and Granting Defendants' Motion for Summary Judgment) ("Decision"). The court ruled that the Contract is clearly invalid under Article XII, but that the Lease, inclusive of the Lease Amendment, is legally binding because it conveys to Lee a property interest in accordance with Article XII. *Id.* at 8-9. Opining that there is nothing inherently wrong with a clause providing for the purchase of improvements, the court reasoned that, even with the possibility that a lien could be obtained against the property resulting in a forced sale if Mary Ann is unable to pay for the improvements, the Lease Amendment "does not cause an extension of the leasehold, purport to transfer the land to Lee, or prevent Mary Ann from encumbering or transferring her remainder interest." *Id.* In other words, the court ruled that the addendum does not affect her ownership of the land because it will revert to her at the end of the lease term. *Id.* at 9.

ANALYSIS

I. The Lease Amendment Violates Article XII and Is Void Ab Initio.

¶9 Since neither party disputes the lower court's finding that the Contract is void ab initio under Article XII, we proceed directly to Mary Ann's argument that the Contract and Lease ("documents") are to be treated as a single transaction for purposes of determining what constitutes a transaction under § 6 of Article XII. Mary Ann contends that a careful reading of the two documents, particularly the terms of the Contract and § 12 of the Lease, as modified by the Lease Amendment requiring Ernest to purchase the improvement equal to the fair market value of the improvements plus the fair market value of the premises, establishes that the parties intended for Lee to acquire title to the property.

¶10 Article XII of the N.M.I. Constitution provides that an acquisition of permanent and long-term interests in real property within the N.M.I. shall be restricted to persons of Northern Marianas descent. N.M.I. Const. art. XII, § 1. The term "acquisition" refers to "transfers by sale, lease, gift, inheritance or other means." See ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS at 169 (Dec. 6, 1976).

¶11 At the time of the execution of the disputed instruments, Article XII defined permanent and long-term interests as freehold and leasehold interests of more than 40 years including renewal rights.[4] In other words, a non-NMD was limited to acquiring a leasehold interest, inclusive of renewal rights, in N.M.I. land of not more than 40 years. *See supra* note 4. Where a non-NMD acquires a permanent or long-term interest in violation of § 1 of Article XII, the transaction is void ab initio and "completely without force and effect." N.M.I. Const. art. XII, §§ 1 and 6 and *Diamond Hotel Co., Ltd. v. Matsunaga*, 4 N.M.I. 213,

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[4] At the time the Contract and Lease were executed, the maximum permissible leasehold period was 40 years. Upon the ratification of 1983 Constitutional Convention Amendment No. 35, the period was modified to 55 years.

219 (1995).

¶12 In *Manglona v. Kaipat*, 3 N.M.I. 322, 334 (1992), which involved a deed of gift conveying land to both a NMD and a non-NMD, we explored the issue of what constitutes a transaction under § 6. We determined that the term "transaction" has a flexible meaning and held, accordingly, that for purposes of § 6, a transaction shall be narrowly defined as an "acquisition by a non-NMD of an illegal interest in real property." *Id.* (holding that a deed conveying land to a NMD co-grantee and a non-NMD co-grantee is not entirely void, but only that part which conveys a permanent or long-term interest to a non-NMD). We reasoned that a declaration that the entire deed was void ab initio, including the conveyance to the NMD co-grantee, was illogical in view of Article XII's purpose of restricting landownership to persons of NMI descent. *Id.*

¶13 Consistent with our holding in *Manglona*, we resisted a suggestion to treat a "transaction" under Article XII as the term is used in Rule 13(a) of the Commonwealth Rules of Civil Procedure.[5] *See* 3 N.M.I. at 334 n. 6. Rule 13(a) requires a party to bring a counter or cross-claim in an action if such "arises out of the transaction" which is the subject matter of the lawsuit inclusive of all facts which constitute the foundation of a claim. *Manglona* at 334 n. 6. Noting that the rule is "strictly a rule of procedure, not substantive law," we regarded its definition "inadequate for purposes of Article XII." *Id.* Although we remain reluctant to read Rule 13(a)'s broad construction of the term "transaction" into § 6 of Article XII, we acknowledge that any transaction involving a non-Northern Marianas person must be carefully probed

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[5] Com. R. Civ. P. 13(a) reads in pertinent part:

> (a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

to determine whether the transaction would result in the acquisition of a long-term interest by a non-NMD, or in having NMI land pass out of the hands of NMD persons. *Ferreira v. Borja*, 1 F.3d 960, 962 (9th Cir. 1993) (citing *Ferreira v. Borja*, 2 N.M.I. 514, 549 (1992) (King, S.J., dissenting).

¶14 Although Mary Ann's assertion to view the Contract and the Lease as comprising a single transaction makes practical sense because the instruments involve the same property and were executed on the same date, doing so ignores the obvious fact that the parties purposefully crafted two separate agreements. Implicit in the simultaneous execution of these documents and their provisions is the parties' clear intent to treat the Contract and the Lease as distinct and separate transactions. We agree with the lower court that given the existence of the two documents, it would be inappropriate to treat them as a single transaction for determining an Article XII violation. *See* Decision at 8.

¶15 Nor, as we explain, should the Lease and the subsequently executed Lease Amendment be treated as a single transaction under Article XII scrutiny. At the time the original Lease was executed, Lee received a leasehold interest no longer than 40 years. *See* ER at 15. A valid acquisition under Article XII, the original Lease is not a transaction which triggers the enforcement power of § 6. *See Manglona* at 334 (defining the term "transaction" as an "acquisition by a non-NMD of an illegal interest in real property").

¶16 On the other hand, the Lease Amendment, which was signed three months after the Lease was executed, purports to amend the Lease by inserting a provision which arguably offends Article XII. Styled as a repurchase of improvement clause, it states that "[i]f, at the expiration of the Term of this Lease . . . ownership of the premises shall be vested in any person other than [Lee]," then Mary Ann is obligated to pay for all improvements remaining on the property equal to the fair market value of the improvement, and the fair market of the premises, which cannot be less than the rental price of $40,000.00. In other words, Lee's right to the repurchase price would be extinguished if he obtains title to the property sometime during

the 40-year lease term. By pegging the repurchase amendment to such a condition and requiring the purchase price to include not only the improvements' fair market value, but also the fair market value of the property, the Lease Amendment emerges as a poorly veiled attempt to transform a valid lease into an invalid sale agreement, whereby Lee would be entitled potentially to more than a refund of the total rental price, in the event he does not own the property by the end of the lease period. *See* NMI Const. art. XII, § 1 (only NMDs may acquire permanent and long-term interests in N.M.I. land).

¶17 In *Diamond Hotel*, we extensively explained the policies undergirding Article XII and summarized its primary purpose as providing "substantive protection to NMDs, to further the preservation of their culture, and to protect the underlying social order of the Northern Mariana Islands." 4 N.M.I. at 218. We also determined that "Article XII was designed not only to prevent a non-NMD from actual acquisition of a leasehold interest beyond [the permissible leasehold period], but also to prohibit a non-NMD from holding any right or power" that would permit a later acquisition of a leasehold interest in excess of permissible lease period.[6] *Id.* We concluded, moreover, that "any agreement by which a non-NMD is given, receives, or obtains a right, conditional or otherwise, to acquire title to or an interest in land" longer than the permissible period violates Article XII. *Id.* Accordingly, we ruled that an option in the lease agreement, which gave the hotel a right to extend its 55-year lease in the event that CNMI law was changed to allow a greater lease period, violated Article XII and that the clause must be severed from the main lease. *Id.* at 218 and 221.

¶18 When scrutinized against our holding in *Diamond Hotel*, the Lease Amendment, which provides far more than just a mere repurchase of improvements at the end of the lease term, succumbs to Article

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[6] In line with those considerations, we declared that the term "renewal rights," as it is used in Article XII, § 3, shall be construed broadly as inclusive of "any right, conditional or unconditional, that a non-NMD could exercise to acquire a leasehold interest in land exceeding [the permissible period]." *Id.* at 217.

XII's enforcement power. Particularly egregious under Article XII is the condition that the repurchase price need not be paid if and when Lee receives ownership of the two parcels at the end of the lease term. The creation of such a right in favor of Lee, which permits him to acquire outright title to the property beyond the maximum permissible lease term, is precisely the type of interest forbidden by Article XII. *See Diamond Hotel*, at 218. Since Mary Ann cannot effectuate such a transfer under Article XII, the Lease Amendment, moreover, effectively penalizes her for complying with Article XII by requiring her to buy back the two parcels from Lee for an amount not less than the total rental price of $40,000.00. Any arrangement that would require a lessor to return all of the consideration because title did not transfer to the lessee during the lease term is equally repugnant to Article XII.

¶19 Having identified the Lease Amendment as a transaction from which Lee acquires an illegal interest in NMI land, we conclude that the Lease Amendment, in attempting to transform Lee from an ordinary lessee into a titleholder, violates Article XII and is void ab initio and is thus completely without force and effect.[7] *Manglona*, 3 N.M.I. at 334; *Diamond Hotel*, 4 N.M.I. at 219; N.M.I. Const. art. XII § 6; *cf. City of Beaumont v. Fertitta*, 415 S.W.2d 902, 906 (Tex. 1967) (declaring lease amendment void on the ground that it violated a Texas constitutional provision prohibiting the legislature from releasing or diminishing an obligation without consideration) and *Beau Monde, Inc. v. Bramson*, 446 So.2d 164 (Fla. Ct. App. 1984) (invalidating condominium association's action in amending original condominium instruments because not all record owners joined in executing amendments contrary to Florida law). Because only the Lease Amendment is void, the original Lease stands as a validly executed instrument in

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[7] Unlike *Diamond Hotel*, severance is an inappropriate remedy because the entire Lease Amendment violates Article XII by attempting to transform Lee from an ordinary lessee into a potential title holder of the two parcels. As such, the Lease Amendment is void ab initio under the express provisions of § 6 of Article XII.

which Lee has only the right to possession and exclusive use of the two parcels during the 40-year leasehold period, with that right reverting to Mary Ann, or her successor in interest holding title to the property.

¶20 The trial court overlooked our holding in *Diamond Hotel* and the significance of both the contemplated transfer of title to Lee during the lease term and the calculation of the repurchase price in reaching the conclusion that the Lease Amendment is merely a repurchase of improvements clause. Decision at 8. It erred in ruling that the Lease Amendment conformed with Article XII, on the mistaken view that it ultimately did not operate to strip Mary Ann of title to the property at the end of the lease term. *Id.* As explained, under the lop-sided terms of the Lease Amendment, Lee effectively acquires an impermissible interest in N.M.I. land and under terms repulsive to Article XII's primary purpose of providing substantive protection to NMD persons in land transactions with non-NMD persons.

¶21 Having decided the Lease Amendment's validity solely under Article XII, we do not reach Mary Ann's question on the constitutionality of Public Law 8-32.

II. The Superior Court Did Not Abuse its Discretion in Ordering Plaintiff's Counsel to Pay Defendant's Costs in Bringing the Motion to Dismiss.

¶22 Com. R. Civ. P. 41(b)(1) permits the dismissal of an action "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court."[8] Before imposing dismissal as a sanction, however, the trial court is required to weigh the following factors: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.

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[8] Com. R. Civ. P. 41(b)(1) reads: "(1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."

See Wabol v. Villacrusis, Appeal No. 98-008 (N.M.I. Dec. 15, 2000) (Opinion at 6) (citing *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) and *Al-Torki v. Kaepen*, 78 F.3d 1381 (9th Cir. 1996)); *Dodson v. Runyon*, 86 F.3d 37, 39-40 (2d Cir. 1996); *cf. Silas v. Sears, Roebuck, & Co.*, 586 F.2d 382, 385-86 (11th Cir. 1978).

¶23 Here, the trial court ultimately decided that, although a delay of over three years was on its face unreasonable, the five factors counseled against dismissal. It specifically found that the court's docket was not made "unmanageable by cases of this nature," as the court favors disposing of matters on the merits. Decision at 5. Acknowledging that Lee did not allege specific injury due to the delay, the court further determined that there was no prejudice in terms of the loss of evidence or memory since the outcome of the case "rests squarely on the written terms of the Contract and Lease." *Id.* at 6. The trial court also recognized a strong public policy that favors addressing the merits of an action involving a land transaction between an NMD and a non-NMD because land is "arguably the single most important issue for citizens of the CNMI." *Id.* Lastly, the court determined that a less drastic sanction directly against Mary Ann's counsel, in the form of a monetary sanction constituting Lee's costs of bringing the motion to dismiss, would be "adequate to serve the interests of justice." *Id.*

¶24 Mary Ann's counsel ("counsel") does not dispute the trial court's findings as to four of the five factors but insists that the monetary sanction lacks a substantive legal basis and that the plain language of Com. R. Civ. P. 41(b)(1) does not authorize the court to sanction a party who prevails against dismissal.

¶25 Although a plain reading of Rule 41(b)(1) does not explicitly provide the imposition of less drastic sanctions, counsel turns a blind eye to a long line of cases recognizing that the five-factor test requires an examination of less drastic alternatives because of the harshness of dismissal as a sanction. *See, e.g., Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984) (when considering whether to dismiss case for lack of

prosecution the trial court must weigh five factors, including the availability of less drastic sanction); *Dodson*, 86 F.3d at 39 (holding that a trial judge must consider the suitability of lesser sanctions before granting a motion to dismiss); *Silas*, 586 F.2d at 385 (explaining that extreme circumstances warranting dismissal include a clear record of delay or contumacious conduct by plaintiff, and when the imposition of lesser sanctions would be ineffective); *McGowan v. Faulkner County*, 782 F.2d 554, 557 (11th Cir. 1981) (holding that dismissal inappropriate where trial court failed to consider lesser sanction). Under its inherent power to control case management, *see Link v. Wabash R. R. Co.*, 370 U.S. 626, 629-30, 82 S. Ct. 1386, 1388, 8 L. Ed. 2d 734 (1962), and to regulate the practice of law both in and out of courts, *see Matsunaga v. Matsunaga*, 2001 MP 11 ¶ 19, the trial court may consider, moreover, a range of appropriate sanctions, where, as here, litigants or attorneys engage in dilatory conduct. *See Silas* at 385 n. 3; *Dodson* at 40. Thus, contrary to counsel's assertion, the weight of decisional law recognizes that, despite the absence of express language authorizing less drastic sanctions in Rule 41(b)(1), a trial court must consider and should impose, where appropriate, lesser sanctions on a plaintiff or counsel for dilatory prosecution of a case.

¶26 The choice of a particular sanction, moreover, should fall within the permissible range of the court's discretion in light of the circumstances of a case and with the objective of achieving compliance with court orders and expediting proceedings. *See Silas*, 586 F.2d at 385. Depending on the context, lesser sanctions may include a conditional order of dismissal or various types of disciplinary action directed at the erring attorney, including perhaps a fine or a reprimand from the court. *Id.* n. 3. Courts should assess, moreover, the relative roles of attorney and client in causing the delay, as well as whether a tactical benefit was sought by the delay. *Dodson*, 86 F.3d at 40. When a lower court considers the appropriate sanction for failure to prosecute an action, the more the delay is attributable to a plaintiff's personal obstruction or

was designed to benefit the plaintiff's strategic interest, the more suitable the remedy of dismissal. *Id.* Conversely, if the delay was caused by the lawyer's disregard of his obligation toward a client, a less drastic sanction imposed directly on the lawyer may be warranted. *Id.*; *see, e.g.*, *Mann v. Lewis*, 108 F.3d 145, 147-48 (8th Cir. 1997) (finding dismissal unwarranted but assessed costs on attorney since his lack of diligence resulted in non-compliance with court orders) and *Bardin v. Mondon*, 298 F.2d 235, 238 (2d. Cir. 1961) (ordering errant attorney to pay all trial and appellate court costs). In sum, dismissal is generally inappropriate and lesser sanctions favored where neglect is plainly attributable to an attorney, rather than to a blameless client. *See Silas* at 385.

¶27 Here, the trial court properly concluded that dismissal was unwarranted and that a monetary sanction directly on counsel was "adequate to serve the interests of justice." Decision at 6. While it did not explore the factors described above to determine the cause of the delay and explain the basis of its selection, the trial court clearly rejected counsel's proffered explanation that the delay was caused by unsettled Article XII case law. *Id.* In evaluating counsel's argument and trial memorandum against the relevant case law, the court below thus ruled that the case law, in fact, was not so unsettled as to hinder prosecution and that counsel's argument, instead, reflected mere disagreement with CNMI and Ninth Circuit case law. Decision at 4-5. Accordingly, the court found that the plaintiff's summary judgment motion could have been made far earlier in time, particularly given counsel's involvement in other Article XII litigation, that placed him in a position to be fully apprized of current legal developments on Article XII. Referring further to prior warnings against counsel in unrelated cases for not responding to a discovery request and a subpoena, the court observed that "this type of problem is not new to this particular counsel." *See id.* at 5-6 n. 3.

¶28 While any consideration of the warnings given to counsel in those cases was clearly improper, the

trial court's discrediting of counsel's explanation, in tandem with the absence of evidence in the record of any contumacious conduct by Mary Ann, implies that fault for the three-year delay belongs to counsel and not Mary Ann. The trial court was unpersuaded by counsel's explanation, intimating that the proffered rationale was perhaps frivolous and that counsel had instead neglected his duty to prosecute the case.

¶29 We add to the trial court's observations our own commentary on a point not raised below that, if in fact the delay was a deliberate legal tactic, counsel, on behalf of Mary Ann, should have sought a stay of the proceedings under Com. R. Civ. P. 16(c)(16).[9] *See* 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1525 (2d ed. 1990) (court may consider matters which facilitate the just, speedy, and inexpensive disposition of an action, including the appropriateness of a stay to proceedings). Had he pursued a stay of proceedings, it would have obviated the need for Lee's dismissal motion. Instead, counsel waited to press his client's case by filing a motion for summary judgment only after being prompted by Lee's motion to dismiss. By that time, Lee had incurred costs to resuscitate Mary Ann's case on the court's docket, even though it is counsel who owes a duty to his client to move her case forward in a diligent and timely manner. This consideration apparently swayed the trial court to impose a sanction premised on reimbursing Lee for costs incurred in bringing the motion to dismiss.

¶30 The trial court's choice of a less drastic sanction, nevertheless, concerns us in several respects. First, the record does not indicate any prior misconduct by counsel in the instant case. Second, the court's

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[9] Com. R. Civ. P. 16(c)(16) provides that:

> (c) SUBJECTS FOR CONSIDERATION AT PRE-TRIAL CONFERENCES. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to
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> . . . .
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> (16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

expressly determined finding that the delay did not inconvenience the court in managing its docket. Third, there was no evidence that the delay prejudiced Lee. Given these factors, and especially the absence of any prejudice, the imposition of strict deadlines for the resolution of the case would have been more appropriate in situations where, as here, the only dilatory conduct complained of is the failure of counsel to press his client's case in a timely manner. *See, e.g., Daniels v. Loizzo*, 175 F.R.D. 459, 462 (S.D.N.Y. 1996). In other contexts, the case could have been dismissed without prejudice. *See Mann*, 108 F.3d at 147-48. We recognize, however, that the trial court was concurrently considering the parties' motions for summary judgment which were dispositive of the case, and under the circumstances presented, those alternative sanctions were impracticable.

¶31 Moreover, despite our misgivings about the appropriateness of this particular sanction, we are required to view the sanction under the abuse of discretion standard. Until and unless there is a definite and firm conviction that the court below committed a clear error of judgment in its conclusion, a lower court's decision may not be set aside for abuse of discretion. *See Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976); *Pangelinan v. Itaman*, 4 N.M.I. 116, 118 (1994). In light of the reasonable inferences that we draw from counsel's apparent failure to reasonably explain the delay, the absence in the record of any misconduct by Mary Ann, and the relatively minimal sanction imposed, we conclude that a monetary sanction for costs was probably one of the least severe of all possible penalties under the circumstances. Accordingly, we find no abuse of discretion in the imposition of the monetary sanction directly on counsel.

¶32 We now turn our attention to counsel's assertion that the sanction violates due process because it was imposed without prior notice or hearing. A fundamental requirement of due process dictates that a person must be afforded an opportunity to be heard upon notice and proceedings "which are adequate to safeguard the right for which constitutional protection is invoked." *Link*, 370 U.S. at 632, 82 S. Ct at

1389. "The adequacy of notice and proceedings turns on the knowledge which the circumstances show that a person may be taken to have of the consequences of his own conduct." *Id.* 82 S. Ct. at 1390. As explained, counsel should have been alerted, after being served with the notice of motion to dismiss and schedule of hearing, that the court would be considering the question of whether to impose the harsh penalty of dismissal, or less drastic alternatives, in light of his failure to prosecute the case. At the hearing, counsel was given every opportunity to fully explain the three-year delay in pursuing his client's case. Given the context of the dismissal hearing in this case and the opportunity to be heard afforded to counsel during the hearing, we find no due process violation.

CONCLUSION

¶33 For the foregoing reasons, we **REVERSE** that portion of the trial court's decision where it determined that the January 1980 Amendment to the Lease Agreement did not violate Article XII and **REMAND** for entry of judgment consistent with this opinion. In addition, we **AFFIRM** the award of sanctions against Milne's counsel in the amount of Lee's costs in bringing the motion to dismiss.

SO ORDERED THIS 10th DAY OF SEPTEMBER 2001.

MIGUEL S. DEMAPAN, Chief Justice

JOHN A. MANGLONA, Associate Justice