Model answer re Estelle & Joseph as regards the CMS points
(with commentary from Michelle Counley at NACSA)

I have 10 points

1. Of course prior to separation, Estelle can't go to the CMS …
    a. remember that 'S' in the jurisdiction test … "separation" cell F8. From line 19, in the light blue, the restrictions on the court's acting, are only if the CMS has jurisdiction.
    b. But this means that in fact if Estelle could get to the court prior to separation then the court *would* have power to impose an order for PPs
    c. And that would mean that even if they did later separate, the court's award would last because she would then be protected by the 'O' of GAPSOS, standing for "order" and the order once made stands for 14 months, before Joseph could knock it out by his application to the CMS under s4(10(aa)CSA91 (line 27 for those keeping up).
    d. Varying the order does not, we believe, restart the 12 month clock … no test case on that yet. But the mood music [ABvCD, Mrs Justice Roberts; Dickson v Rennie…] is very much about the courts protecting the CMS's jurisdiction.

2. Assuming that by the time of the order, separation will have happened then the judge can't give her general maintenance … what should she do?
    a. Estelle will want to put in her application to the CMS asap after separation
    b. It may be helpful to look at the sheet "process" on the spreadsheet.
    c. She has to get over the hump of CM options (an organisation put in place to dissuade her from going to the CMS) but must stick to her guns
    d. Once she has applied then the CMS ought to be in touch with Joseph within a fortnight? That will trigger the start of his obligation.
    e. The CMS then obtains HMRC data on Joseph's earnings … the overall fastest would probably be a wait of around 6 wks (it would be much longer if tracing were needed – not likely to be an issue here.) But in any overstretched bureaucracy there are outliers and much longer waits are possible.
    f. We have a real sense that persistent applicants who are on the case,
        i. build a friendly but business like relationship with their caseworker
        ii. establish timelines; an
        iii. chase immediately they are not met
        are best served.
    g. If promises are breached a complaint will be needed … if the complaint is not dealt with that failure must be complained about too and early involvement of Estelle's MP – once she has enough to complain about is bound to be helpful.
    h. Connecting up with a group or an advisor is going to help too – think
        i. Mums net
        ii. Nacsa
    i. During lockdown there are delays – everything is just going slower.

3. The assessment is going to be based on Joseph's last tax return –
    a. Initially the number is going to be just the £10k of employee income generating an award of £130 per month …
    b. Because dividend income is currently only incorporated into the assessment if there is an application for this by a variation – see line 17…
        i. (there are some moves afoot to change this) …

Commented [JP1]: Michelle comments: "Its not a common or easy argument to succeed, but CMS can consider an application prior to separation if there is a clear distinction of separation whilst living under same roof. There is a difference between a "home" or a "household".

It unlikely to apply in this example as the arrangement is perhaps temporary whilst in lockdown, but if the situation was a long drawn out process, and neither party left the family home, there is an opportunity to submit an application as long as the applicant is able to demonstrate living a separate life to the other party.

The question of whether or not there was an NRP in such circumstances would fall to be the same questions as considered for Reg 50. So simply living under the same roof would not necessarily show absolute equal shared care, which would cause there to be 'NO' nrp.

Commented [JP2]: Michelle comments: "There is no specific timeframe, it just requires contact within 'a reasonable time'. Generally, applications are processed quite quickly – so would expect something within 2-4 weeks (in times passed, longer times would have been notable if there was an active CSA case that had to be closed and migrated, but we do not have these now).

Also – whilst we are assured applications can still be made during lockdown – I have no details as to the speed in which they are done. We have been advised that the initial stage of the application process – ie the provisional calculation will be treated as priority work during lockdown, but any dispute by either party is unlikely to be considered until life resumes to some kind of normality."

ii. Estelle should put in an application for a variation immediately … she can do this even before she receives the award [it may or may not make things go that much faster … the real thing to ensure is that she puts in the application within 28 days of the date of the decision letter – because then the variation will backdate to the date of the original award … otherwise it only starts on the date of the application.]
iii. At this point, the CMS will also haul into the reckoning the pre-tax income (after mortgage payments) from Joseph's property letting.

4. Now Estelle has a problem the progeny of two things:
    a. the propensity of the CMS officer to push out to a tribunal anything that looks difficult
    b. the slow strike rate of decisions, even pre Covid19.
    c. Briefly
        i. if the officer says no and then Estelle would need to appeal …
        ii. and before she appeals she must have a long wait in the queue marked "mandatory reconsideration" …
        iii. it may well be 6 months before a first hearing at the first tier tribunal and 1-2 years for it to be concluded …
        iv. by which time there will be a spaghetti of cross applications involving a whole range of different calculations over the period.

    She must appeal each one!

5. Estelle may have an advantage of being able to give chapter and verse on the dividend income from her close previous knowledge of the company … if her evidence is completely robust then clearly it is easier for the CMS officer to say yes and given the delays that will have a seismic impact on cash flow either for her or for Joseph.

6. So then we come to Joseph –
    a. Remember that the person whose income has dropped by 25% can ask for their income to be assessed on a 'current' rather than 'historic' basis? - cell D11
    b. Joseph's position is likely to be that the income of £197k is completely unrealistic – the business has come to a stand-still and so says that he should be looked at on a current income basis.
    c. But the CMS may respond to Joseph that the company may yet provide a tranche of dividend and it is only at the year end that the position would be known thus the CMS may not progress the application until Joseph is able to produce new accounts. So there is a possibility that:
        i. Whilst the CMS might be able to see that his 10k employee income has been cut (presumably to 80%, having furloughed himself),
        ii. It may not be willing to accept that his dividends are reduced…
    d. And the consequence of that is that
        i. The CMS award could be at the top-most figure (1700 p/m)
        ii. And also that Estelle is permitted to now go for a top-up

7. You will tell Joseph – anyway to pay in full and on time all the time whilst he is appealing – the yellow cells
    a. If he does not, he may be put in the Collect and pay scheme which will involve what is, in effect a fine of 20% of the award …

Commented [JP3]: Michelle: "Under CS3, there is a long list of expenses that are offset against rental income, not just the mortgage payments – rule of thumb work on the net figure of rental on the tax return, after all the taxable expenses have been deducted."

Commented [JP4]: Michelle: "This very much depends on the integrity of the officer in charge of the case. We have seen MR's issued almost to the day of 16 day period but others have taken over 12 months.

Apart from the obvious diversion cases, which will see quick MR's, we would prepare clients for a period of 2-3 months for the MR notice, another 2-4 months for the appeal to be submitted (they rarely meet the 42 day timeframe), and then potentially 3-6 months before the first hearing. As you say approx 2 years for the matter to be concluded (from date of appeal application to any final conclusion – and hope of no application to UT)."

Commented [JP5]: Michelle: "And generally people get very confused, so this is definitely where assistance is needed. One client I have, currently has 5 separate appeals in place, but we are still waiting for the MR for a 2018 decision, which will lapse all existing appeals, most of which will need to be submitted again as a new appeal."

Commented [JP6]: Michelle: "Joseph wouldn't be classed as S/emp – he is an office holder, and therefore treated as PAYE, and can submit a change to income and/or dividends by the supply of payslips (even fake ones!)

Change in dividends is more difficult to prove mid term, but if there is another complete year available there could be a submitted change of circs. as dividend income is not subject to tolerance. Its quite easy for the NRP to manipulate his income by delayed submission of accounts, followed in quick succession of his next – much lower set of account. , And as long as the dividends are lower, it could result in a change

If Joseph was self employed rather than employed – he would need to have a complete full year of trading accounts before any change is considered – or he can deregister from Semployed status with HMRC which would then allow a mid term change.

Furlough is not being treated as a change of circs as it does not breach tolerance. But CMS are not enforcing short/missed payments if someone has reported furlough status.

Commented [JP7]: Michelle: not going to happen under Furlough/lockdown...but that is a temporary situation.

b. He may also fail the "likely to pay" test because of the way that he responds to the CMS on the initial call.
c. So briefing Joseph is important

8. Remember, acting for Estelle to get permission from the court to release the court information back to the CMS … she can do that if she is on an appeal … but otherwise she cannot do so (and would be in contempt of court if she did) and so would not be able to make use of Joseph's disclosure to back up her case to the CMS.

9. The numbers are affected by overnight stays … the bit everyone remembers …
But remember also regulation 50, if they share care equally, then
   a. There is no non-resident parent
   b. And that means there can be no cms award
   c. And that means that the court's jurisdiction emerges …
   d. Until someone changes the child-care arrangement and it pops back into being a CMS case again [unless at that point there is an order in place that is less than 12 months old]

10. Finally, through Edward he can reduce his payments significantly (the 1700 becomes 1390).

Commented [JP8]: Michelle: As long as Annabelle verifies that they have a FBA in place, even verbally – Edward would be considered as a QC (referred to as CiFBA) and the calculation would be made on the basis of 3QCs, 2 to Estelle and 1 to Annabelle

So it is unpredictable … the crazy situation you have is that

- The CMS
  - could give an award of £130
  - or could give an award of £1700 and licence to Estelle to seek top up

- And it may be a very slow process to get it "corrected" (depending on whose side you are on) … and I am not totally clear what "correct" would be –
  - on balance eventually the award probably would settle at the higher number (ie a maximum assessment)…
  - whether it does so from the outset is a lottery
  - a year after the first assessment, the CMS will reassess and by then Joseph will have new numbers to put forward for the business, perhaps leaving Estelle needing to fight all over again for a maximum assessment.
  - If he fold the business in the meantime then he can probably ask immediately for a supersession to reduce the number down to £7 pw … It would be backdated to the date he puts in his application and there might then be a payments holiday whilst things caught up.
- Of course for Estelle she is on pretty thin ice … she may get her max assessment but there is a risk that by the time that she actually gets to the hearing that Joseph might have collapsed the company or gone past his annual review and been able to dip below the £156k maximum and thus strip from the court the power to make a top up.

Commented [JP9]: Michelle: If he was in receipt of benefit they tend to process these very quickly – but that would depend on all evidence being submitted to show that the company was no longer trading. We have numerous cases of Directors applying for benefit, because they are out of contract…and they are looking to achieve the flat rate. But if the company is still active, there is potential for income to be taken, whether by salary, drawings or dividends and the change is refused.

Go to arbitration – done a couple where parties have said in effect they agree to make the order at the level that I award.

Otherwise and if you stuck in the system, for goodness sake get in someone to manage this stuff for you … there is little point in your giving your client rolls-royce legal advice if you are then leaving them to cock up the CMS application through want of guidance … Michelle Counley at NACSA is contactable at michelle@nacsa.co.uk