Meetings of single-member companies

The amendments of the law relating to meetings to accommodate the single-member company have already been considered in Chapter 1 See p. 2.

Electronic communications – CA 2006

The electronic communications provisions of Companies Act 2006, namely, ss 1143–1148, Schedules 4 and 5 have now been implemented. It should be noted at first that these provisions apply to all types of companies. The earlier distinctions made between companies whose shares are traded on a stock exchange and those whose shares were not traded has been eliminated. CA 2006 allows any information or documents to be communicated in electronic form, provided that the requirements of the CA 2006 are met.

Definitions of electronic form and electronic means (CA 2006, s 1168)

A document sent in 'electronic form' means that the document or information is sent or supplied by electronic means (for example, by e-mail or fax) or by any other means while in electronic form (for example, sending a disk by post). The same section also states that a document or information is sent by 'electronic means' if it is sent initially and received at its destination by means of electronic equipment for the processing or storage of data or entirely transmitted, conveyed and received by wire, radio, optical means or other electromagnetic means. A document or information sent by 'electronic means' must also be sent in such a form that the sender or supplier *reasonably considers* will enable the recipient to read it and retain a copy of it. In CA 2006, s 1169 'read' means that the document or information can be read with the naked eye, or, if it consists of images, pictures, maps, plans or drawings, etc., it can be seen with the naked eye.

CA 2006 – Schedules 4 and 5

CA 2006 makes a distinction between communications by a company (Schedule 4) and communications to a company (Schedule 5). Please note however that in the situation where there are two companies communicating, e.g., a proxy fight, it is only the rules relating to communications by a company that are applicable.

Schedule 4 – Communications to a company

If the company agrees, documents may be sent to or served on it by electronic means. The address is that specified by the company and so, for example, it could be an email address or fax number. In some situations, the company is deemed to have consented to receiving documents electronically. For example if it publishes an electronic address in a notice convening a general meeting, CA 2006 provides that the company is deemed to have consented to receiving documents relating to that meeting, such as proxies, at that electronic address. If a document is sent in electronic form by hand or by post (e.g. a CD-ROM or floppy disk)

then it must be sent to the company's registered office or to the address provided by the company for receipt of hard copy correspondence. The company may also agree to receive documents in a form other than hard copy or electronic form.

Schedule 5 – Communications by a company

Schedule 5 provides a method for communications in both hard copy form and electronic form. With respect to communications in electronic form, if the recipient agrees, the company may supply information and documents in electronic form to the address provided for that purpose by the recipient. If the document or information is sent in electronic form by post or delivered by hand (for instance on a computer disk or CD-ROM), it must be handed to the intended recipient or sent or supplied to an address to which it could be validly sent if it were in hard copy form.

Communications by means of a website (Part 4 of Schedule 5 to CA 2006)

A company may communicate via its website with its members if its members have resolved that the company may communicate with members through a website or the company's articles must contain a provision to this effect. The resolution must be filed at Companies House. Each member must be individually asked by the company to consent to communication by means of a website (either generally or in relation to specific documents). The company's request must clearly state the effect of a failure to respond by the member (for instance, that he or she would be deemed to have consented if he or she does not reply within 28 days starting with the date on which the request is sent). The company's request must not be sent less than 12 months after a previous request made to that member in respect of a similar class of documents. If the company satisfies all of this, it can communicate via a website with any members who consent or who fail to respond within 28 days starting with the date on which the request is sent. If a member says he or she does not want to be communicated with via a website, the company must wait 12 months before it asks the member again for consent in relation to the specific documents for which consent was originally sought.

Procedures to be followed after consent is obtained (Schedule 5)

Once needed consents are obtained (from all or some of the members), the company must take the following steps:

- A document or information on a website must be made available in a form, and by a means, that the company reasonably considers will enable the recipient to read it and retain a copy of it.
- The company must notify the intended recipient of the presence of a document or information on a website, the address of the website, the place on the website where it may be accessed and how to access the document or information.
- Unless the member has also consented to being contacted by electronic means, this means that this information must be provided in hard copy form such as letter.
- The company must make the document or information available on the website throughout the period specified by any applicable provision of the Companies Acts or, if no such period is specified, the period of 28 days beginning with the date on which the notification that the document is available on the website is sent to the person in question.

Right to request hard copy form (CA 2006, s 1145)

If the member so requests, the company must provide a hard copy form of any document sent by electronic means or made available on a website, within 21 days of receipt of the request and for no charge. Failure of a company to comply with this requirement means that the company and every officer in default commits an offence and are liable to a fine and a daily fine while the contravention continues.

CA 2006, s 1146 – authentication of electronic communications

Section 1146 provides that an electronic communication is authenticated if the identity of the sender is confirmed in the manner specified by the company or, in the absence of such specification, the document contains statement of the identity of the sender and the company has no reason to doubt the truth of the statement.

Conclusions

We live in an age where we use the Internet and e-mail to communicate with each other ever more often. The electronic communications reforms are designed to save companies significant postage and printing costs while contributing to increased sustainability of the planet by reducing the use of paper. However, a company's use of e-mails and websites for communications is entirely dependent on consent of the member which can be withdrawn at any time. In addition, if a website is to be used as a basis to communicate with members, special procedures such as agreement to a resolution authorising such communications must be obtained as well. In short, while it may be environmentally friendly, it may not be feasible to expect that a large company will be able to communicate with all its members electronically at all times. Some members will always feel more comfortable with receiving 'snail-mail' instead.

Essay questions

1 (a) Explain how and in what circumstances a general meeting of a company will be called.

AND

(b) Explain what minimum period of notice must be given to call an extraordinary general meeting and whether and how such period may be shortened/lengthened.

AND

(c) Explain how many members must be present for a quorum at a general meeting of a company and whether and how the quorum may fall below the required minimum.

(*Glasgow Caledonian University*)

2 (a) What members' meetings are held by registered companies?

(b) Name and define the different kinds of resolution which may be passed by such companies in general meeting. In the case of each kind of resolution give one example of business for which such a resolution is necessary. (*The Institute of Company Accountants*)

3 You are required to explain the following issues relating to company meetings.

(a) What is an extraordinary resolution and when is such a resolution required under the Companies Act 2006?

(b) What is proxy voting? State whether such voting is always possible at company meetings.

(c) What is a poll vote and who may demand such a vote?

(d) What is special business? Identify two matters which would be included under such business.

(e) What is a requisitioned circular? Who may demand it and who bears the cost?

(*The Chartered Institute of Management Accountants*)

4 Maurice, a shareholder of Traders plc, has informed the company secretary that he intends to propose a resolution at the forthcoming annual general meeting that the company should discontinue its business activities in a particular overseas country.

The directors have instructed the secretary not to include the proposed resolution on the agenda for the meeting.

Advise Maurice. (*The Institute of Chartered Accountants in England and Wales*)

5 Directors owe their company a duty to exercise their powers only for a 'proper purpose'. Explain what is meant by 'proper purpose' and discuss the nature and scope of this duty. Illustrate your answer with references to decided cases, particularly those dealing with the power to issue shares. (*The Association of Chartered Certified Accountants*)

6 XY Bank plc is the subject of a takeover bid by Able Securities plc. In order to frustrate the takeover bid, the board of directors take the following action:

(a) they allot one million unissued shares to Lionel who will vote against the takeover bid by Able Securities plc. Lionel does not have enough money to pay for the shares but secures a loan from XY Bank plc to cover the payment;

(b) they make a payment of £1 million to Computer Security Services Ltd as an advance payment on a contract that has been negotiated between the two companies. Computer Security Services Ltd is informed by the directors that it should buy shares in XY Bank plc if it wants to make a quick profit and keep the contract. Computer Security Services Ltd buy £1 million of shares in XY Bank plc;

(c) they decide that XY Bank plc should buy its own shares as a good investment and £10 million of shares are purchased.

The shares rise in value and all purchasing parties make a profit. The takeover bid is frustrated. Advise the directors as to the legality of their actions and of any proceedings that could be brought against them or the company. (*University of Central Lancashire*)

Test your knowledge

Four alternative answers are given. Select ONE only. Circle the answer which you consider to be correct. Check your answers by referring back to the information given in the chapter and against the answers at the back of the book.

1 In what circumstance may the members of a company who have requisitioned an EGM call the meeting themselves?

A If the directors do not call a meeting to be held within 21 days of the deposit of the requisition.
B If the directors do not within 21 days from the date of the deposit of the requisition call a meeting for a date not more than 28 days after the notice calling the meeting.
C If the directors take action to call a meeting within 21 days but the date of the meeting is set at a date more than three months from the date of the deposit of the requisition.
D If the directors fail to call a meeting to take place within 28 days of the date of the deposit of the requisition.

2 Felicity is a member of Wash plc. She has appointed Thomas as her proxy for the next AGM. Thomas will be able:

A To vote on a show of hands and speak at the meeting.
B To vote on a show of hands but not speak at the meeting.
C To vote but only on a poll and speak at the meeting.
D To vote only on a poll but not speak at the meeting.

3 Cunnane Ltd was incorporated on 1 February 2004. What is the latest date on which it must hold its first AGM?

A 31 July 2005 B 31 December 2005 C 31 March 2006 D 31 December 2006

4 Thames Ltd wishes to pass a special resolution of the members to change the articles. What length of notice is required, and how many of the company's members present and voting in person or by proxy are needed to pass the resolution?

A 21 days' notice and over 50 per cent.
B 28 days' notice and over 50 per cent.
C 21 days' notice and 75 per cent.
D 28 days' notice and 75 per cent.

5 What is the minimum period of notice which must be given to the members of a limited company who are entitled to be present and vote in person or by proxy at an EGM to pass an ordinary resolution?

A 28 days B 21 days C 14 days D 7 days

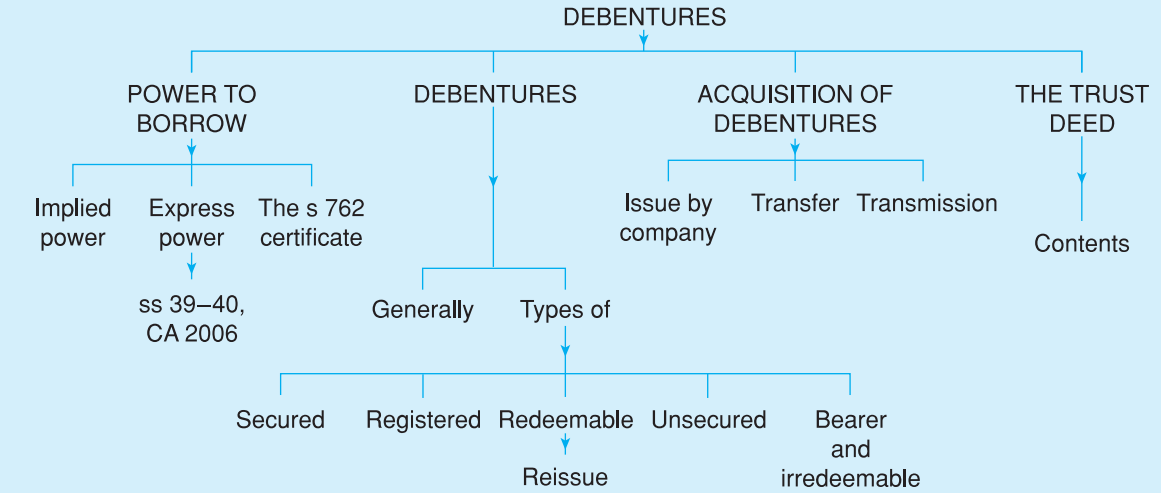
6 What quorum is required for a general meeting of a multi-member registered company?

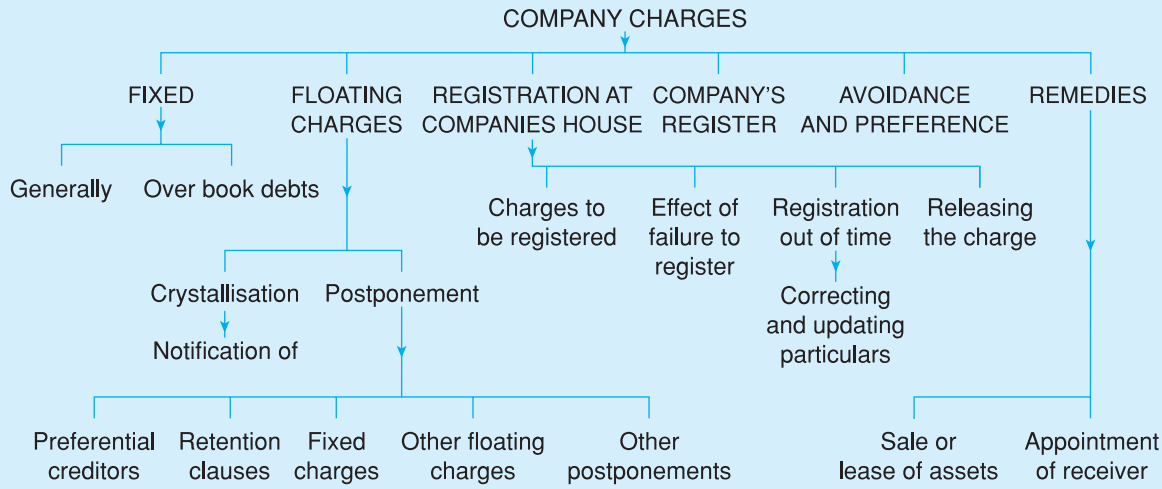
A Two persons who are either members or proxies for members.
B Three persons who are members or proxies for members.
C Two persons who are members.
D Three persons who are members.

Answers to test your knowledge questions appear on p. 617.

Visit **www.mylawchamber.co.uk/keenancompany** to access study support resources including practice exam questions with guidance, weblinks, legal newsfeed, answers to questions in this chapter, legal updates and further reading.

22 Debentures and charges





In this chapter we shall be concerned with a company's loan capital and the means of securing loans by charging the company's assets.

Power to borrow

A trading company has implied power to borrow (***General Auction Estate and Monetary Co*** v ***Smith*** [1891] 3 Ch 432). Nevertheless, prior to the CA 2006, it was usual for an express power to be given in the memorandum, and such express powers may impose some limit on the company's borrowing by stating a fixed sum beyond which the company cannot borrow, or by limiting the borrowing, say, to one-half of the issued share capital. A non-trading company has no implied borrowing powers and must take express power to borrow in its constitution.

A power to borrow, whether express or implied, carries with it by a further implication of law a power to give a security for the loan and to pay interest upon it (***General Auction Estate & Monetary Co*** v ***Smith***, 1891, above). Once again, it is usual for the company's constitution to give an express power to do these things, though an express power cannot override the Companies Act. Thus, it would not be possible to charge the company's reserve capital since this is expressly forbidden by the provisions of the Act, which renders such capital incapable of being called up except on a winding-up (see Chapter 6).

See p. 129

As regards the directors, *Table A* gives the board all powers to manage and there is no need for a *specific* power to borrow. There is no limit on the amount the directors can borrow so long as they remain within the company's power. However, in view of the provisions of CA 2006, s 39 and s 40 (see Chapter 6), borrowing by the directors beyond the provisions of the company's constitution is much less likely to affect a contract of loan with an outsider such as a bank.

See p. 129

The directors must obtain member approval before allotting convertible debentures, i.e. debentures which carry rights of conversion into share capital. As we have seen, a public company should not borrow money until it has received a CA 2006, s 762 certificate allowing it to trade, though this does not affect the enforceability of the loan (see Chapter 1).

See p. 2

Debentures – generally

The most usual form of borrowing by companies is by means of debentures. The debenture also gives a charge on the company's property. The word 'debenture' has its origin in a Latin word for 'owing'.

As regards a definition, a debenture is a document executed by a company as a deed in favour of a creditor, providing the creditor with security over the whole or substantially the whole of the company's assets and undertaking, normally creating a fixed charge over fixed assets such as land and buildings and a floating charge over the rest of the company's assets such as stock and giving the creditor power to appoint an administrative receiver with extensive authority to collect in the assets, run the company's business and dispose of the assets either one at a time or as part of a sale of the business as a going concern. Under the Companies Acts, debenture includes debenture stock, bonds and other securities of a company, whether or not constituting a charge on the assets of the company.

Debenture holders are creditors (but consider the position under a trust deed) and not members of the company, and are entitled to interest on their debentures whether the company earns profits or not. Holders are provided with a safe if limited income, and debentures appeal to a cautious investor.

Debentures may also be *convertible* which means that they are issued with an option, tenable for a certain period of time, to exchange them for shares in the company. Debentures can be issued at a discount without restriction, but the issue of convertible debentures must not be allowed to operate as a device to issue shares at a discount as would be the case if a debenture for £100, issued at £90, were later to be exchanged for 100 shares of nominal value of £1 each. This would in effect be an issue of shares at a discount which is forbidden by the Companies Acts.

Types of debentures

Debentures may be issued in a series, e.g. where there is a public offer, or alternatively they may be issued singly, e.g. to secure a bank loan or overdraft. They may also be issued in respect of either an existing debt or a fresh loan.

In the case of a public offer the admission of debentures to listing must comply with Part VI of the Financial Services and Markets Act 2000. The Public Offers of Securities Regulations 1995, which regulated a public offer of unlisted debentures, was repealed in 2005. These matters are considered in Chapter 10.

See p. 212

Where debentures are issued in a series, it is usual to provide expressly that they are to rank *pari passu*, i.e. equally. This is essential because loans rank for priority according to the time they are made, and if such an express provision were not made, the debentures in the series would rank for priority of payment and security according to the date of issue, and if all were issued on the same day, they would rank in numerical order.

Gartside* v *Silkstone and Dodworth Coal and Iron Co Ltd (1882) 21 Ch D 762

The company issued 150 debentures of £100 each on the same day. They were issued in two lots, one lot being numbered 501–600 and the second lot 601–650. Each of the debentures contained a provision that it was to rank *pari passu* with the others, but the first group referred to the amount of £10,000 and the second to £5,000, this being the only difference in the respective provisions. Nevertheless, this suggested that they were independent issues. The company was in liquidation and the question of priority arose. When two deeds are executed on the same day, the court must inquire which of them was executed first, but if there is anything in the deeds to show such an intention, they may take effect *pari passu*.

Held – by the High Court – the company could, therefore, choose to give security in the form of a second floating charge of the kind outlined, and this was valid and did rank equally with the first charge because they were expressed to be *pari passu*.

Where debentures rank *pari passu*, there can be no action at law brought by an individual debenture holder merely in respect of his own rights, and any such action brought by him is deemed to be a representative action on behalf of all the debenture holders of the series.

Debenture stock may be issued so long as the stock is fully paid, and this affects transfer. A debenture must be transferred as a whole unit whereas debenture stock can be transferred

in part, though the articles or the terms of issue usually fix a minimum amount which can be transferred, e.g. £1.

Debentures are usually *secured*, *registered* and *redeemable*, though they may be unsecured, unregistered (i.e. bearer debentures) and irredeemable.

Secured debentures

These are normally secured by a charge on the company's assets, either by a provision to that effect in the debenture itself, or by the terms of the trust deed drawn up in connection with the issue. Sometimes a provision appears in both documents.

Registered debentures

These are recorded in the register of debenture holders. Such debentures are transferable in accordance with the provisions of the terms of issue, but transfer is usually effected by an instrument in writing in a way similar to that of shares. The transferee of a debenture takes it subject to equities, and this includes claims which the company has against the transferor. However, the company's claims are normally excluded by the terms of issue of the debentures, these terms usually stating that the money secured by the debentures will be paid without regard to any equities between the company and previous holders.

Re Goy & Co Ltd, Farmer* v *Goy & Co Ltd [1900] 2 Ch 149

In a voluntary winding-up of the company WH Doggett had been appointed liquidator and also receiver. At this point, Chandler, a former director, transferred £600 of debentures to GD Robey by way of security for a loan. The conditions of the debentures provided that on complying with certain formalities, the principal and interest secured by the debentures would be paid without regard to any equities between the company and the original or intermediate holder. After Robey had taken the transfer, it was discovered that Chandler had been guilty of misfeasance and he was ordered by the court to pay £300 to the liquidator. Robey, who had no notice of this cross-claim, sent his transfer to the liquidator, for registration. The liquidator declined to register it, and claimed the right to deduct the £300 owed by Chandler.

Held – by the High Court – the right to transfer and have the transfer registered was not affected by the winding-up or by the court order against Chandler, and Robey was entitled to have the debentures registered without deduction.

It should also be noted that when a company sets up a register of debenture holders, the CA 2006, ss 743–748 provisions relating to no notice of trust do not apply to it, and the company would be bound by any notice of trust or other equity over the debentures. It is, therefore, usual to provide in the terms of issue that the company shall not be bound to recognise anyone other than the registered holder.

Redeemable debentures

Debentures are usually redeemable, and the company may provide a fund for their redemption. The annual amount so provided must be charged whether profits are made or not,

though in some cases the terms of issue may stipulate that the fund shall be provided only out of profits, if made.

Debentures may be redeemed in the following ways:

(a) *By drawings by lot*, either at the company's option or at fixed intervals.
(b) *By the company buying them in the market*, and if the debentures are bought in the market at a discount, the consequent profit to the company is a realised profit available for dividend unless the articles otherwise provide.
(c) *By the company redeeming them either out of a fund or possibly by a fresh issue of debentures*. A fresh issue is useful to the company where rates of interest have fallen, because the old debentures can be redeemed and the money reborrowed by the fresh issue at lower rates of interest. Where redemption is by a fresh issue, it is usual to allow the existing debenture holders to exchange the old debentures for the new ones if they so wish.

The company will redeem at a fixed future date, but usually has an option to redeem on or after a given earlier date, and this allows the company to choose the most convenient time for redemption.

Redemption may be at the issue price or at a higher price, and debentures may be issued at (say) 80 and redeemed at 100, or issued at 100 and redeemed at 110, thus giving the debenture holders a capital gain in addition to the interest payments made.

Reissue

CA 2006, s 752 allows the company to reissue debentures which it has redeemed unless the company has resolved that the debentures shall not be reissued, or unless there are provisions in the articles or terms of issue of the original debentures that they shall not be reissued. A person to whom debentures are reissued has the same priorities as had the original debenture holder.

The articles and/or the trust deed under which the debentures are issued invariably forbid reissue, and if there was a reissue in that situation the purchasers of the reissued debentures would be deferred to other persons holding debentures at that time.

Where a company has issued debentures to secure advances made from time to time on a current account such as a bank overdraft, the debenture shall not be considered redeemed by reason only of the account ceasing to be at a certain point in debit so long as the debentures are still deposited with the person making the advances. They are a valid security for fresh advances.

Unsecured debentures

Such a debenture is no more than an unsecured promise by the company to repay the loan. The holder can, of course, sue the company on that promise, but is only an ordinary creditor in a winding-up, although, since he is a creditor, he can petition the court for a winding-up.

Bearer debentures

These are negotiable instruments and are transferable free from equities by mere delivery and it is not necessary to give the company notice of transfer.

Interest is paid by means of coupons attached to the debenture, these coupons being in effect an instruction to the company's banker to pay the bearer of the coupon a stated sum on presentment to the bank after a certain date. The company can communicate with the holders of bearer debentures only by advertisement, and it is often provided that the holders of such debentures may exchange them for registered debentures.

Irredeemable debentures

A debenture which is issued with no fixed date of redemption is an irredeemable debenture, though such debentures are redeemable on a winding-up, and the liquidator is empowered to discharge them. In addition, irredeemable debentures always empower the debenture holders to enforce their security should the company, for example, fail to pay interest on the loan and such enforcement will result in the payment of the debenture debt. CA 2006, s 735 provides that such debentures may be issued, and this provision is necessary because otherwise the general rule of equity, that redemption of a mortgage cannot be postponed for too long a time, would apply. The result is that a company can create long mortgages over its land and other property by means of debentures, whether irredeemable or for a long contractual period prior to redemption.

Knightsbridge Estates Trust Ltd* v *Byrne [1940] AC 613

The claimants owned a large freehold estate close to Knightsbridge. This estate was mortgaged to a Friendly Society for a sum of money which, together with interest, was to be repaid over a period of 40 years in 80 half-yearly instalments. The company wished to redeem the mortgage before the expiration of the term, because it was possible for it to borrow elsewhere at a lower rate of interest.

Held – by the House of Lords – the company was not entitled to redeem the mortgage before the end of the 40 years because the effect of what is now the Companies Act 1985 was to remove the application of the equitable doctrine of no postponement of the right of redemption from mortgages given by companies. Therefore, Knightsbridge was not entitled to redeem the mortgage except by the half-yearly instalments as agreed.

A debenture with no fixed date for redemption, but which gives the company the right to repay it at its option, is properly called a *perpetual* and not an irredeemable debenture (CA 2006, s 739).

Acquisition of debentures

Debentures may be acquired either from the company itself or by transfer or transmission.

Issue by the company

A company may issue debentures either individually or in a series. The provisions of the Companies Act 2006 forbidding the allotment of shares at a discount do not apply to debentures,