(1) Bai would look to Cania Stat. § 546. The statute says that no "lease for 5 years or longer" is valid against a subsequent BFP like Bai unless it ("the same") is recorded. This means the statute might invalidate an unrecorded lease as against a subsequent BFP. Bai would point out that Latoya's lease was not recorded.

Latoya would argue that her lease is not a "lease for 5 years or longer." Her lease is for 4 years. She may say she plans to extend it to 8 years, but she's under no obligation to do so; she would not be in breach of her lease with Xander if she left at the end of the fourth year. Consequently, she would argue, the option cannot be considered to create a single 8 year lease. And that means there's no way § 546 would invalidate it, because it only (possibly) invalidates leases of 5 or more years.

If § 546 doesn't apply and invalidate her lease, Latoya would argue, the common law would apply. At common law, when Xander conveyed Blackacre to Bai, all Xander had was ownership subject to Latoya's lease. So that's all Xander could convey to Bai. Thus, if the common law applies, Bai will have to respect her lease. (Of course, Latoya might also want to check to see if Cania's landlord-tenant statute provides that a lease can be terminated early by a new owner of the property.)

Bai would reply that the lease *is* a lease for 5 years or longer, and §546 does apply. Latoya has a unilateral right to extend it to 8 years—unilateral because it's in her sole discretion and the landlord (Xander) doesn't have to agree to it. Bai would argue that the purpose of the statute is to make sure there's a public record of major encumbrances on a title. That's why it refers to "or any interest therein." A lease of, say, 30 days would not be a big encumbrance; a lease of 99 years would. The legislature decided to draw the line at 5 years, providing that any lease that can last longer than 5 years without the consent of the subsequent purchaser is a major encumbrance.

This could be a close question because Latoya has a point. How can it be seen as a "lease for 5 years or longer" when she'll be perfectly free to leave after four years? But given the policy behind the statute, which is to encourage public recording of long-term leases, Bai seems to have the stronger argument. Given the importance of public records, any ambiguity ought to be resolved in favor of having the obligations to record apply. Under the terms of the lease, Latoya has the right to be there more than 5 years, with no say on Bai's part.

If § 546 does apply, then Bai will then claim that Latoya's unrecorded lease can't be valid as against him because he was "without notice" and was a "purchaser for valuable consideration." It doesn't matter whether or not Bai's deed from Xander would be considered "recorded" (which it might not be since it was misindexed). §546 invalidates a "lease" (≥5 years) as against subsequent BFPs only if "the same" (the lease) is not recorded. It doesn't say anything about whether the subsequent BFP's deed was recorded, so it's irrelevant that Bai took his deed in for recording – and irrelevant that the misindexing mishap may make his deed unfindable. (Of course, that may make a problem for him down the road, but it's not a problem here.)

As to the first point, Latoya would claim that Bai had notice of her living in the Blackacre house. The very fact that she was living there should have put him on notice that she might have some kind of protectable interest in it, triggering a thorough inquiry. He should have asked her if she was renting it, or he could have asked Xander what the situation was. The purpose of the "without notice" language is to give buyers an incentive to inquire into matters that may not be in the public records when there's something that looks inconsistent with the paper title.

Bai would argue that he did make an inquiry, and Latoya gave an incomplete answer to his question about her buying it. She could easily have said, "no, I'm renting." The whole business about her looking for a job and Xander being her uncle could easily make it look like she's just staying there. There wasn't any apparent need to ask Xander, either, because the situation seemed clear. Anyway, Xander and Bai are friends, so Bai would've expected him to say something. It's true the law is intended to give an incentive for a prudent inquiry, but, Bai would say, that's what I did. He even did a title search.

The court would say that Bai had a duty to make some kind of inquiry – the question is how thorough. It might agree with Latoya and say that at the very least, a reasonable inquiry is one into all the reasonable possibilities, and renting is one of them when the person living there has just said she doesn't have enough money to buy it. But if the court really wants to put a strong incentive on people to record whenever an instrument is subject to the recording statute, then it might well think the burden was on Latoya to answer completely. All she had to do is say, "I'm renting." She's the cheapest cost avoider.

Even if Bai was not on notice under the statute, there would still be a question whether he was a purchaser for valuable consideration. The Picasso may be worth around $200,000, though it hasn't been appraised and could be worth more or less. The house is worth $500,000.

Latoya would argue this isn't "valuable consideration" because it's so far below the fair market value of the house. It's just a sweet deal between friends, not a low price that a great negotiator got. It's more like a gift from one friend to another, and § 546. She would argue that the statute doesn't prioritize a later gift over an earlier unrecorded interest; similarly, the legislature wouldn't want someone who was prior in time (like Latoya) to lose out if someone who was later (like Bai) who got a sweet deal. That's just unfair. Also, a fair market value standard would be a lot more administrable. If the court is going to accept less than that as "valuable consideratoin," then how much less is OK? Would $100,000 have been enough? What about $10,000? Even though experts may not always agree on what FMV is in a particular case, at least it's a standard in principle.

Bai would reply that the statute says "valuable consideration," not "fair market value." That's an indication that the legislature didn't want the courts to start judging in detail whether the price was exactly right. Bai might point to the "shocks the conscience" standard in mortgage law as an analogy, and say what he effectively paid (by handing over the Picasso, which also had sentimental value for Xander) was a lot more than that. Just as courts are able to deal with a standard other than FMV in mortgage law ("fair value" as the measure of damages where the sole claim is the bank's lack of due diligence), so they can deal with it here. Since all Latoya had to do was record her lease, she shouldn't try to make it out that he didn't buy for valuable consideration.

Bai would probably have the stronger argument here. Since lack of valuable consideration in effect creates an exception to the recording statute requirement – by allowing the prior unrecorded deed to be effective against a subsequent person who is without notice – it shouldn't be interpreted in a way that makes it too easy for prior unrecorded claimants like Latoya to win.

(2) Bai is probably stuck with the pipe repairs. Under the implied warranty of habitability, he, as the new landlord, has an obligation to keep the house habitable, and damaged plumbing is incompatible with that. There's even a chance that it will lead to leaking sewage like in the *Hilder v. St. Peter* case. A court would also look to the local housing code if there is one; working plumbing is pretty important to residential housing, so one would expect it to be included. If it's

not, Bai could try to argue that the court should defer to the local government's judgment. *Hilder v. St. Peter* makes clear, though, that the housing code doesn't fully define the obligations of the IWOH.

Bai's one hope on this issue would be the lease. Of course, if the lease obligates the landlord to make repairs, Bai would have to do so. But if it provides that the tenant waives the warranty of habitability, or that Latoya will make all repairs, that would raise the question of waiver. The common law warranty is based on a concern about inequality of bargaining power, and so isn't generally in favor of waivers. On the other hand, this is a house (unlike in *Hilder v. St. Peter*), and a court might recognize an exception for single-family housing. Or it might be open to case-by-case exceptions where the relationship between the tenant and landlord in negotiating the lease was a familial one.

As for the roaches, there's a strong argument that a major infestation could make it not fit for living. It might even be a problem under the housing code. But as *Hilder* recognized, the landlord shouldn't be responsible when the condition is the tenant's fault. Latoya's confession that she's super messy, combined with the indication that the problem is recent ("now there's a big problem"), point to her as the cause of the problem. Again, the lease would have to be checked, in case there's a valid waiver, or the opposite (a duty on the landlord's part to exterminate pests).

Comments on Model Answer

As to subquestion (1):

a. Note that the model answer here does not proceed by first classifying the statute as "notice" (as opposed to "race-notice" or "race") and then drawing conclusions from that classification. It proceeds by interpreting the language of the statute, § 546, which is what you should do. One reason is that that's the only way you'll learn to read statutes. The other reason is that not all statutes fit entirely within one of those three categories, and statutes that do fit within any one of them may still have significant differences from each other. You need to show that you can analyze the text of the statute, not make some judgment or guess about its classification and proceed from that (or, as some answers did, hedge your bet by giving an outcome under race, race-notice, and notice statutes).

b. I don't usually include red herrings on exam questions, but neither do I guarantee against them. The fact that Xander's deed was misindexed has no bearing on the analysis, if you read the statute properly. Under §546 all that matters is whether there's a subsequent BFP contending against a prior unrecorded deed/lease. (Nor is it particularly helpful to get into what might happen to Bai down the line if *he* is ever confronted by some other subsequent BFP; that's not in the facts here). If you wrote an answer that made any kind of deal of the fact that Xander's deed may not have been "recorded" due to the misindexing, then you didn't get points for recognizing its irrelevance to this statute. (It would be relevant under a different statute, like the California statute at CB 700.)

As to subquestion (2):

This is a much simpler question than (1). The issues are a bit less complicated given the facts. It is a good idea, before you start answering either, to outline both, so you have a better idea how to allocate your time between them.

Keep in mind, too, that even though it may seem relatively straightforward, you still want to explain your conclusions in terms of the underlying reasons for having an implied warranty of habitability. For example, don't just say "the duty is unwaivable." Explain why it is generally – basically, a concern about unequal bargaining power, though there might also be a desire to keep the housing stock in the jurisdiction in good shape overall. But keep in mind that the context (family lease; house, not apartment) might open the way in the common law for it being waivable. Also, this is a question is where you would particularly want to think hard about what other information you might need. (Make sure you read the question carefully, though; it's not going to help you to say that you'd need to check to see if there's a statutory warranty of habitability, because the question says there isn't one.)

The model answer refers to *Hilder v. St. Peter*, but you could write the answer without mentioning the name of the case at all. It's the principles behind it that matter. Also, note what the model answer does not cover: how Latoya would enforce her rights, if she has them here. The question – "Does Bai have a duty to repair the broken pipes in the basement bathroom and to exterminate the roaches?" – just asks about the duty. It's intended to limit the scope of the question, and in that sense, make it easier.